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Alaska Bar Assn.

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February 14, 1969

Mr. Barry Jackson, Esq.
Chairman,
House Judiciary Committee
Pouch Y
State Capitol
Juneau, Alaska 99801

Dear Mr. Jackson:

Thank you very much for your kind letter of February 6, 1969, asking that either I or my representative appear before the House Judiciary Committee to discuss Bar Association activities, plans and problems.

Mr. Stanely Howitt, the Executive Director of the Alaska Bar Association and myself will be in Juneau on February 17th through the 19th. Would it be possible for us to meet with the House Judiciary Committee at that time?

I apologize for this very short notice, but my recent schedule has been extraordinarily chaotic.

Very truly yours,

Lester W. Miller, Jr.

Lester W. Miller, Jr.

LWM:kw
cc: Mr. Stanley Howitt

Budget

March 2, 1970

The Honorable Bill Ray
Chairman, House Finance Committee
Pouch "V", Capitol Building
Juneau, Alaska 99801

Dear Mr. Ray:

The House Judiciary Committee has reviewed with the responsible administrators, the programs of the Court System, Department of Law, and Public Safety as budgeted for FY 1971.

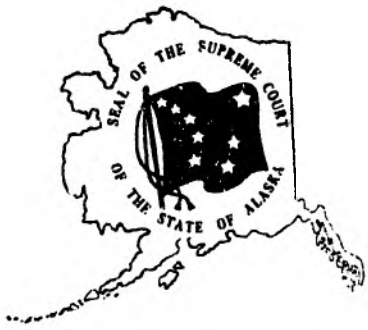
While the committee did not review these budgets in detail to the degree that the Finance Committee will, I have been directed to state that the Judiciary Committee generally concurs with the Governor's recommendations for these agencies.

Very truly yours,

Barry W. Jackson, Chairman
House Judiciary Committee

BWJ/mm

Copies to: Representative Chancy Croft
Representative George Hohman
Representative Mike Bradner
Representative Ernie Haugen
Representative Dick Borer
Representative John Sackett



Alaska Court System

State of Alaska

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ADMINISTRATIVE DIRECTOR
RAYMOND W. GREGORY
ASSISTANT ADMINISTRATIVE DIRECTOR
ERNEST Z. REHBOCK
LEGAL ASSISTANT

OFFICE OF ADMINISTRATIVE DIRECTOR
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

February 11,1969

Hon. Barry M. Jackson, Chairman
House Judiciary Committee
Alaska State Legislature
Capitol Building
Juneau, Alaska 99801

Dear Representative Jackson:

Your letter of February 5, 1969, requested that I or my representative meet with your committee in a general information meeting to deliver a formal oral presentation concerning the activities of the court system, our problems and our plans for the future. I note that Chief Justice Buell A. Nesbett received a similar letter and has accepted your invitation. I shall likewise be available.

Inasmuch as the Chief Justice and I will both be in Juneau from the 17th through the 21st of February, if you have any specific questions which would require back-up statistics we would appreciate an immediate response as this does not allow much time.

I note that the Chief Justice has outlined his itenerary and mine during our visit in Juneau. Even so, we shall contact you after our arrival.

Sincerely,

Robert H. Reynolds

Robert H. Reynolds
Administrative Director

RHR/ld

March 13, 1970

The Honorable Bill Ray
Chairman, House Finance Committee
Pouch "V", Capitol Building
Juneau, Alaska 99801

Dear Mr. Ray:

The Judiciary Committee has reviewed the programs and analyzed the budget of the Division of Corrections in detail, with the assistance of Mr. Charles G. Adams, Jr., Director of the Division of Corrections.

The committee was pleased to note that the 1970-71 budget as approved by the Governor did include many provisions for increased services, all of which the committee approved.

Inasmuch as prisoner reformation and rehabilitation is the desired goal of the State under Article I, Section 12 of our Constitution, we would like to recommend the positions of Psychology Counselor I in the adult camp, Group Worker III in N.R.C.I., and Correctional Officer I at Wasilla. These additional positions will provide much needed counseling service so necessary to attitude changing.

Most of the inmates of our correctional institutions have no developed skills and poor work habits. Part of the rehabilitation process is learning skills. To this end the committee would like to see the budget include items proposed by the Division of Corrections for vocational training and job experience.

Food service is one area in which there is a marked shortage of workers in the State. It would seem advisable to fill the Cook II position in the N.R.C.I., enabling inmates in that institution to be trained in culinary arts insuring them of employment upon their release.

The expansion of the kitchen facilities and the addition of refrigeration at the adult camp would make possible food service training as well as the training in the processing and freezing of produce.

We know you are deeply interested in prisoner rehabilitation and wish to lend you the support of the Judiciary Committee in improving the State's program.

Sincerely yours,

Barry W. Jackson, Chairman
House Judiciary Committee

Copy to all House Finance Committee members

BWJ/mm

Budget Review

March 5, 1970

Bill Ray, Chairman
House Finance Committee
Pouch "V", Capitol Building
Juneau, Alaska 99801

Gentlemen:

The Judiciary Committee of the House of Representatives has carefully considered the proposed budget of the Alaska Public Defender Agency. After taking testimony and discussing the issues, the committee unanimously recommends that the budget of the agency be increased in the following specific particulars:

1. An Attorney V position in Anchorage to be responsible for appeals, cost $38,800 including secretary and necessary equipment;

2. Investigators for the Nome, Ketchikan, and Juneau offices, cost $55,537 including necessary transportation (the investigator can prepare the information for bail proceedings and assist in developing sentencing recommendations);

3. Counselors for Fairbanks and Anchorage, cost $38,111;

4. Two law students for summer internships in Fairbanks and Anchorage, cost $6,975;

5. A training program for agency staff, cost $1,000; and

6. Increased contractual services to offset reduction of personnel, cost $10,000.

Total cost of $150,000.

We feel that the addition of these items will very substantially improve the service of the agency, and will enable the agency to adequately and properly perform its duties.

Very truly yours,

Barry W. Jackson, Chairman
House Judiciary Committee

cc: Representative Chancy Croft
Representative George Hohman
Representative Mike Bradner
Representative Ernie Haugen
Representative Dick Borer
Representative John Sackett

BWJ/mm

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

PUBLIC DEFENDER AGENCY
Pouch AE, Juneau, Alaska
99801

February 18, 1970

The Honorable Barry W. Jackson
Chairman
Judiciary Committee
Alaska State House of Representatives
Juneau, Alaska 99801

Dear Mr. Chairman:

This letter is in response to your request for a letter confirming my testimony on February 17, 1970. Your questions concerned possible alternative positions to the proposed funding of the Alaska Public Defender Agency at a $500,000 level for the fiscal year beginning July 1, 1970.

Alternatives include:

1. an attorney V position in Anchorage to be responsible for appeals, cost $38,800 including secretary and necessary equipment;

2. investigators for the Nome, Ketchikan and Juneau offices, cost $55,537 including necessary transportation (the investigator can prepare the information for bail proceedings and assist in developing sentencing recommendations);

3. counselors for Fairbanks and Anchorage, cost $38,111;

4. two law students for summer internships in Fairbanks and Anchorage, cost $6,975;

5. a training program for agency staff, cost $1,000; and

6. increased contractual services to offset reduction of personnel, cost $10,000.

The above total is $150,000. The requested appropriation of $500,000 does not include any of the counselors,

investigators for Nome, Ketchikan or Juneau, neither Attorney V in Anchorage, no summer law students, and does not include the possibility of additional judges in Sitka, Kenai-Kodiak and Fairbanks.

Enclosed are copies of excerpts from the evaluation of the Offender Rehabilitation Project for the District of Columbia. Your continued interest in the Agency is appreciated.

Very truly yours,

Victor D Carlson

VICTOR D. CARLSON
Public Defender

VDC:rj

Enc.

Excerpt from "An Evaluation of the Offender Rehabilitation Project of the Legal Aid Agency for the District of Columbia"

BACKDROP FOR THE EVALUATION

A. Evolution of the Offender Rehabilitation Project

In the summer of 1964 the staff attorneys of the Legal Aid Agency for the District of Columbia discussed how they might improve overall services to their indigent clients. A part of their thinking arose from the understanding that their role as defense attorneys was far less importantly the romantic notion of vital adversary participation in a dramatic determination of guilt or innocence than it was competent representation of a client in working out a non-trial disposition and, more often than not -- trial or no trial -- representing a guilty defendant before the judge at sentencing.[6/] A major shortcoming, they felt, was the lack of comprehensive social background data and rehabilitative planning assistance in their cases, particularly at the time of sentencing when the judge based his decision largely on a probation office presentence report not available as of right

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6/ Upwards of 75 percent of the persons prosecuted in the District of Columbia are convicted. President's Commission on Crime in the District of Columbia, Report 240-41, 274-75 (1966), hereinafter cited as D.C. Crime Commission Report.

For a statement of the role of defense counsel at sentencing see American Bar Association Project on Minimum Standards for Criminal Justice (hereinafter cited as ABA Standards): Sentencing Alternatives and Procedures § 5.3 (Tentative Draft 1967).

to the defendant and his counsel.[7] All the attorneys were full-time personnel carrying demanding caseloads, and it was concluded that if this important assistance was to be properly and beneficially rendered it would have to be done by specialized supplemental staff.[8]

In applying shortly thereafter for a grant from the National Defender Project of the National Legal Aid and Defender Association, request was made to include two social service oriented staff persons among the additional attorneys, investigators, and clerical personnel sought for expansion of the Legal Aid Agency's total program. A $200,000 grant was received and from October 18, 1964, to March 31, 1966, two social service workers gathered social background information and developed rehabilitation plans for use by attorneys in selected cases. Used primarily at sentencing in the United States District Court for the District of Columbia, which has jurisdiction over all felonies prosecuted in the District,[9] the attorneys generally found

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7/ F. R. Crim. P. 32 (c) (2), applicable in the U.S. District Court for the District of Columbia, makes disclosure of the contents of the presentence report discretionary with the court. The ABA Standards recommend that disclosure to the defendant's attorney be required. ABA Standards: Sentencing Alternatives and Procedures § 4.4 (Tentative Draft 1967). See also National Crime Commission Report 145.

8/ See ABA Standards: Providing Defense Services § 1.5 (Tentative Draft 1967) regarding the importance of adequate supporting services.

9/ See 11 D.C. Code § 521 (a) (2) (1967); cf. 11 D.C. Code § 963 (a).

these services helpful in several ways: attorneys could be a more effective part of the dispositional process, judges were receptive to sentencing alternatives and the somewhat new (to them) concept of community-based rehabilitative planning, defendants were greatly assisted toward more constructive functioning in the community by the individually tailored plans presented to the court in their behalf.

On April 1, 1966, the Institute of Criminal Law and Procedure made funds available to expand this first-of-its-kind social service staff to eight people -- a coordinator, a social worker supervisor, four social work assistants, and two secretaries. The results of this pilot project, lasting through March 1967, have been thoroughly reported;[10/] some of the basic concepts of the Offender Rehabilitation Project evolved directly from this pilot experience. An understanding of its evolution provides important insight to the expanded Project funded by the Office of Economic Opportunity and to the directions this Evaluation has taken in consequence.

The pilot project under the Institute of Criminal Law and Procedure was primarily focused toward defendants in the U.S. District Court. Seventy-three percent of its clients were involved in cases in that court and only 18 percent were from the

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10/ See Dash, Medalie, & Rhoden, Demonstrating Rehabilitative Planning as a Defense Strategy, 54 Cornell L. Rev. 408 (1969).

D.C. Court of General Sessions.[11] The essence of the program, as with the initial social service assistants provided under the National Defender Project grant, was on providing defendant studies and rehabilitative plans which defense attorneys could use at the time of sentencing. That this was in fact the primary thrust is confirmed by the finding that at the time of initial referral to the pilot project, two-thirds of the defendants had already pleaded guilty to at least some of the original charges.[12] The report on the pilot project, however, describes an important broadening of concern based on this experience:

> "As time went on, it became increasingly clear to the [Pilot] Project staff members that they should be brought into the case as early as possible after the defendant was assigned counsel. Early referral was seen as necessary to do the kind of thorough background study that was required and to get the defendant, if he was on bail, into a job situation, a training program or a form of therapy, if indicated, prior to trial and case disposition. This early attention to the defendant's needs was important not only for the ultimate disposition of the case, but was essential in order to help alleviate the impact and crisis confronting the defendant and his family as a result of the arrest and often as a result of the removal of the head of the household from the home.
>
> As the [Pilot] Project developed it became clear that early referral of a defendant . . . had a separate value and purpose. It permitted the development of background material on the defendant and a plan for rehabilitation that could be relevant for discussion between the defense

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11/ Id. (in original manuscript). The Court of General Sessions has trial jurisdiction over misdemeanors in the District of Columbia. 11 D.C. Code § 963 (a) (1967). Its judges also serve as committing magistrates for persons arrested on felony charges. 11 D.C. Code § 963 (c) (1967).

12/ Dash et al., op. cit. supra n. 10 at 411.

> lawyer and the prosecutor even before trial. The concept of early diversion developed out of this recognition . . . . Under this concept, the same information that was being made available to the judge for sentencing purposes could be made available to the prosecuting attorney to guide him in exercising his discretion to divert the case out of the criminal system for a solution through other community resources."[13/]

The concept of early diversion, endorsed by the National Crime Commission,[14/] became a fundamental part of the expanded Project evaluated in this report. Moreover, an appreciation of the fact that the less serious criminal cases prosecuted in the Court of General Sessions were far more susceptible to such diversion also led to plans for the expanded Project to begin operations in that court, as had not been possible with the comparatively small staff of the pilot project. Indeed, it was recognized that defendants in the District of Columbia suffered from an anomalous situation: accused misdemeanants, who had not yet "graduated" to the status of accused felons in the U.S. District Court, had fewer services available -- especially from the Probation Department -- than U.S. District Court defendants, yet could most benefit from social services to interrupt the all-too-usual progression from lesser crimes to the more serious.[15/]

Lack of early referral of defendants to the pilot project led to other problems as well. Defense attorneys frequently deferred

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13/ Id. at 414.

14/ National Crime Commission Report 151.

15/ D.C. Crime Commission Report 393, 396, -16.

making use of the program until they had determined for themselves a dispositional strategy in a particular case. Once the defendant had been referred, often after a guilty plea, it frequently left too little time for competent rehabilitative planning, much less an adequate opportunity to judge the appropriateness of the plan and the defendant's willingness and ability to follow it. In fact, a defendant's situation often deteriorated in the interim between arrest and referral because an already precarious social situation was aggravated by the pendency of a criminal charge. In many instances, too, the pilot project's experience was that the defense attorneys emphasized the need only for specific services, particularly employment, since they believed that was the most important factor in judges' dispositional decisions. The lawyers, consequently, were frequently making their own diagnoses of social service needs and doing so, quite naturally, from their own perspective concerned with immediate disposition rather than long-range rehabilitation. The net result was that the pilot project prepared only 88 defendant studies from among its 226 clients, 39 percent. Attorneys tended to request studies only in those cases where they thought a disposition could most likely be affected.[16/]

These problems, too, the expanded Offender Rehabilitation Project set out to correct. Under the Office of Economic Opportunity grant, the enlarged staff would permit automatic referral, as soon

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16/ Dash et al., op. cit. supra n. 10 at 410, 416.

counsel was assigned, of practically all indigent cases for the full range of Project services as needs were determined by the Project staff. The Project was to be unique for its lack of restrictions on intake. Limited only by its primary obligation to the indigent clients of the Legal Aid Agency for the District of Columbia, it would service defendants ranging from those charged with murder to a traffic violation, those with the proverbial criminal record "as long as your arm" to the first offender charged with a misdemeanor -- a truly ambitious undertaking, as should be borne in mind in reading this report. A correlative aim of the Project, arising from the experience of the pilot effort, was to expend greater effort to sensitize defense attorneys, as well as others within the criminal justice system, to a greater awareness of the needs for and benefits of social services for all defendants.

Two additional departures were planned for the expanded Offender Rehabilitation Project. In addition to continuing its use of non-professional social work personnel, a manpower utilization endorsed by the National Crime Commission,[17/] the Project planned to utilize indigenous ex-offenders as "rehabilitative aides," later called "follow-up counsellors." This seemed appropriate both because the Project was to be funded by the "Poverty Program" and because, again, of the endorsement by the National Crime Commission:

> "People who have themselves experienced problems and come from backgrounds like those of offenders often can help

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17/ National Crime Commission Report 167-68.

> them in ways professional caseworkers cannot. Contact with a person who has overcome handicaps and is living successfully in the community could mean a great deal more to an offender than conventional advice and guidance."18/

These follow-up counsellors were to operate as a "follow-up unit" within the Project to prevent, by providing extended service, breakdown in rehabilitation plans and to assist defendants with other significant problems which might occur while released on bail or probation.

The Project planned also to utilize a part-time psychiatrist and a part-time psychologist to help identify mentally disordered or deficient offenders as early in the criminal process as possible and to recommend community-based therapeutic treatment programs if possible. These staff members were not themselves to give treatment, but were to provide psychiatric and psychological evaluation reports and testing for the assistance of Project personnel. Nor were they to assist defense attorneys in presenting insanity issues in court, though they would help to identify defendants with possible problems in that area so that the attorneys could pursue the usual channels for mental examination of indigent defendants.19/

In summary, the Offender Rehabilitation Project had a definite evolutionary basis for the direction and form proposed for it

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18/ Id. at 168.

19/ 24 D.C. Code § 301 (1967).

as an expanded two-year experimental project. It would continue to provide a valuable presentence service to the criminal defense. But in order to better perform that function, and in order to provide a new and additional component of involvement in the pretrial stages of the criminal process, it was to be brought into every new case as soon as counsel was assigned on an automatic basis not dependent upon selective referral by the lawyer. Further, it was to begin operating in misdemeanor cases in the Court of General Sessions, it was to utilize indigenous ex-offenders in a social work role, and it was geared to attempt to influence the criminal justice system toward a greater sensitivity to offender rehabilitation issues, including influence upon the community and governmental resources with potential for providing vitally needed social services to the criminal offender.

B. Underlying Features of the Evaluation

There are features about the Evaluation Program and its relationship to the Offender Rehabilitation Project which should be kept continually in mind in interpreting the evaluation results which follow.

First, the organization and staff of the Project and the Evaluation Program were separate and distinct entities. Each had virtual autonomy and each did its own job to the best of its ability affected at most by peripheral matters of cooperation with the other. When cooperation was required, from the Evaluation Program's

Excerpt from "An Evaluation of the Offender Rehabilitation Project of the Legal Aid Agency for the District of Columbia"

SUMMARY OF FINDINGS AND CONCLUSIONS

One June 1, 1967, a demonstration program known as the Offender Rehabilitation Project was funded by the Office of Economic Opportunity Legal Services Program. The purposes of the Project were to provide defense attorneys with social background information on indigent defendants for use in the criminal process; to work with those defendants to develop rehabilitation plans based on community social and rehabilitative services; and to embody the social information and planning in reports for the attorneys' use in facilitating, where appropriate, negotiated dispositions before trial or community based sentences for convicted defendants. The Project utilized college educated non-professionals and indigenous and ex-offender personnel supervised by professional social workers.

Since the Offender Rehabilitation Project was the first systematic effort in the nation to help public defender attorneys develop rehabilitative programming for their indigent clients, the Office of Law Enforcement Assistance, U.S. Department of Justice, concurrently funded a thoroughgoing evaluation of the Project. The aim was to discover as much as possible, within the time available for evaluation, about the Project's impact upon the defendants it attempted to service and upon the system of criminal justice. The Office of Economic Opportunity included funds in its grant for the Evaluation Program's research assistant personnel.

The evaluation was conducted on three levels: (1) the effect of the Project on defendants; (2) the impact of the Project on the criminal justice system; and (3) the internal functioning of the Offender Rehabilitation Project. Randomized experimental and control groups of defendants were set up so that the experimental group defendants had the services of the Offender Rehabilitation Project while the control group did not.

To provide perspective for the Evaluation, the Office of Law Enforcement Assistance requested the evaluators to conduct a nationwide survey to determine the existence and extent of social services provided by defender agencies throughout the nation. Among 133 defender agencies responding, 41 percent had one or more means of providing social services to their offender clients. Only two agencies were found to have their own formal programs providing social services to offenders, one of which was the Offender Rehabilitation Project. Nineteen agencies had formal or informal arrangements with outside resources in the community; in 44 agencies the attorneys made referrals; and in 23 agencies the attorneys themselves provided services to defendants. A mere 2.1 percent of the clients of all these agencies, however, were beneficiaries of the social services provided.

Part 1

As expected, the Offender Rehabilitation Project's clients were predominantly male, black, relatively young, often single, of relatively low educational attainment, unskilled, erratically employed, recidivists, and having generally marginal income. The experimental and control

groups of defendants were closely similar to each other and to all other Project clients; if anything, the experimental group was slightly more handicapped, being charged with a higher proportion of crimes against the person, having more previous juvenile arrests, and earning less income.

In the reports the Project wrote on its clients and transmitted to the defense attorney for his use, the Project made recommendations for probation or suspended sentence in 69 percent of them. The Project's sentencing recommendations were followed by the U.S. District Court (where felonies are prosecuted in the District of Columbia) 53 percent of the time. Its recommendations were followed 59 percent of the time in the Court of General Sessions (where misdemeanors are prosecuted, some of which are reduced felony charges). In the 342 full defendant reports examined, the Project suggested some 604 elements of rehabilitation plans for its clients. In addition, 59 separate community resources were mentioned 229 times in a total of 405 reports abstracted by the Evaluation.

The Project appeared to have, through direct and indirect means, a significant effect upon dispositions of criminal cases. In the Court of General Sessions only 52 percent of the experimental group defendants were convicted and 54 percent of these were sentenced to probation or given a suspended sentence. In the control group, on the other hand, 63 percent were convicted and of those, only 35 percent were sentenced to probation or given a suspended sentence. All other Project clients in the Court of General Sessions had a conviction rate of 57 percent and of those, 56 percent were sentenced to probation or given a suspended sentence.

In the U.S. District Court 58 percent of the experimental group defendants were convicted compared to 88 percent of the control group defendants. All other Project clients were convicted at a rate of 78 percent. The effect of the Project on sentences in that court was less clear, though the incarceration rate was 42 percent of the total experimental group and 65 percent of the control group. Legal Aid Agency attorneys achieved a conviction rate 16 percentage points lower than private practitioners using the Project in the Court of General Sessions and 9 percentage points lower in the U.S. District Court.

A cost analysis comparison between the experimental and control groups shows a conservatively calculated correctional cost saving to the community of almost $540 per client over and above the cost of operating the Project itself. At the rate the Project serviced clients, this saving comes to approximately $360,000 per year. Not included are indirect savings from the fact that more Project defendants are in the community as taxpayers rather than in prison and unable to support their families. The average correctional time to which experimental group defendants were sentenced was 37 months compared to 48 months for the control group.

Recidivism was measured by rearrests of Project clients within the District of Columbia whether convicted or not convicted on the charge pending at the time of Project referral and without reference

to the length of time they had been in the community since referral. Twenty-two percent of the Court of General Sessions defendants recidivated as did 15 percent of the U.S. District Court defendants. A greater proportion of Court of General Sessions defendants were free in the community with opportunities to recidivate. In the Court of General Sessions 28 percent of the experimental group defendants recidivated compared to 44 percent of the control group defendants. In the U.S. District Court 15 percent of the experimental group defendants recidivated compared to 18 percent of the control group defendants. These differences are even more significant in light of the fact that more experimental group defendants were free in the community with opportunities to recidivate.

Part 2

Judges interviewed by the Evaluation could be analyzed in three groups in terms of their attitudes toward sentencing -- those who gave primary consideration to the defendant and his rehabilitative potential when considering an appropriate sentence, those who primarily considered protection of the public, and those who fell somewhere between the first two groups. The first group of judges was very enthusiastic about the Offender Rehabilitation Project and had had substantial contact with it through receipt of many of its defendant reports. The second and third groups of judges had had very little experience with the Project and were less enthusiastic about it. But since these judges were by no means negative toward the Project, the evaluation concludes that defense attorneys were unduly cautious in their "judge-shopping" and use or non-use of Project defendant reports at sentencing.

The Project has a very favorable image within the defense bar and enjoys a full and thorough appreciation of its use to the attorney at sentencing. Its role in pretrial negotiations is less well understood and less utilized. Public defender attorneys seem to have a broader appreciation of the Project's usefulness as well as a broader understanding of the defense role. Defense attorneys who had not utilized the Project showed much less comprehensive views of the attorney's role at sentencing and after. The strongest criticism of the Project by defense attorneys was that its services were not rendered quickly enough. This criticism was tempered, in a pretrial negotiations pilot study conducted by the Evaluation, by a finding that attorneys moved their cases too quickly for the Project to act in many instances.

Prosecutors did not exhibit a thorough understanding of the Offender Rehabilitation Project. One-third of them had received information in pretrial negotiations that they knew to have come from the Project. Few prosecutors were willing or able to rate the Project on any specific issue, but when informed more fully about the Project's operations all felt that it could provide valuable services and information to them. The nature and seriousness of the offense and the defendant's prior record were the most important factors cited by prosecutors in determining whether to prosecute or in negotiating a guilty plea.

The Court of General Sessions probation officers interviewed were younger and more hetrogeneous than the better educated, more experienced U.S. District Court officers. While the latter were considerably more negative toward the Project, the general attitude among all probation officers was one of cooperation with the Project even though there may not have been general sympathy with its aims, of crediting its innovative character, and of favorable recognition of its emphasis on rehabilitative planning and the use of community resources. Primary negative attitudes expressed were criticism of the Project's defendant reports and the overlap of effort to produce them, a feeling that the skills and abilities of Project personnel were inferior to those of probation officers, and the view that probation officers had a greater fund of information about defendants. The Evaluation concludes that the Project seemed to have broken down some communication barriers with probation officers and to have done so in an atmosphere of benign rivalry with them.

The Project was in contact with at least 137 community agencies and organizations in the Washington metropolitan area plus many private employers. A few agencies were used very heavily. There was some evidence of a tendency by the Project to become a service agency rather than a referral agency for its clients. The Project's major failing in the community resource area was its inability to develop and consistently execute a program for coordinated mobilization and use of community resources.

An instrument known as the "Decision Game" was used with probation officers, prosecutors, and Project workers to compare sentencing or dispositional recommendations, information utilized in making those decisions, and the effect of rehabilitative planning. Results showed the tendency toward somewhat more community oriented decisions by Project workers and the poor emphasis on rehabilitative planning by District Court probation officers in comparison to other players (except prosecutors). A significant effect of rehabilitation plans, comparable to those prepared by the Project, was also shown, especially upon prosecutors in a pretrial negotiation context. Information most often used in decisions made were the defendant's offense, his prior criminal record, his employment and his own statement about the offense.

Part 3

As originally organized, the Project designated two types of staff workers. Program developers were to work with and develop rapport with clients, develop community resources to serve them, and devise rehabilitation plans for them. Follow-up counsellors were cast in a supportive role to check on the suitability of rehabilitation plans and to help put them into effect. Program developers were college educated and most were white females. Follow-up counsellors were not highly educated, were black males, products of the ghetto, and the majority were ex-offenders. The Evaluation observed some degree of acculturation toward a middle class life style by the follow-up counsellors during the life of the Project. They seemed to be more self-confident than program developers and began to assume some of the duties originally

assigned to program developers. This caused some confusion and tension within the Project which was augmented by a salary differential between the two types of personnel.

The Evaluation found evidence of various communication difficulties within the Project, some of which related to misunderstandings about in-house training, staff and unit meetings, and a rising level of black militancy. Difficulties arose over inefficient deployment of psychological staff and employment counsellors. There were occasional problems of hurried and insensitive demands placed upon the Project by defense attorneys.

The Evaluation found that approximately 50 percent of all Project time accounted for during a ten-week test period was spent in travel or waiting. The Evaluation attributed much of this inefficiency to poor location of the Project's central office, a problem which has since been rectified. Analysis of non-travel or waiting time highlighted the planning functions of the Program developers and the community oriented, implementation functions of the follow-up counsellors. The data suggest that there was much less overlap in roles than was perceived or imagined by Project staff.

Conclusions

The Evaluation concludes that the legal dispositions achieved through utilization of the Project, while obviously good from the defendant's point of view, are acceptable from society's point of view only if the fundamental premise of the Offender Rehabilitation Project is accepted: that community oriented rehabilitation is more effective in reducing criminality and preventing recidivism than is correction through incarceration. The Evaluation accepts this premise as valid and feels its preliminary recidivism data tend to justify it. It therefore concludes that the Project succeeded, to a degree justified by its cost, in its goal of wrenching the legal system farther away from an orientation which tends toward incarceration because of failure to offer something better. The Evaluation further concludes that the Project is unique in that it was able to help <u>all</u> defendants to some degree. It concludes that Offender Rehabilitaton Project type services are more widely effective and desirable within a defense context at the present time. Disadvantages of adversary status and duplication of effort are outweighed by the need for adequate defense services, confidentiality, and a counter to secret probation office presentence reports.

The Evaluation concludes that the Project is better utilized by organized public defender attorneys. The Project's use in pretrial negotiations ought to be optimized, perhaps through the greater use of short form reports or automatic screening of Project defendants. Informal communication and cooperation with probation offices ought to be expanded and opportunities for joint in-service training ventures and staff programs explored. There should be full-time responsibility in one or more Project staff persons in the aggressive and dedicated

pursuit of community resource development. Further, there should be greater flexibility in recognizing latent talent among Project workers without arbitrary distinction based upon formal education. The Project's services ought to be expanded into Juvenile Court proceedings. Replications of the Offender Rehabilitation Project would more likely be benefitted by ongoing in-house evaluations.

File Budget Review

February 13, 1969

House Judiciary Committee
Alaska State Legislature

Attention: Mr. Barry Jackson, Chairman

This follows a narrative rundown of the activities, problems and future plans of the Division of Corrections in the Department of Health and Welfare, as requested in your letter of February 5, 1969.

To briefly introduce myself and touch lightly on personal qualifications, please be advised that I entered the Federal Bureau of Prisons System at Alcatraz in December of 1936. I retired from that service December 30, 1966. During 1967 I served as a consultant in penal management and operations to the Federal Bureau of Prisons and the American Correctional Association. As a consultant I did studies for the States of Maryland and Alaska and a survey of all the county jails on the Pacific Coast between Everett, Washington and San Jose, California. As a followup to the Alaska study, in March of 1967 at the request of the then Deupty Commissioner, Health and Welfare, Richard B. Lauber, on December 16, 1967 I came to Alaska as Director of the then Youth and Adult Authority, now the Division of Corrections.

Comments are based on varied experience and training and fourteen months as Director. I join other penal practitioners and share in the extreme difficulty of developing and understanding and explaining to the lay individual the purpose of modern day corrections. Unless the problem touches the lives of the individual, the concept of punishment transcends and literally eliminates all thoughts of corrections, or what is broadly referred to as rehabilitation of the individual. Thus the problem of correctional enlightenment in all its ramifications seems insurmountable, and our attempts to enlist the support and cooperation of government, labor, business, management, industry and the community at large is a discouraging and futile action. Yet crime and delinquency is increasing at an alarming rate and reaching deeper and deeper into our youth, tomorrow's society. In short, it is a matter of one's point of view.

For many months I have felt the urgency of statistical support for our programs, and a means of conveying to the uninitiated the growth and seriousness of crime in Alaska. I am reliably informed that soon the Department of Health and Welfare will become a member in the electric data processing system which

will provide the Division of Corrections with the information essential to annual and semi-annual reports and support for our correctional program effort.

I believe that Alaska at this point is at the crossroads and can look back with considerable satisfaction to the accomplishments in updating the institutions since becoming a state. The future, however, is limited by the desire for continuing progressive action. The vision and concern of legislators attending early sessions brought into existence the new Regional Institutions in Fairbanks, the McLaughlin Youth Center in Anchorage, and this year the Regional in Juneau. During the past year we have changed the name from Youth and Adult Authority to the Division of Corrections. Programs implemented the past year are, in part, the Citizens Action Committee at Fairbanks, which works closely with the community at large in the area of foster home placement, post-release employment, and public education. From the existing staff at Fairbanks we have developed a teacher working with the juvenile and the adult groups. A number of cases are on work furlough; others care for the lawns and gardens of the Pioneers Home, which is adjacent to the Fairbanks Institution.

In Anchorage we have a class of adults working toward a certificate in GED. There are group counselling sessions with trained employee group leaders. We have the largest number at Anchorage on work furlough.

In Juneau we have a full-time and approved vocational training class in food service, also individual counselling sessions.

At the Adult Conservation Camp, Palmer, fire fighting crews are trained and moved to various points throughout the State to combat fires. The only full-time instructor is at Palmer, teaching adult basic education. There are group and individual counselling sessions.

At the youth institutions we have active educational programs--at McLaughlin Youth Center, with instructors supplied by the Anchorage Borough School District, and at the Youth Conservation Camp, Wasilla, with teachers from the Mat-Su Borough School District. Several youngsters are leaving the McLaughlin Youth Center and attending community schools. At the Alcantra Youth Conservation Camp, Wasilla, educational classes are conducted by the Mat-Su Borough School District with emphasis, due largely to educationally retarded students, on the program learning instead of the formal classroom setting.

Many of the offenders sent to outside "contract" institutions, largely because of length of sentence, or that our facilities are not adequate for their needs, are engaged in advanced programs of education, vocational training, and social adjustment activities. At a given point they are reclassified for

return to the Alaska institutions. Contracts for the adult and the deeply troubled youth are with the Federal Bureau of Prisons; with California and Utah Youth Authorities for the less troubled youth, and to the Good Shepherd Homes of Spokane, Denver and Seattle for the pre-delinquent boy and girl.

Our efforts at education, pre-vocation and vocational training, and social adjustment, are broad and demanding. Recognizing this I have worked closely with Commissioner Hartman, Department of Education, in hopes of enlisting help for our specialized needs. At the adult level, four to five and occasionally six years exist in educational achievement between the same age group in the community. Further, larger numbers are without a salable skill; consequently the revolving jail door for those unprepared to cope with the demands of a competitive society. At the juvenile level are youngsters who fail in school, who are unable or unwilling to conform, consequently become involved in runaway, truancy, and reveal pre-delinquent tendencies. As a result of my conversations with Dr. Hartman and members of his staff, the Department of Education included in their fiscal year 1970 budget an employee qualified to serve the needs of the Division of Corrections. I am reliably informed this position was removed during early budget considerations.

Some of the problems presently confronted by the Division of Corrections:

1. Full-time employee in the Department of Education to serve as a liaison in the specialized field of correctional education, pre-vocational and vocational training.

2. Enlarge upon the furlough program to include not only the privilege of work, but also study and home visits where indicated. This places greater responsibility on the institution classification committee that only those eligible are accorded this privilege.

3. Under the judicial banner:

   (a) Furlough is the responsibility of the institution and not the courts. However, their recommendation is well received and encouraged.

   (b) We are having problems with the amended sentence. We perform extensive preliminary work only to discover the original sentence has been amended to "time served."

   (c) Sentences that require the individual serve sentence in the jail <u>weekends</u> and <u>evenings</u> only. The responsibility for booking and release, the control of contraband, inventory of clothing

and personal property, is vital to the security and is working a hardship on the institutions.

4. Employee training to effectively cope with the increasing number and different type individual, juvenile and adult, committed to our institutions. During recent months there is noticeable increase in the numbers of the criminally sophisticated, prison-wise offenders entering our system. The attraction of the economic development and availability of work is bringing this element in with legitimate interests.

5. Division of Corrections should be permitted the flexibility of placing the aggressive and mature 17, 18 and 19 year old juvenile offender in an institution best suited to the interests of the community and the individual. Example--the Adult Conservation Camp at Palmer or even placement in a correctional institution. Many of today's older youth are hardened beyond their years; consequently disrupt the atmosphere of the juvenile institution and the cost of "outside" commitment is high.

6. Long-range study of the physical needs of the Division of Corrections:

   (a) Replacement of the Anchorage State Jail

   (b) Completion of McLaughlin Youth Center

   (c) Rebuilding the Youth Conservation Center at Wasilla

   (d) Removing the children from the jail settings of Fairbanks and Juneau.

7. Adequate staffing in the institutions and the field units. Strengthen the Central Office personnel complement. There is critical need for more space in the Central Office.

8. Community involvement--citizen participation.

9. Labor-Management sharing in our treatment efforts.

10. State use industries. Productive and contributing to the economy of the state at large, yet providing a salable skill and a better educated individual upon release. In this latter connection, agreement has been made with the Department of Natural Resources, Division of Lands, to preserve and maintain historical monuments throughout the State. For example, Chilkoot

Trail, wayside parks, and picnic areas, thereby making them inviting to resident and tourist alike.

Engage in experimental programs of tree culture, creating a nursery at the Youth Camp, and otherwise engage in statewide reforestation projects. Also, remain in constant state of readiness for fire-fighting.

Still has been introduced? or in AG 9/12

11. Uniforms to implant pride and dignity to correctional work--distinguish employee from inmate.

12. Salary imbalance as compared to like work.
need to raise salary — are working w/ Dept of Admin

13. In many cases "concurrent" sentence meaningless.

14. Remove impediments and eliminate delays to speedy justice.

"Justice delayed is justice denied!"

↓

V. 1. calendar crowding
pre trial. report delay - 3 weeks
appeal

Demands on p.s. report
no great
can't give prob. supervision

21 par. pers.

115 caseload
compared w
50 standard
75 (could do 2/

misc. 3 of 3
Budget Review

JUNEAU BAR ASSOCIATION RESOLUTION

RELATING TO THE DEDICATION OF A PORTION OF DIVISION OF CORRECTION'S INSTITUTION BUDGET TO THE REHABILITATION OF THE ALCOHOLIC CRIMINAL OFFENDER.

BE IT RESOLVED BY THE JUNEAU BAR ASSOCIATION:

WHEREAS the overwhelming majority of prisoners institutionalized by the State of Alaska at anytime, are Alcoholics or problem drinkers; and

WHEREAS most of these prisoners are recidivist as a direct or indirect result of alcohol consumption; and

WHEREAS it costs the tax payer approximately $18.00 per day or $6,500.00 per year to incarcerate these individuals in present facilities; and

WHEREAS the present facilities are security institutions and cost approximately $20,000.00 per bed to construct; and

WHEREAS the present facilities are not equipped to rehabilitate the alcoholic and have no programs specifically calculated to rehabilitate the alcoholic; and

WHEREAS there is no need for costly security jails and a disproportionate number of guards to detain the alcoholic; and

WHEREAS to continue the present system will only continue the problem and perpetuate a wasteful and ineffective method which has totally failed;

BE IT RESOLVED both legislative and administrative action be taken which will result in the dedication of a portion of Division of Corrections Institutional budget to institutions and programs specifically calculated to rehabilitate the incarcerated Alcoholic Criminal Offender; and be it

FURTHER RESOLVED the Alaska Bar Association is respectfully requested to join the Juneau Bar Association in supporting and implementing this objective by it's inclusion in it's legislative program; and be it

FURTHER RESOLVED that a copy of this resolution be sent to the Honorable Lester W. Miller, Jr., President of the Alaska Bar Association and to Stanley Howitt, Executive Director and Bar Counsel and to each member of the Alaska Bar Association Board of Governors, and to Glen Wilcox, Director of Alcoholism, Department of Health and Welfare, and to the Health, Welfare and Education Committee, Judiciary Committee and Finance Committee of each house of the Alaska Legislature, the Honorable Keith H. Miller, Governor, and the Honorable J. Scott McDonald, Commissioner of the Department of Health and Welfare.

FG-95

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME
STANDARD OPERATING PROCEDURE

SOP #	PAGE
3201-08	1 OF 3
EFFECTIVE DATE: June 1, 1969	
SUPERSEDES SOP #	DATED
APPROVED BY: Irene Keef	

SUBJECT: PERSONNEL, CONFLICTS OF INTEREST

DIVISION	SECTION	CHAPTER TITLE
Administration	Personnel	Policy and Procedures

Purpose:

To establish guidelines for personnel participating in activities which may conflict with the interest of the State or Department.

Distribution:

All manual holders.

Definition:

A conflict of interest occurs when a Departmental employee participates in an activity which results in one or more of the following:

(a) Employment which reflects adversely the good will, reputation or public faith in the Department or State.

(b) Uses for personal gain information not available to the general public.

(c) Results in personal gain from participating in commercial fishing, guiding, trapping or other profit ventures under departmental control.

(d) Participation as a member of Fish and Game Advisory Committees or as an officer of a conservation group or societies or sportsmans group.

(e) In violation of Rule 13 of the Personnel Rules of the State of Alaska.

POLICY:

Outside Employment:

Approval must be obtained from the Commissioner prior to acceptance of any outside employment.

FG-95

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME
STANDARD OPERATING PROCEDURE

S.O.P. #	PAGE
3201-08	2 OF 3
EFFECTIVE DATE: June 1, 1969	
SUPERSEDES S.O.P. #	DATED
APPROVED BY: Augie Reef	

SUBJECT: PERSONNEL, CONFLICTS OF INTEREST

DIVISION	SECTION	CHAPTER TITLE
Administration	Personnel	Policy and Procedures

Use of Information:

Departmental employees are encouraged to prepare general or technical articles or papers on Department work on official time. However, information not generally available to the public should not be used in articles being sold. Clearance shall be obtained from the Commissioner before articles or photographs, based on departmental activities, are submitted for publication.

Commercial Fishing, Guiding, Trapping:

These commercial activities are under the control of the Department, and employees shall refrain from engaging therein. Our efforts are directed to conserving resources for the public use, and employees who guide, fish or trap for profit jeopardize their responsibility both to the resource and the State. Approval is required by the Commissioner for any special situations under which the employee may engage in these activities.

Advisory Committees, Sportsmans Clubs, Conservation Societies (Sierra Club, Wilderness Society, Alaska Conservation Society, Audubon Society, etc.):

Departmental employees are encouraged to assist Advisory Committees and serve as technical consultants - but cannot be voting members.

Departmental employees are encouraged to participate in sportsmans clubs and conservation societies. They may serve as technical assistants or non-voting secretaries to the governing body, but are not permitted to serve as officers or voting members of the governing body. Employees who are appointed or elected as officers, without their knowledge, shall request relief from the President or Chairman of the governing body.

In matters pertaining to the fish and game policies or programs of the Department or State Administration, the employee

FG-95

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME
STANDARD OPERATING PROCEDURE

SOP #	PAGE
3201-08	3 OF 3
EFFECTIVE DATE: June 1, 1969	
SUPERSEDES S.O.P. #	DATED
APPROVED BY: Eugene Kopf	

SUBJECT: PERSONNEL, CONFLICTS OF INTEREST

DIVISION	SECTION	CHAPTER TITLE
Administration	Personnel	Policy and Procedures.

is obligated to defend those policies or, if he is not in accord with such policies, refrain from any comment on the matter.

Professional Societies (American Fisheries Society, The Wildlife Society):

Departmental employees are encouraged to participate and serve as members and officers of professional societies and organizations; however, when these groups become involved in fish and game matters contrary to the policies and programs of the Department or State Administration, the employee is obligated to defend those policies or, if he is not in accord with such policies, refrain from any comment on the matter.

Licensing of Architects & Engineers

This material is on a separate subject

March 24, 1970

Mr. William J. Moran
Attorney at Law
P. O. Box 1891
Anchorage, Alaska 99501

Re: Revision of AS 08 48.260

Dear Bill:

I do agree that this section should be amended, but I think it is too late now to introduce a bill and get it through this session.

Hopefully, it can be included in the Revisor's Bill next year or in a general revision of AS Chapter 48.

Sincerely,

Barry W. Jackson
Chairman
House Judiciary
Committee

BWJ/mm

~~HB-754~~

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

March 20, 1970

M E M O R A N D U M

TO: Barry W. Jackson, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson
Revisor of Statutes

SUBJECT: Bill Moran's March 13 letter regarding AS 08.48.260 (licensing of architects and engineers)

As Mr. Moran pointed out, the revisor's note (written by my predecessor) under AS 08.48.260 states: "Subsection (b) is incomplete and conflicts with paragraph (1). Legislative action will be needed to correct this conflict." That section, in more-or-less its present form, was derived from sec. 5, ch. 111 SLA 1949, the relevant part of which stated:

> (5) (Holders of certificates from other state or country.) The board shall from time to time examine the requirements for the registration of professional engineers and professional architects in other states, territories and countries and shall record those in which, in the judgment of the board, standards not lower than those provided by this Act are maintained. The secretary of the board, upon the presentation to him by any person of satisfactory evidence that such person holds a certificate of registration issued to such person by proper authority in any state, territory or country so recorded, may, upon approval by an examining quorum of the board hereunder:
>
> (a) Reciprocity Registration: Issue a certificate of registration as provided hereunder, upon submission by the applicant of satisfactory proof of his fulfilling the residence requirements for examination, of this Act and upon payment by him of a transfer fee of Twenty ($20.00) Dollars and such annual license fees as are prescribed herein.
>
> (b) Non-resident Permit: Issue a non-resident permit for a period of not to exceed one year, for a non-resident within the meaning and intent of this Act, upon presentation by the applicant of a detailed description of the work upon which such applicant will be engaged within Alaska

and upon receipt by the board of a non-resident Permit Fee of $250.00. Such non-resident permit shall cover the work specifically described in the application therefor.

That was amended by sec. 2, ch. 84 SLA 1951 to delete the provision on non-resident permits and add the confusing language presently in AS 08.48.260(b)(1), below. The conflict is as follows: the lead-in line in (b) gives (or used to give) the registration authority to the secretary of the board with the approval of an "examining quorum" (three out of the nine members [see AS 08.48.090]), whereas (1) now gives the authority directly to the board without mentioning the type of quorum (under AS 08.48.090 a regular quorum is five members); in addition, (1) recognizes registration by certain national professional organizations. The 1951 amendment wasn't made to fit the lead-in line, which makes the material between the present "(b)" and "(1)" (the last part of the material between the "(5)" and the "(a)" in the 1949 version, above) look incomplete.

I haven't checked with the architects or engineers and I don't know how AS 08.48.260 has been interpreted, but, assuming that they would prefer the most recent and broadest language, and assuming that the quorum matter is not important, my suggested amendment is as follows:

* Section 1. AS 08.48.260(b) is amended to read:

(b) [THE SECRETARY OF THE BOARD, UPON THE PRESENTATION TO HIM OF SATISFACTORY EVIDENCE THAT A PERSON HOLDS A CERTIFICATE OF REGISTRATION ISSUED BY PROPER AUTHORITY IN ANY STATE, TERRITORY OR COUNTRY SO RECORDED, MAY, UPON APPROVAL BY AN EXAMINING QUORUM OF THE BOARD HEREUNDER:

(1)] The board may, upon application and payment of a fee of $20, issue a certificate of registration as a professional engineer or professional architect to a person who holds a certificate of qualification or registration issued to him by proper authority of the National Council of State Boards of Engineering or Architectural Examiners, or of the National Bureau of Engineering or Architectural Registration, or of any state or territory or possession of the United States, or of any country. However the applicant shall meet the requirements of this chapter and the rules established by the board.

Presumably that last sentence refers to the character and education and experience requirements in AS 08.48.160. It should perhaps be noted that although AS 08.48.150 requires registration and licensure before practicing professional engineering or architecture, and several sections talk about an examination, there is nothing in AS 08.48 that requires a person to take an examination in order to become registered and licensed. Also, it is not clear what function AS 08.48.260(a) serves; it requires the board to make a list of states, etc., in which

the standards are not lower than those specified in AS 08.48, but when (b) refers to other states, etc., it doesn't mention standards; perhaps (a) should be deleted (repealed) too. As Felix Toner indicated at yesterday's House Judiciary Committee meeting (with regard to HB 626), some architects and engineers organization is planning a completely revised licensing chapter.

AP:ic

cc: William J. Moran, Esq.
Box 1891
Anchorage, Alaska 99501

PHONE 272-4441
AREA CODE 907

WILLIAM J. MORAN
ATTORNEY AT LAW
P. O. BOX 1891
ANCHORAGE, ALASKA 99501

March 13, 1970

Hon. Barry W. Jackson
Chairman, Judiciary Committee
House of Representatives
Pouch V
Juneau, Alaska 99801

Re: Revision of AS 08.48.260

Dear Barry:

I had occasion to review the subject section of the article dealing with the registration of professional engineers and architects. The revisor's note reflects the observation that sub-section (b) thereof is incomplete and in conflict with paragraph (1) - an observation with which I heartily agree, but I have found no evidence that legislative action has been taken to correct the error. I should think it important that appropriate action be taken.

Sincerely,

Bill

William J. Moran

cc: Arthur H. Peterson, Esq.
Legislative Affairs Agency
Pouch V
Juneau, Alaska 99801

Judicial Council

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE
GEORGE F. BONEY, ASSOCIATE JUSTICE
ROGER G. CONNOR, ASSOCIATE JUSTICE

Supreme Court
State of Alaska
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

February 11, 1969

Hon. Barry W. Jackson
Chairman
House Judiciary Committee
Alaska State Legislature
Capitol Building
Juneau, Alaska 99801

Dear Rep. Jackson:

Yours of February 6 requests that I or my representative meet with your committee in a general information meeting to deliver a formal oral presentation concerning the activities of the Judicial Council, court system problems and plans for the future.

I accept your kind invitation.

Senator Phillips has arranged for the annual meeting between all members of the Alaska Judicial Council and the legislators to be held at 4 p.m. February 20, 1969. In past years these meetings have included the President, Speaker, Majority and Minority leaders and the Chairmen of the Finance and Judiciary Committees of both houses plus any other interested legislators.

The Administrative Director and I will be in Juneau presenting our 1969-1970 budget to the finance committees on February 18. On February 19 there will be meetings of the sub-committees and of the full statewide committee of the Alaska Judicial Council on sentencing. (Notices were mailed to you as a member) At 9 a.m. on February 20 the Alaska Judicial Council meets in the library of the Supreme Court. Sometime between 11 a.m. and 4 p.m. on the 20th the Council will meet with the Governor, and, as mentioned, at 4 p.m. it will meet with the legislators.

I will contact you after my arrival in Juneau to arrange a time satisfactory to all concerned.

Sincerely yours,

Buell A. Nesbett
Chief Justice

cc: Senator Brad Phillips
Robert H. Reynolds
Justice Dimond



Alaska Judicial Council

941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

February 6, 1969

TO: All Members Alaska Judicial Council Statewide Committee on Sentencing

A meeting of the Alaska Judicial Council Statewide Committee on Sentencing will be held in Juneau in the Superior Court courtroom, 5th floor, Capitol Building, Juneau, Alaska, commencing at 3:00 p.m., February 19, 1969.

All members desiring transportation and/or hotel reservations should immediately notify Mr. Robert H. Reynolds, Administrative Director of Courts, 941 Fourth Avenue, Anchorage, telephone 272-1587.

Please do your best to attend and bring with you the background research material furnished you in the past.

Sincerely yours,

Buell A. Nesbett
Chairman, Alaska
Judicial Council

Judicial Qualifications
Judicial Council



Supreme Court
State of Alaska
Pouch U
~~BOX 2607~~
JUNEAU, ALASKA
99801

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE

April 1, 1969

Hon. Barry W. Jackson, Chairman
House Judiciary Committee
State Capitol Building
Juneau, Alaska 99801

Dear Mr. Jackson:

Enclosed are copies of my letter to you of March 4, 1969 together with the proposed bill mentioned in that letter.

In my letter of March 4 I neglected to explain the reason for including section 22.30.145 which is on page 5 of the proposed bill. It would appear that under AS 44.62.330(b) the Administrative Procedure Act would not be applicable so far as adjudication is concerned. However, it may be that the provisions of the Administrative Procedure Act relating to filing and publication of regulations, procedure for adopting regulations, etc. may be applicable. I suggest that they should not be because the rules which will be adopted deal only with judges of the Alaska Court System and are not the kind of rules or regulations which have general application to persons throughout the state. What the commission plans to do once the rules have been adopted is to make copies available

to every judge and to every member of the Alaska Bar Association and to all other persons who may be interested.

Sincerely yours,

John H. Dimond

John H. Dimond

Set up file

Supreme Court
State of Alaska
Pouch U
BOX 2601
JUNEAU, ALASKA
99801

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE

March 4, 1969

Hon. Barry W. Jackson, Chairman
House Judiciary Committee
State Capitol Building
Juneau, Alaska 99801

Dear Mr. Jackson:

As you know, the last session of the Alaska legislature enacted SLA 1968, chapter 213, which established the Commission on Judicial Qualifications. At the same session House Joint Resolution No. 74 was approved. This resolution proposed amendments to the Alaska Constitution which would also establish the Commission on Judicial Qualifications. The membership provided for in the resolution differs somewhat from that established in chapter 213, in that the resolution provides for three superior court judges whereas the statute provides for only two, and the resolution provides for only one district court judge whereas the statute provides for two.

The amendments to the constitution proposed in the resolution were approved by the voters at the August 1968 primary election. It appeared logical to assume that the provisions of the constitution would govern the membership of the commission. Therefore, membership of the commission was selected according to the provisions set out in the resolution rather than those set out in the statute.

The commission believes that the statute should be made to conform to the resolution. In order to accomplish this, among other things, the enclosed proposed bill has been prepared. I spoke to Mr. Kerttula, Speaker of the House, as to how to go about getting the bill introduced. He suggested that I refer the matter to you with the thought that perhaps the House Judiciary Committee would introduce and sponsor this legislation. I shall appreciate it if you can let me know whether or not your committee will introduce this legislation.

Here are some specific comments on the proposed bill:

1. Section 3 on page 2 would take care of a situation where a judge might be charged with a serious offense involving moral turpitude but will not have been tried and convicted. It seemed to the commission that such a charge, even before final determination by a court, might be such as to bring disrespect upon the judiciary and that in such a situation a suspension of the judge might well be in order.

2. Section 4 on page 2 is included to make certain that when a judge is removed by the supreme court he will not lose his retirement rights and benefits.

3. The new sections under Section 5, beginning on page 2, line 26, are provisions which the commission thought should be included in the law in order to confer upon the commission sufficient authority to perform its functions. These sections are taken from the California statute on judicial qualifications.

I shall be very happy to answer any questions that you may have regarding this proposed legislation.

Sincerely yours,

John H Dimond

John H. Dimond

KALAMARIDES & McVEIGH
ATTORNEYS AT LAW
SUITE 204-209 CRAWFORD BUILDING
TELEPHONE 277-7431
507 E STREET ANCHORAGE, ALASKA 99501

PETER J. KALAMARIDES
RICHARD L. McVEIGH

April 11, 1969

The Honorable Barry Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
House of Representatives
Juneau, Alaska

Dear Barry:

In this morning's Anchorage Daily News, Friday, April 11, 1969, there appeared the original of the enclosed xerox copy of inquiry with respect to Hubert A. Gilbert.

The 1968 legislature passed a statute authorizing the appointment of a Judicial Qualifications Committee to whom, it was anticipated, all inquiries would be directed regarding the qualifications of any judge in the state of Alaska.

I strenuously object to the methods utilized by the writer of this ad who is seeking information. Primarily, because it implies a failure of qualification and/or dereliction in performance of his judicial duties. Frankly, it smells of McCarthyism and is a type of character assassination which the members of the judiciary should not be exposed to. I can certainly see and anticipate that the nature of the replies to this ad would be hearsay and when the mass of hearsay from disgruntled litigants is presented to the Judicial Qualifications Committee and they seek affidavits in support of the so-called charges, and these affidavits could not be produced then, of course, both the Bar and the judiciary would be accused by the non-lawyers interested, of working hand in hand to deprive the non-lawyers of a proper hearing. Contrary to this, proper grievance methods, both as to attorneys and the judiciary, have been utilized in the past and I have been advised rules of procedure will soon be adopted by the Judicial Qualifications Committee.

It is my opinion that the judiciary committees of both the senate and the house should take forceful action to avoid putting members of our judiciary before the public in a like manner as has been presented here. Proper methods of procedure are available without the necessity of impugning, even by implication, the character of any member of the judiciary. I trust you will see this in the same light as I.

Very truly yours,

Peter J. Kalamarides

PJK:jo
Encl:
cc: Hon. T. B. Miller
Chmn., Senate Judiciary Committee

Information is sought

on the professional performance of

Hubert A. Gilbert,

a State Superior Court Judge

who has served in Nome, Anchorage and Ketchikan.

All inquiries confidential.

Write: Blind Box 888
c/o Anchorage Daily News
Box 1660
Anchorage, Alaska 99501

Fri. April 11, 1969, Anch. Daily News

Juvenile Letter

Box 1309
Fairbanks
Alaska 99701
February 14, 1969

Fairbanks Legislative Delegation
Alaska State Legislature
Juneau, Alaska 99801

Sir:

For the past six months I have been handling a substantial percentage of the juvenile appointments in the Fairbanks Superior Court. My clients come from an area between Barrow and Bethel with about half of them from the Fairbanks area. I have been continually shocked by the existing detention and treatment facilities and by the cumbersome and somewhat unfair procedures for juvenile delinquents and dependents.

At any one time there are between fifteen and thirty juveniles held in the Juvenile Detention Wing of the Fairbanks State Jail. Both delinquent and dependent children are held in the jail with no separation. There is absolutely no program of any kind available to these children: no schooling, no physical exercise program and no therapy. (There is a library with very few books, almost all of which are unsuitable and unattractive.) The first four days of detention are spent in solitary confinement awaiting physical examination and are immediately followed by physical abuse from other inmates; the juveniles regularly beat each other up with potentially serious injuries; a child with the "proper" attitude can gradually advance in the pecking order and become the abuser rather than the abused. Some of the children go "stir crazy" while others become withdrawn and still others obtain an unfortunate sophistication about their new way of life. None of them can really understand that his detention isn't punishment but is rather a step on the road to rehabilitation. In addition, due to the construction of the ceiling there is free secret access between the boys' and girls' dormitories. The children are exposed to both sexual and homosexual experiences. Almost all of the children held in "temporary" detention stay there more than two months, and I know of one girl detained there for eight months. As a result each child held there is in danger of losing a year of school, especially those who are placed outside of the available but inadequate State institutions. Most of them are in academic trouble anyway, and this loss becomes too great to overcome.

The problems in the Juvenile Detention Wing of the Fairbanks State Jail are acute, but solutions to these problems should not be exceedingly difficult. I understand that a proposal (for which there are available funds) has been made to provide

the Fairbanks Jail with two part time teachers and a psychologist, that this proposal was forwarded to Mr. May, that his reaction could be termed lukewarm at best because the problems have not as yet caused enough pressure upon anyone at that high a level in the Department, and that he turned this proposal over to Mr. Hartman upon whose desk it is now collecting dust.

Prior to adjudication a child may be detained although the District Attorney's Office does not yet have possession of a police report from which to draw up a petition against him; the State need only make a prima facie showing of cause for temporary detention at a short hearing at which no defense attorney is present. The State can then wait thirty days before the next hearing at which the child is to admit or deny the allegations against him. In the meantime the State has time to collect information on which to base its petition; it could never put an adult in jail without a complaint against him. If the child denies the allegations against him, there is further delay until the hearing on the truth of the allegations. In addition, it has happened that a child's papers are lost and nobody knows he is in jail. One of my clients was there for 64 days before he could admit or deny the allegations, and after he denied them, the State couldn't even prove its case. Once a child is adjudicated dependent or delinquent, the bureaucracy and red tape of the Department of Health and Welfare keep him in jail for a further unconscionable length of time. There is no real program planned for the children until after adjudication, and the planned program must go through so many channels for modification and approval that it is not unusual for a child to spend at least another six weeks in jail before he is sent anywhere for "rehabilitation".

There are problems also with the legal proceedings against juveniles. Sometimes the State will bring a petition of delinquency against a child to remove him from an intolerable home situation because this is a more convenient procedure than proving dependency or terminating parental rights or because there are more facilities available for delinquents than dependents. This is done more often to children from the bush whose parents do not understand what is really happening, find it inconvenient, if not impossible, to come all the way to Fairbanks to protest. In general, the legal proceedings are supposedly aimed at the best interest of the child, but the juvenile is not provided with the basic rights afforded an adult defendant. A child can be institutionalized for many years for an act which would not be a crime if committed by an adult or for a longer period of time than provided by statute for adult criminals. In addition the juvenile rules of procedure state that an allegation must be proved only by a preponderance of the evidence although the State must prove charges against adults beyond a reasonable doubt. The purpose of the secret juvenile proceedings is to remove the stigma of crime from delinquency and to rehabilitate the child, but at the moment the tight secrecy surrounding treatment of

juveniles also serves to keep the public unaware of existing conditions. In Fairbanks attorneys are routinely appointed for juveniles, but, from my experience, this is not true in Anchorage or in the small native communities of the State. Also, some of the judges feel that children should not be subject to the trauma of a trial; this means that the child should admit the charges whether or not the State has acted properly in the matter. Many of my clients resent this attitude and refuse to admit inaccurate charges or charges where they feel some State official has violated their confidence. Some of the charges are also unrealistic. I have yet to have a client who will admit associating "with vagrant or immoral people", and I have also had difficulty when the charge is being "uncontrolled by parents". Either of these charges is sufficient for delinquency, but it seems to be psychologically difficult for the child to call his friends "immoral" or to admit his parents are unable to handle him.

The State facilities for treating delinquents are inadequate, overcrowded, understaffed and unprofessionally staffed; they are vastly superior to the facilities for dependent children when a foster home cannot be found. In some cases the institutional environment is actually worse for the child than it would be if he were returned to the community after his "brief" stay in jail. In addition, for some reason children from Fairbanks and the bush are not accepted by McLaughlin Youth Center but are almost always sent to other institutions.

No proper physical examination is given to most of the juveniles at any time during their institutionalization. The examination at the jail when the child is first taken into custody is mainly to check for communicable diseases. Any child who is not sent permanently to McLaughlin is not tested further unless an obvious need presents itself. Children sent to Alcantra Youth Camp are often shipped through McLaughlin, but no diagnostic work-up is done. It seems to me as a layman that these children should be tested for such things as epilepsy, diabetes and low blood sugar, all of which can influence criminal behavior and can be treated. In addition, many of these children need extensive psychological evaluation.

In considering these problems I cannot in all fairness blame the local authorities who are almost all acting in complete good faith, but they have no authority and no money to help these children. The procedure to get a child's papers through the committee at McLaughlin, which decides where to place the children, is very slow, and the committee often ignores the the local probation officer's recommendation, sometimes sending a child to an institution which cannot help him. Much of this is due to the lack of space and programs, but having the power to decide the child's placement in a body outside of the community presents real problems. The parents or anyone in the community interested in a child have no real recourse when a poor placement decision is made. The probation officer and the judge

who know the child also have little power over the decision. The child and the family resent this naturally, especially when the local probation officer informs them of the program he will recommend, and another program is put into effect. Generally, the recommended program is more palatable to the family than the program finally decided upon.

As I understand it, the police say that only one out of every twenty-seven serious delinquents in Fairbanks is prosecuted; only one out of every nine cases involving at least three felonies is prosecuted. In the city this backlog is not due to the police; the police reports have already been prepared and are sitting on someone's desk. The State facilities are already overcrowded; the Division of Corrections employees are already overworked; it is probably impossible with the present facilities and personnel to do anything about these children. However, I cannot understand why the Division of Corrections does not make the Legislature aware of the need for much more money, for better and bigger facilities, and for more and better qualified personnel. It seems to me that more expensive programs can be made palatable to the taxpayer if he is made to realize the high cost of delinquency and the general failure of rehabilitation. One might almost say that the current Alaskan treatment of juvenile delinquency is aimed less (in practice, not, of course, in theory) at rehabilitating delinquents than at putting them away for several years, thereby merely deferring and sometimes actually contributing to their potentially serious criminal behavior. Experiments in California have shown that expensive, almost individual treatment of delinquents with highly qualified and highly salaried personnel leads to a lowering of the recidivism rate to the extent that the taxpayer actually saves money in the long run in terms of the cost of crime and of institutionalization.

Up to this point I have refrained from attempting long-term drastic legal action or attempting to publicize the atrocities of the present system because I was afraid the local authorities might well receive the blame, and they are not at fault. However, if something isn't done soon, I shall feel morally obliged to attempt what I can. The present problems are threatening to multiply to the extent that the cost to the State would be astronomical, and the seeming indifference and lack of understanding of the administrators in the Division of Corrections and the Department of Health and Welfare must be corrected.

If I can be of any assistance to you in this matter, please do not hesitate to call on me. I would be happy to give you further information and anonymous case histories if you wish. In addition, Judge Arthur Robson is extremely knowledgeable in this area and will probably be coming to Juneau to discuss the public defender bills. He would be happy to discuss any of these matters with you.

I can no longer in good conscience refrain from attempting

to publicize these problems, but I would prefer practical legislative solutions to merely shocking the public conscience. However, I do also hope to arouse community interest and action in this area.

Very truly yours,

Elinor B. Levinson

(Miss) Elinor B. Levinson
Attorney at Law

cc: Fairbanks Legislative Delegation (11)

Stanley Cornelius; Tom Fink; Gene Guess; Willie Hensley; George Hohman; Wendell Kay; Richard McVeigh; Moses Pauken; John Sackett; Charles Sassara; Nicholas Begich; Raymond Christiansen; Joseph Josephson; John Rader. House and Senate Judiciary, Health, Education and Welfare and Finance Committees.

Governor Keith Miller; Mike Gravel; Ted Stevens; Howard Pollock; Commissioner of Health & Welfare; Commissioner of Education; Director of Division of Corrections.

Jessen's Daily; Fairbanks Daily News-Miner; Robert Zelnick.

Alaska, Tanana Valley, Anchorage & Juneau Bar Associations; Fairbanks Chapter of the American Civil Liberties Union; Alaska Legal Services.

Supreme & Superior Court Justices; Alaska Judicial Conference; Legislative Council.

Arthur Robson; Ross Ward; Gertrude Cunningham; Gerald Van Hoomissen; Morgan Grude.

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

Native Land Claims

February 5, 1970

The Honorable Henry Jackson, Chairman
Committee on Interior and Insular Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Jackson:

This memorandum is with reference to the brief of Solicitor Melich of the Department of the Interior of October 23, 1969 on the subject of Alaska Native Land Claims.

The memorandum of the Solicitor concluded the following: "Congress thus cannot impair the title to lands granted to the State of Alaska by Section 6 by the imposition of the two percent royalty urged by the Alaska Natives." The State of Alaska agrees with that conclusion, and merely observes that the conclusion of the Department of the Interior is in agreement with Opinion of the Attorney General No. 6, September 5, 1969, of the State of Alaska. That opinion, as well as Supplemental Opinion of October 3, has already been sent to you.

The State of Alaska, however, strongly disagrees with the legal conclusion that "Congress may grant the Natives a royalty interest in proceeds received under the Mineral Leasing Act, 41 Stat. 437 (1920), as amended, 30 U.S.C. sec. 181, et seq (1964)." The reasons for that disagreement are contained in this memorandum.

The legal basis of the Solicitor's memorandum is the following. The Solicitor first argues that Section 28(b) of the Statehood Act is not a part of the compact between the State and the Federal Government because it was not a clause inserted in the Alaska Constitution and only those clauses included in the Alaska Constitution which were repeated in the Statehood Act constitute the compact. The Solicitor next argues that the ratification of the Statehood Act by Alaskan voters did not relate to Section 28(b) of the Statehood Act because it was not a grant of property within the meaning of Section 8(b)(3) of the Statehood Act. This memorandum will discuss each of the arguments of the Solicitor.

First, Section 28(b) of the Statehood Act is part of the compact between the State of Alaska and the Federal Government. The State Constitution did not constitute the offer which led to the compact between the State and the Federal Government. It should be readily evident that the purpose of a state constitution is not an offer to the Federal Government to form a compact, but is only intended to relate to those domestic affairs which are the province of a state. The delegates to the Alaska Constitutional Convention certainly did not believe that they were offering to form a compact with the Federal Government. The nature of the clauses contained in the State Constitution, for example, the complete absence of any land grant to the State, militate against such a construction. The only clause in the State Constitution which directly relates to the compact is Article XII, Section 13, which states: "All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people." This clause, of course, is a substantial restatement of Section 8(b)(3) of the Statehood Act, which was approved by the Alaska voters when it ratified the Statehood Act on August 26, 1958.

Further, the basic law of contracts demonstrates that the State Constitution did not constitute an offer of a compact. The language of the document and the circumstances surrounding it indicate that the document adopted by the Constitutional Convention on February 5, 1956 and approved by the people of the Territory on April 24, 1956 constituted a pre-compact petition or solicitation by the people of the Territory of Alaska to the Congress for admission to statehood. It manifested the intention of the people of the Territory to become a State, but it did not indicate the terms upon which it would become a State. In legal terminology, the document constituted a solicitation of an offer and not the offer itself. Restatement of the Law of Contracts §24. The offer of statehood itself was the Statehood Act, and the acceptance of that offer by the people of the Territory occurred with its ratification by the people of the Territory in the referendum election held on August 26, 1958. The State Constitution did not become operative as a legal document until January 3, 1959 when Alaska officially became a state of the Union with the signing of a presidential proclamation.

Next, the Statehood Act itself, when looked at as a whole rather than piecemeal, shows that the State Constitution did not constitute the offer of statehood. Section 1

of the Statehood Act provides, in pertinent part: ". . . the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the Constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence and is hereby accepted, ratified, and confirmed. (emphasis added) Section 3 of the Statehood Act provides: "The constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." (emphasis added) The Constitution of the United States, Article IV, Section 4, provides in pertinent part: "The United States shall guarantee to every state in this Union a republican form of government. . ." It should be clear from a comparison of these quotations from the Statehood Act and the U. S. Constitution that the legal reference between the Statehood Act and the State Constitution is that the Statehood Act "accepted, ratified, and confirmed" the State Constitution as being in conformity with the U. S. Constitution as "republican in form" and that the Statehood Act in no way recognized the State Constitution as an offer of a compact.

Second, Section 28(b) of the Statehood Act is included within the language of Section 8(b)(3) of the Statehood Act which was ratified by the people of Alaska on August 26, 1958. Section 8(b)(3) provides: "All provisions of the Act of Congress approved.....(date of approval of this Act) reserving rights or powers to the United States as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people." (emphasis added) The Statehood Act itself, as well as the history of Section 28(b) make it clear that Section 28(b) was a grant of "other property" within the meaning of Section 8(b)(3).

The history of Section 28(b) of the Statehood Act clearly shows that it was a grant of property. Senator Barrett of Wyoming and Senator Anderson of New Mexico were

responsible for the inclusion of the 90% grant in the Statehood Act and the record of the 1957 Statehood hearings reflect that they believed that the people of Alaska had a right to these revenues based on the Treaty of Cession. The entire discussion of the Senate hearings on this point are included in this memorandum at this point because of the importance of the question.

> "SENATOR BARRETT. Mr. Chairman, I would like to ask a question or two. I have to leave here very shortly.
>
> Governor Gruening, I am somewhat concerned now about the economic status of Alaska when it becomes a State. I am rather intrigued by your reference here to the treaty with Russia when these lands were ceded to the United States.
>
> It is my interpretation of that treaty, which by the way, of course, is the highest law in the land, and certainly binds this country explicitly without any question of doubt--I may say to you that it is my understanding of this phase in the treaty: "shall be admitted to the enjoyment of all of the rights, advantages, and immunities of the citizens of the United States and shall be protected in the free enjoyment of their liberties, sovereignty, and religion," has been used in several treaties in substantially the same language, first with the treaty with France in 1803 and later with the treaty with Mexico nearly half a century later.
>
> The courts have interpreted that language to mean that the--territory--which is the way they referred to lands in those days, shall be held in trust for the States to be carved out of the lands granted for the benefit of the people of the States.
>
> Now, when they speak here "shall be admitted to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States," they mean that the people up there will enjoy certain rights as citizens of the State of Alaska and they come into those rights by virtue of their citizenship in the State of Alaska.
>
> As a consequence, <u>I think it is very important here when we consider this legislation that we</u>

take into consideration the rights that those people have up there in natural resources of that new State and in your intense desire to get statehood I hope that you will not fail to stand up and assert the rights that you are entitled to under this treaty which you mention here, and under the law of the land which, of course, has been somewhat forgotten for a long period of time, in my judgment.

Now, to be specific, I think that the territory up there belongs to the people of Alaska and not to the people of the present 48 States. I think that you have to have those resources if you are going to develop and control your own destiny as a State, and you will need them.

And I think it is unwarranted for the Congress to take any action that would deprive you of that income.

Now, under the leasing act of 1920, unfortunately as far as my State is concerned, we got thirty-seven and a half percent of the royalties from leasing act minerals that were produced within our State.

Fifty-two and a half percent went to reclamation fund and 10 percent was retained by the Federal Government.

Just to show you what that amounts to since that act went on the books, about $155 million or $160 million has been taken into the Treasury of the United States from royalties from the minerals produced in Wyoming alone.

Now, that law is applicable to Alaska and fifty-two and a half percent of the leasing act minerals produced in Alaska goes to the reclamation fund.

DELEGATE BARTLETT. No.

SENATOR BARRETT. I have just checked with counsel and he says they do.

DELEGATE BARTLETT. Could I answer that particular provision?

We are in a worse situation than that, Senator Barrett. We get thirty-seven and a half percent and all the remainder goes to the Federal Government.

SENATOR BARRETT. That is what I said.

DELEGATE BARTLETT. We are not under the Reclamation Act so we get no benefit at all.

SENATOR BARRETT. I did not say you were under the Reclamation Act. What I said is this:

That under existing law fifty-two and a half percent of the income from the Leasing Act minerals produced in Alaska goes to the Reclamation fund; thirty-seven and a half percent goes to Alaska, and 10 percent is retained in the Federal Treasury.

Now, you do not get any benefits from the Reclamation Act, I know that, but that makes it all the worse as far as you are concerned.

So I think it would be eminently fair and just and right and proper, when we write this bill up, that we provide here that the Leasing Act of 1920, as amended, and let them retain the title to the lands up there except that which is granted--personally I hate to see that done, but to be realistic we probably have to do that--<u>let the Federal Government retain the title to the minerals except such public lands as are granted to you, but give the Territory now and the State of Alaska-to-be ninety percent of the income from the minerals under the Leasing Act royalties that come in from now on out</u>.

I believe you need it; I think it ought to be done. I think that the banker, Mr. Rusing, who just got through testifying here, was hitting the nail right on the head, if this State is going to have a chance to develop and to become one of the strong States of the Union, certainly you need your own assets up there and if you are only a one percent stockholder, that is bad.

I would like to give you a fair shake on the thing.

Now, what do you think about that?

MR. GRUENING. I appreciate that very much. I think that would be excellent, Senator Barrett. I hope that will be done.

I understand that in a House bill it is planned to do that.

DELEGATE BARTLETT. Upon that particular point, the House committee has approved and there is now on the House consent calendar a bill which will give the Territory ninety percent of these proceeds.

SENATOR BARRETT. It is not in this bill here over in the House?

DELEGATE BARTLETT. No.

SENATOR BARRETT. But it is in a separate bill?

DELEGATE BARTLETT. That is right.

SENATOR BARRETT. I think that is a very wise piece of legislation. I think you are certainly entitled to it.

If the Department has no objection to it, I think it ought to be incorporated right here in this bill.

MR. GRUENING. I know Alaskans will certainly appreciate that, Senator Barrett." Senate Hearings on S. 49 and S. 35, March 25 and 26, 1957, pp. 29-31. (Emphasis added)

"SENATOR BARRETT. Mr. Chairman, I agree with the statement that Mr. Bartlett made about the improvement in this legislation. I think it could be improved quite a little bit. I am offering an amendment here for the consideration of the committee. I think this is probably as good a time as any to do it.

I discussed this amendment this morning when you were absent, Senator Anderson. I propose to insert a new section 21 on the last page of the bill and provide in here that 90 percent of the

income from coal and 90 percent of the income from the leasing act minerals shall go to the new State of Alaska.

When I mentioned that this morning, Delegate Bartlett told me that the House committee had considered a bill doing precisely that and had reported it out favorably. Since then I have looked up the record and I find that the Secretary of the Interior has filed a favorable report on the bill and agreed that it should be enacted into law but suggested that the statehood bill was the proper place to insert such a provision.

Maybe it would be well to have in these hearings a copy of the report that the Secretary of the Interior made on the House bill.

SENATOR JACKSON. Without objection, the report and the amendment of the Senator from Wyoming will be included in the record at this point, if this is agreeable. The report and the amendment should go together.

(The documents referred to are as follows:)

BARRETT AMENDMENT TO S. 49

Sec. 22. (a) The last sentence of section 9 of the Act entitled "An Act to provide for the leasing of coal lands in the Territory of Alaska, and for other purposes", approved October 20, 1914 (48 U.S.C. 439), is hereby amended to read as follows: "All net profits from operation of Government mines, and all bonuses, royalties, and rentals under leases as herein provided and all other payments received under this Act shall be distributed as follows as soon as practicable after December 31 and June 30 of each year: (1) 90 per centum thereof shall be paid by the Secretary of the Treasury to the State of Alaska for disposition by the legislature thereof; and (2) 10 per centum shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts."

(b) Section 35 of the Act entitled "An Act to promote the mining of coal, phosphate, oil,

oil shale, gas, and sodium on the public domain", approved February 25, 1920, as amended (30 U.S.C. 191), is hereby amended by inserting immediately before the colon preceding the first proviso thereof the following: ", and of those from Alaska 52 1/2 per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof". Ibid, pp. 66-68. (Emphasis added.)

The Senate Report on S. 49 adopted the Barrett Amendment which granted 90% of federal revenues to the State. See S.Rep. 1163, 85th Congress, 1st Session 3. The identical provision was later incorporated into H.R. 7999 as a section of the Statehood Act.

The inclusion of revenue grants to the State in the Statehood Act further evidence that it was the intention of Congress to make the grant a permanent right of the State of Alaska. If this were not the case, it would make no sense to include the provision in the Statehood Act. Public Law 85-88, approved July 10, 1957, Sec. 2 had already provided that the Territory of Alaska receive 90% of the mineral revenues. The proper place for a statutory formal revision of Public Law 85-88 to change "Territory" to "State" would have been the Omnibus Act and not the Statehood Act. The inclusion of the revenue provision in the Statehood Act meant and was understood to mean that it was part of the compact between the people of Alaska and the Federal Government.

The language used in the Statehood Act also shows that Section 28(b) was included within the Section 8(b)(3) "grants of . . . other property. . . ." It is useful at the outset to consider how the term "property" has been defined by various courts. Generally the term property has been afforded a broad definition by most courts which have had cause to interpret it. Unfortunately, none of the cases which interpret the word property interpret it quite in the context in which it is used in the Statehood Act. Typical of the cases is Goldsmith v. Albion Public Schools, Calhoun County, 373 Mich. 397, 129 N.W.2d 377 (1964), which was a proceeding to test the validity of a school bond election. The question presented was which persons were entitled to vote in the elections as property holders. Some plaintiffs were contract vendees under land sale contracts and others owned property pursuant to deed but their names did not appear as such on the assessment rolls. The court stated

that all of those persons held interests in property and defined the term as follows:

> The word "property" is susceptible of broad definition. In a broad sense, it is defined as any valuable right or interest considered primarily as a source of wealth [case cited]. The word is said to be so all-embracing as to include every physical object, intangible benefit, and prerogative, susceptible of ownership, possession, or disposition. (129 N.W.2d at 379).

The concept of property as a source of wealth is one employed by many cases and its use in the Calhoun County case is not an isolated one.

The Supreme Court of Maine in McInnes v. McKay, 141 A. 699, 127 Me. 110 (1928) discussed the concept of property. This case was an action by plaintiff to recover a certain sum of money for services. The defendant objected to the jurisdiction of the court by way of attachment and in reviewing the history of the particular attachment statute then applicable, the court had occasion to define the word property:

> Property in legal conception is the total of the rights and powers incident to a thing rather than the thing itself. The legal right to use and derive a profit from land or other things is property. (141 A. at 702)

It is noteworthy that in the McInnes case the court again tied the concept of property to the right to derive a profit from land.

The United States Supreme Court in a series of early cases in which it had to adjudicate the significance of property rights acquired under the laws of earlier sovereigns to territory then in the United States, defined in several instances what that term meant. Soulard v. United States, 29 U.S. 511 (1830), was an action by plaintiff to quiet title to certain lands in the Louisiana Purchase under title which plaintiff had derived from the former Spanish Government. The court held the matter in abeyance until more light could be shed on the nature of plaintiff's claim. The court noted that in the Treaty of

Purchase, the United States stipulated that the innabitants of the ceded territory should be protected in the free enjoyment of their property. The court stated:

> The term "property" as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory as well as those which are executed. (29 U.S. at p. 522)

Thus the Supreme Court recognized that property could be an inchoate right, the existence of which depended upon the terms of a contract which had not yet been executed.

Strother v. Lucas, 37 U.S. 410 (1838) was an action in ejectment where plaintiffs based their claim to certain property upon the Treaty of Cession of Louisiana by France to the United States. The Treaty stated that the inhabitants of that territory should be protected in the free enjoyment of their property. The court again defined property:

> This Court has defined property to be any right, legal or equitable, inceptive, inchoate, or perfect, which before the Treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign with a trust, and make him trustee for an individual, according to the law of nations, of the sovereign himself, the local usage or custom of the colony or district, according to the principles of justice, and rules of equity. (37 U.S. at 436)

Thus, in Strother the concept of property is recognized not only to be legal but to be equitable in nature and if the right which is sought to be protected as property should be protected according to the principles of justice and rules of equity, then that right is no less a property right.

The Supreme Court in the same case also defined the term "grant":

> This Court has also uniformly held that the term "grant" in a treaty, comprehends not only those which are made in form, but also any concessions, warrant, order or permission to survey,

> possess or settle, whether evidenced by writing or parol, or presumed from possession . . . . (37 U.S. at 436)

Thus, a grant need not be in any particular form and need not be a warrant but it would be a concession.

It could be stated that 30 U.S.C. §191 is an assignment from the United States to the State of Alaska of 90 per cent of the money in the form of sales, bonuses, royalties and rentals of public lands received by the United States. Specifically, what is assigned by this section is a right to money and there is no doubt that that money is property. Also, what is assigned is the interest of the United States as to certain rights which it has retained as lessor in certain leases of public mineral land. The interest of which the United States is possessed in respect to that land can be characterized in several ways. The interest is a right to rents and royalties and bonuses under its mineral lands. All of these terms have been considered in Summers in his treatise on oil and gas law and he has had no difficulty in determining that they are property rights. Volume 3(a), Summers Oil and Gas, § 572 (1955), discusses the legal significance of the term "rent" or "royalty". Summers states:

> The question which usually arises as to the nature of the royalty interest is whether it is real or personal property.

Also, Summers states:

> All jurisdictions recognize that the right to receive royalties under the existing lease may be transferred apart from the land, ...

Thus, the rental or royalty interest is either real or personal property and it is a right which may be transferred apart from the land to which the right attaches. It is elementary contract law that an assignee takes the same rights as the transferor in the thing transferred, no more or no less.

Summers also states:

> But where the lease is limited to a definite term of years and the royalty under

> the lease is assigned, the interest may be properly classed as a chattel real and in that sense personal property.

If the royalty is unaccrued, Summers states:

> . . . unaccrued royalties, if the lease may continue indefinitely, are incident to the reversion in the land or minerals, and pass with a sale thereof, and when separately transferred are usually held to be interests in land.

Thus, Summers recognizes that unaccrued royalties may be transferred separately and when they are, they are usually an interest in land. Again that interest has been defined as a property interest.

Summers also defines at section 586 of his work, the term bonus:

> "Bonus" is usually defined as any consideration given for a lease in addition to the usual royalties reserved in the lease, whether paid in cash or payable out of production.

Bonus then, like royalty, is a right to payment to the owner of the land arising initially out of his ownership of the land. There should be no reason why as in the case of a royalty, a bonus which is an amount payable in addition to the usual royalty may not be assigned with all rights of the assignor.

Thus, there is ample authority to support the proposition that the term property as used in section 8(b)(3) of the Statehood Act encompasses the money, either accrued or unaccrued, to which the State of Alaska would be entitled by virtue of the provisions of section 28(b) of the Statehood Act.

Sincerely,

G. Kent Edwards
Attorney General

GKE:jt

MILLARD F. INGRAHAM
EDWARD R. NIEWOHNER

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LAW OFFICES OF
INGRAHAM & NIEWOHNER
SUITE "C" NERLAND BUILDING
FAIRBANKS, ALASKA 99701

February 14, 1969

The Honorable Barry Jackson
Alaska State House of Representatives
State Capitol Building
Juneau, Alaska

Dear Barry:

Your letter to the bar association regarding the proposed probate code was read at our weekly meeting today. A committee has been appointed to study the code and will be reporting to you shortly.

I would wish to remind you that, according to the last draft which I had seen, Sections 13.20.330 and 13.20.340, the wrongful death statutes, are repealed. There is no statute comparable reenacted in the proposed code. I am sure that not even the most reactionary insurance company would seriously contend that the action for wrongful death be repealed.

Very truly yours,

INGRAHAM AND NIEWOHNER

BY: _____
Millard F. Ingraham

MFI:sjb

CC: John Elliott

MAN IN NATURE: A STRATEGY FOR ALASKAN LIVING*

Robert B. Weeden

Alaska Conservation Representative
Box 5-425 College, Alaska 99701

People move to Alaska for many reasons, and because of the distance and cost of moving, the reasons rarely are trivial. Major population increases have come in boom times; one might infer that the lure of economic benefits has been paramount. But recessions have followed the booms and those with purely economic motives often have gone back "Outside" where, if they were going to starve, they could do it in a comfortable climate. Even in our exciting times in Alaska a man spends $1.32 for what he could buy in Seattle for $1.00; he earns only $1.21 for a dollar's worth of labor by national standards. Clearly the Alaskan is not as well off as the average American.

Or is he? Is there something in the air, the romance of Alaska that creates the captivating incentive that money fails to provide? Do people stay because they expect to take part in a legend? I think they do. In Alaska people perceive and respond to a uniqueness comprised of the freshness of history, the indefinable lure of "frontier,"

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* Paper presented at the Tundra Conservation Conference, Edmonton, Alberta, October 16, 1969.

and, above all, the wilderness. Despite the comings and goings of boomers, I think the heart of Alaskans is in Alaska.

If ever it was important for a people to gauge accurately their own feelings about themselves and their environment, it is true in Alaska today. History and Nature have proffered an array of choices that our civilization has never seen before. The only decision we cannot make is to stay aloof from change. If we Alaskans do not make our own choices, others will happily do it for us.

The most obvious element in the situation is the economic upheaval since the September 10, 1969 oil lease sale in Anchorage. On that day Alaskans, who had earned a total personal income of a little over a billion dollars in 1969, received slightly over $900,000,000 in lease payments and bonuses on State lands near Prudhoe Bay. The expectation of significant continued income from future lease sales and from oil and gas production suggests that the rather desperate search for revenue characterizing the decade after statehood is over.

An equally important ingredient is that the inherent character and productivity of the land are largely undiminished. Over vast areas of the State there is hardly any evidence of human use. Air and water are as pure as anywhere in this polluted world. Renewable resources are (with a few exceptions) harvested below or barely at

annual production levels. Surface transportation nets cover only one-fourth of the State, sparsely. In short, the present array of choices is not greatly diminished by past mistakes or heavy capital investments.

Third, a major group of Alaskans, the approximately 60,000 Indians, Eskimos, and Aleuts of the State, may suddenly gain economic and landowner stature such as they have never had before. These people face individual and group choices that are in many ways more difficult and unsettling than those confronting other Alaskans.

Fourth, the richness of the present opportunity is largely due to the recognition by Alaskans that their new wealth brings new responsibilities of decision. To some the responsibility is mainly fiscal: to invest for greatest dollar return in time. Others see the social good that could come from expenditures for education, sanitation, public works, or various welfare programs. As just one example of this widespread awareness, there will be a series of public discussions this autumn, sponsored by the Brookings Institute and led by the Alaska State Legislative Council, in which Alaskans will consider policies for the uses of public revenues.

In this context it seems both appropriate and urgent that there be full and vigorous public debate of various strategies fo. Alaskan living. Among the several alternatives, I am urging one that involves exceptional recognition of Nature as an integral part of the

human environment. If this style of life touches the hearts and minds of Alaskans we will necessarily have to adopt bold policies relative to population growth and industrialization. These, in turn, will require that specific tactics of resource and environmental use immediately be brought to bear on current political and economic decisions.

The general idea is simple. I see Alaska as a place where people elect to withhold the full force of their technical and procreative powers so as to reap the rich harvest of tangible and intellectual resources the wild North can promise. I do not propose turning Alaska into a permanent nature preserve, administered by some monstrous conservationistic bureaucracy. Neither do I propose that Alaska welcome industrialization unreservedly, mimicing the unenviable environments technology has spawned all over the world. The middle road is not, in this case, a politically viable compromise, because walking it will be much harder than taking either of the other paths. Rather, I chose it because I believe in diversity of opportunity--economic, materialistic, creative, recreative--as a prime element in the good life. Not everyone wants to be a bird-watcher. Not everyone should be ensnared in the television syndrome.

POLICIES FOR LEADERS

If this idea is to work, Alaskans and their governments must adopt three basic policies: limited population, selective industrialization, and environmental consciousness. All are indispensable. All are fraught with emotional polarities, and their acceptance and institutionalization will be extremely difficult.

There is no need to belabor the now-obvious perils of excessive population. In policy terms, whereas much of the world cannot long survive without a reduction in population, and whereas America itself must take steps to limit further pupulation growth, Alaska is one of the few self-supporting units of government that can justify conceiving of and working toward an optimal population (which may be at a level somewhat higher than our present quarter-million people). The concept of optimal population, admittedly, is poorly defined. To me it means the general population level at which people enjoy the widest freedom of cultural and economic pursuits. There is an obvious interaction of dollars, culture, and population; a few rich people could finance a performance of an opera, but it takes more middle-income people to do the same thing. "Optimal pupulation levels" may be dynamic rather than static, raising and lowering as cultural and environmental shifts take place.

The life style I advocate will be impossible unless we develop and practice a policy of population regulation. We will need to limit the number of births among Alaskans through legalized abortion, birth-control measures, incentives for small families, or other methods and combinations that are acceptable and effective. We will have to restrict immigration, possibly approaching this tricky problem from a strategy of reducing the incentive for people to immigrate, rather than by barring entry to those who knock on the door.

The spacing or geographic distribution of people is an equally important subject. In Alaska, big settlements have been growing bigger and small places have been getting smaller for several decades, with a net annual increase in total state population. Roughly one-third of all Alaskans now live in Anchorage and its satellite communities. Another one-third live in the towns of Fairbanks, Palmer, Kenai-Soldotna, Ketchikan, Juneau, and Sitka. The trend toward urbanization is essentially conservative of landscape, and it should be encouraged in Alaska. Towns and cities should be made more attractive in both opportunity and appearance. Conversely, outdated programs such as the Homestead Act (by which the federal government gives large acreages to private persons, ostensibly for agriculture but now for other uses including land speculation) should be abandoned. These programs result in the

scattering of people along road systems, leading to high costs for services, and degradation of the countryside.

(The entire mix of federal, state, and local government programs for hinterland development are in dire need of overhaul, reappraisal, coordination, and redirection. Again, Alaskan conditions favor concerted, long-term land planning because large blocks of land are under jurisdiction of a few public agencies responsible for management in the public interest. There is an unbreakable two-way relation between public lands management, access and transportation, settlement patterns, and population policy.)

The second policy, that of selective industrialization, is closely tied to the first. If we reject outright the conventional myth that population growth is a necessary handmaiden to progress, we do not have to look for industries that "provide jobs"--and end up attracting 102 job-seekers for every 100 jobs they offer. We can foster industries that are capital-intensive rather than labor-intensive, and select those least likely to degrade the natural environment through noxious effluents or outputs. We can also reject extravagant power generation projects justified with self-fulfilling projections of demand from processing industries and population growth; neither the manufacturing plants nor the increased population are desirable. Traditional tax enticements

to new industries could be scrapped unless they carry out the environmental or social policies of the State.

Out of a total civilian work force of about 100,000 people in 1968, approximately 91,000 had jobs. Over one-third of all working people were employed by governments. About one-fourth were employed in trades and services, about 6 to 8 per cent each in transportation, manufacturing (including logging), contract construction, and smaller proportions in mining, financial, and other occupations. The main sources of "new money" in the Alaskan economy have been federal government expenditures, commercial fish, oil and gas, forest products, minerals, and tourism, in order of decreasing dollar value.* In 1969 the great increases in oil and gas revenues (mostly lease payments and bonuses, not production) have changed the relative ranking of these sources of money, and the new picture may hold for a number of years.

The important point for this discussion is that revenue from the Cook Inlet and Arctic oilfields has given Alaska a tremendous bank balance after many years when federal expenditures were the critical factor in survival of the economy. Assuming that gas and oil revenues from those fields will be high for several decades, and assuming a continued net inflow of federal dollars, there is no need for economic policy that strains the

*Data from Vol. VI, Nos. 1 and 3, Alaska Review of Business and Economic Conditions, Institute of Social, Economic, and Government Research, University of Alaska, College, Alaska.

productive capacities of renewable resources, and no need for aggressive expansionism in mining, tourism, manufacturing, and other industries. There is a greater need to turn our attention to the serious social inequities in our local economy, a prime example being poverty and joblessness among Alaskan natives--a condition that is worsening rather than improving as our total dollar flow rises.

The third policy, which I coined "environmental consciousness," depends on Alaskans adopting Aldo Leopold's "land ethic." Incorporated into government it would become "ecomanagement," a term Jare Mayda coined* to express the broad new tasks of conservation, encompassing all individual aspects of environment, the whole concept "environment" (since this is more than the sum of its parts), and the interplay of man and environment. Operationally this policy would seek always to maximize the full spectrum of human benefits from the use of space and other natural resources, not merely to maximize revenue. It would defend man against himself in the common environmental problems of air, water, and noise pollution. It would be the basis for defense of those delightfully "useless" animals, plants, and empty miles that may be the ultimate salvation of man, and which unquestionably are an important foundation for scientific knowledge, artistic creativity, and personal re-creation and pleasure.

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*Jare Mayda, 1967, "Environment and Resources: From Conservation to Ecomanagement," School of Law, University of Puerto Rico.

As I said earlier, adopting these policies would mean completely different approaches to environmental management. Alaskan oil developments provide an excellent and timely example; I will describe the current situation briefly and suggest two steps to take immediately to cope with the oil giant.

If the first guesses of petroleum geologists are correct, close to one-half of Alaska and its offshore waters may be underlain by oil- or gas-bearing strata. This includes most of the State outside of the Alaska Range, Brooks Range, and mountainous Interior areas. Some private seismic work or drilling has occurred in practically all of the oil regions of the State, but two, Cook Inlet and the central Arctic have had the lion's share of attention. The first production wells were spudded on the Kenai Peninsula in 1958; the Swanson River field was developed there and, together with about 15 wells offshore in adjacent Cook Inlet, this field produces all of Alaska's present output of about 200,000 barrels per day. A small refinery exists near Kenai, but most Alaskan oil is shipped as "Crude" out of shore facilities on the east and west sides of Cook Inlet.

Exploration and production activity in the Inlet and on the Kenai Peninsula gave Alaskan's a fairly clear idea of the sorts of problems oilfield development brings. The network of thousands of

miles of intertwining tractor trails across marshes, forests and alpine areas jolted people into sharp awareness that even looking for oil causes problems. Strictly enforced regulations helped: anyone who compared the seeded roadsides and healing "cat" trails on the Kenai National Moose Range with the debris and scarring on state lands just outside the Range could see this readily. Air and water pollution came, as inevitably they will. A cloud of smoke is sometimes visible for miles when wasted natural gas is flared from the Inlet's wells. Hundreds of oil spills from tankers, wells, and pipes have been recorded by government agencies. A few big ones have killed ducks or befouled the nets of fishermen (Cook Inlet has an important commercial and recreational salmon fishery). Life in Anchorage has changed, too, with the advent of oilmen and boomers. No longer a small town serving nearby military bases and tourists, Anchorage has swept into an era of burgeoning population, acute land allocation problems, and school and public service expansion suggesting that, like Alice, someone ate from the wrong side of the mushroom.

But Anchorage had its growing pains and Kenai its land scarring before oil. Petroleum development simply intensified and added new facets to the problem. It is in the Arctic, with its virginal and vulnerable landscape, that the impact of oil is most obvious. The gnawing scars from seemingly harmless trails of construction vehicles, the puzzles of permafrost engineering, the unsuitability of ordinary

sanitation techniques, the fantastic longevity and visibility of debris, the oil spills, the huge demand for gravel for camps and airstrips, the question of whether caribou will be frightened and displaced by surface feeder pipes and the general bustle of oilfield operations--these are now commonplace topics of conversation in the North. Technological man has burst upon the Arctic, a stranger. He can ride roughshod for a time over the tundra to his shining golden visions, but always nagged by the feeling he could do much better. Science cannot yet be of much help. Government is an uncertain watchdog, alternately barking and licking its chops.

Bigger questions for Alaska lie beyond Prudhoe Bay and Cook Inlet. Can petroleum be shipped out of Alaska by pipeline, tanker, or any other means without chronic and catastrophic oil spills? Will the Arctic oilfield, now confined to the central Arctic north of the Brooks Range, expand west into the huge Naval Petroleum Reserve No. 4 and east to the lovely Arctic National Wildlife Range? Will the semi-secret explorations in Bristol Bay and on the Alaska Peninsula turn that fabulous big-game, waterfowl, and salmon paradise into another Prudhoe? Can offshore drilling in the savage Gulf of Alaska or the Beaufort Sea be done without a series of Santa Barbara's? Will the next big strike be on the delta of the Yukon River, where Secretary of the Interior Walter Hickel is said to have more than a passing financial interest at stake?

In view of these and other managerial complexities that neither industry, state, nor federal governments have been able to solve, I propose a complete shutdown for at least three years of all further oil and gas exploration in Alaska and adjacent waters, outside of present lease areas in Cook Inlet and the central Arctic. In my judgement the immediate and permanent benefits from this action would far outweigh any temporary reduction in revenues to geophysical contractors or to the State of Alaska. First, this action would let the oil and gas industry turn its full attention to getting known petroleum reserves into production and to market safely and with minimum losses to the environment. Second, the moratorium would give governments time to establish a full range of regulations for oilfield conservation and for the protection of the landscape and wildlife. Even more critical is the need for resource agencies to obtain the staff and funds to explain and enforce these regulations, and to establish training programs jointly with industry. Third, universities and others could begin basic, full-scale studies of tundra and taiga disturbances, so that better evaluations of the regulations would be possible. Fourth, and very importantly, oil companies and the government could steadily improve techniques of slant drilling, seismic systems, helicopter, hovercraft, and overland vehicle usage, and sanitation, so that future exploration could be done in safety and with minor and tolerable damage to the land. Fifth, the State of Alaska could study its new

role as rich man, learning how to make the most social mileage out of its financial windfall. Finally, the moratorium would allow resource agencies and private groups to develop sound proposals for lands to be reserved permanently from oil and gas exploration and exploitation, based on their importance to science or exceptional wildlife, scenic, or recreational values.

Eventually more of the potential oil lands would be explored. This should come on the initiative of the government, not industry. It should be done when the national and global situation clearly calls for development of new reserves, and it should be done on lands selected by the government. And, as oil and gas are public resources under public land, the public, through government, should dictate the conditions and techniques of exploration. I suggest that a separate industry-government corporation be established to explore each parcel as it is opened up, with companies and individual entrepreneurs bidding for a share in the venture. The corporation would then conduct all exploration work with the best technology available, sharing geophysical data within the corporation. This would eliminate the haste and secrecy that have caused such wasteful and destructive duplication of seismic lines, shot holes, camps, roads, airstrips, test wells, and gravel pits in the Arctic. Petroleum discoveries would be developed by the private members of the exploration group, under a unitization plan, dividing proceeds in the ratio of original bids for exploration.

I am convinced that if we act sensibly, using the knowledge we have or can soon develop, the Arctic, Cook Inlet, and perhaps other oilfields can be developed into showpieces of public and private cooperation. Alaska would necessarily have to sacrifice some of her wildness, some of her cleanness of landscape, and some of her outdoor playgrounds and classrooms, doing this not blindly but in full knowledge that a good bargain has been struck by men for men.

ALASKA AND THE WORLD

The future Alaska I rather wistfully envision would have more people than now--perhaps 500,000 or so--but they would be in the same population centers as now. There would be awesome stretches of semi-wilderness where people lived who prized solitude, or who enjoyed making their way from the seasonal fruits of the countryside. There would be relatively smaller stretches of true wilderness, balanced by local areas where facilities were developed for the enjoyment of Nature by larger numbers of visitors. There would be a comfortable network of roads where needed, planned, mile by mile, to display and preserve the countryside and to host appropriate commercial, residential, and recreational uses. Public revenues would come from the usual range of personal and corporate taxes and from the State's share of Alaskan resources extracted for private profit: oil, gas, fish, minerals, timber,

water. Alaskans would be teachers, scientists, civil servants, tradesmen, miners, fishermen, loggers, financiers, artists--a reasonable sample of the whole range of occupations open to modern societies.

Anyone who knows Alaska will remark that what I have in mind is simply to perpetuate the present. Today's Alaska, however, is a result of a complex and dynamic history. The economic, psychological, and global events that made Alaska what it is are already pushing it towards something else. That "something else," I fear, is a repetition of the dollar-rich, culture-poor, trash- and poison-ridden landscape so characteristic of industrial America. Changing this destiny requires a revolution in the attitudes of everyman (and especially of those who lead), towards his own sources of happiness, his own life style, and his own environment.

In a very real sense what I am proposing is not only a milieu for Alaskans but an opportunity for the world. The world needs an embodiment of the frontier mythology, the sense of horizons unexplored, the mystery of uninhabited miles. It needs a place where wolves stalk the strand lines in the dark, because a land that can produce a wolf is a healthy, robust, and perfect land. The world desperately needs a place to stand under a bright auroral curtain on a winter's evening, in awe of the cosmic cold

and silence. But more than these things the world needs to know that there is a place where men live amidst a balanced interplay of the goods of technology and the fruits of nature. Unless we can prove that a modern society can thrive in harmony with the land, the bits of wildness we salvage in Alaska will be nothing more than curious artifacts in the sad museum of mankind.

IN THE HOUSE BY THE JUDICIARY COMMITTEE

HOUSE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

Censuring the President of the Senate.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS, to resolve the differences between the House and Senate versions of HB-857 (trust companies), on May 25, 1970, the President of the Senate (at Page 1140 of the Senate Journal) and on May 27, 1970, the Speaker of the House (at Page 1398 of the House Journal) appointed the members of a free conference committee (with powers of free conference); and

WHEREAS this free conference committee, consisting of Senators Zeigler, Vance Phillips, and Josephson, and Representatives Borer, Chance, and Kay, completed its work by May 28, 1970, as shown by the committee report and House adoption of it at Page 1406 of the House Journal; and

WHEREAS ever since May 28 the President of the Senate has intentionally withheld this free conference committee report from the Senate, thus preventing that body from adopting it and in effect exercising his own veto of the bill; and

changed in form

WHEREAS Paragraph (1)(j) of Appendix A to the Uniform Rules of the Alaska State Legislature, setting out the duties of the presiding officer, requires him, as a ministerial function, "to receive all messages and communications and to announce them to the body;" and

WHEREAS passage of HB-857 am, as recommended by the free conference committee, is essential for the regulation of trust companies and the protection of the public;

BE IT RESOLVED that the legislature censures Senate President Brad

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Phillips for his dereliction of duty and apparent disregard of the public interest.

Snowmobiles

13 Mile Richardson Highway
Fairbanks, Alaska 99701
February 24, 1969

Representative Barry Jackson
House of Representatives
Juneau, Alaska

Dear Mr. Jackson:

We urge your support of the bill introduced by Rep. Bronson in the House last Friday, requiring mufflers on snowmobiles. We urge, however, that this not be confined to those used within a city's limits, but in any populated area. We live just outside the city limits of North Pole, and we think this limitation would encourage unmuffled snowmobiles to be used in an area such as ours. In truth, we feel it is fair for snowmobiles used in populated areas to be subject to the same regulations as automobiles.

Thank you for any support you can give to this bill.

Yours truly,

Joseph Seale
Jule Seale

FORM SA-1B

MEMORANDUM State of Alaska

TO:

Mel Personett, Commissioner
Department of Public Safety

DATE : October 24, 1969

FROM: G. Kent Edwards
Attorney General

SUBJECT: Review of Regulations

By: Robert J. Mahoney RJM
Assistant Attorney General

This office has completed the review of the proposed regulations to be adopted by your department consisting of chapters 2, 4, 6, 8, 10, and 15 of Title 13 of the Alaska Administrative Code. During the course of my review I have made notations on copies of the proposed regulations furnished to this office to indicate changes that will add to the clarity, simplicity, and consistency with other regulations. I have also recommended the deletion of a few sections or parts of sections which the Department of Public Safety is without authority to adopt or which could adequately be covered by rewording other sections in the regulations.

The copies of the regulations containing my comments have been forwarded to Captain Barkley, reviewed by him, and returned to this office. Most of the changes recommended by this office have been incorporated in the regulations to be adopted. Other recommendations were withdrawn or modified by this office following conferences with Captain Barkley. These conferences clarified the factual framework within which the regulations were to be applied and revealed difficulties that could be encountered if the recommended changes were incorporated in the regulations. Several additional changes have been made based on the recommendations of the Department of Highways.

The proposed regulations, incorporating the changes referred to above, are approved by this office as satisfying the criteria set forth in AS 44.62.060. They are in a proper form to be filed with the Secretary of State after adoption, and need not be reviewed again by this office unless substantial changes are made in the regulations following the public hearing.

cc: Secretary of State

GKE:RJM:em

FORM SA-1B

3HB

MEMORANDUM State of Alaska

DEC 11 1 25 PM '69

DEPT. OF PUBLIC

TO: Mel J. Personett
Commissioner
Department of Public Safety

DATE : December 8, 1969

FROM: G. Kent Edwards
Attorney General

SUBJECT: Regulations -
File No. 334

By: Robert J. Mahoney RJM
Assistant Attorney General

Your memorandum of December 1, 1969, enclosing chapters 02, 04, 06, 08, 10 and 15 of 13 AAC, is hereby acknowledged.

This memorandum will confirm my conversation with Captain James Barkley on December 1, 1969, in which I advised Mr. Barkley that the regulations were in proper form for filing and that the memorandum of this office dated October 24, 1969, approving those regulations, should be filed at that time.

The listing in your memorandum of all significant changes that have been made in the regulations as finally adopted, has been noted by this office. Please be advised that Captain Barkley conferred with this office concerning each of these changes prior to the time that they were incorporated in final draft of the regulations. They have been approved as satisfying the requirements of AS 44.62.060(b).

cc: Secretary of State

GKE:RJM:em

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF PUBLIC SAFETY

Notice is hereby given that the Department of Public Safety, under authority vested by AS 28.05.030-050; 28.20.020; and 28.15.130, proposes to adopt, amend and repeal regulations in Title 13 of the Alaska Administrative Code as follows.

GENERAL: A complete revision of the regulations governing rules of the road; equipping of vehicles; inspection of vehicles; safety responsibility; definitions of words and phrases used in the traffic regulations; and adoption of a complete set of regulations governing the issuance or denial of school bus driver permits, is being made. Revisions include the deletion of various existing provisions, the addition of new provisions and the technical amendment of wording throughout the regulations. Adoption of these regulations will repeal 13 AAC 01.101; 103; 104; 105; and 106 and will adopt 13 AAC 02 (Rules of the road); 13 AAC 04 (Vehicle lighting, brakes and other equipment); 13 AAC 06 (Inspection of vehicles); 13 AAC 08 (Driver licensing and safety responsibility) and 13 AAC 10 (Definitions—traffic regulations). The provisions of these regulations concern the following:

A. RULES OF THE ROAD:
(1) Traffic signs, signals and markings;
(2) Use of the roadway;
(3) Right-of-way;
(4) Pedestrian rights and duties;
(5) Turning, starting and signals on stopping or turning.
(6) Special stops required;
(7) Speed restrictions;
(8) Stopping, standing or parking;
(9) Bicycles;
(10) Snow, vehicles (equipment, restrictions on use, etc.);
(11) Miscellaneous provisions—governing leaving vehicles unattended, backing, riding on cycles and scooters, obstructing driver's view, opening and closing doors, livestock on roadway, riding in trailers, coasting, following emergency vehicles, crossing fire hose, littering, carrying or towing persons on outside of vehicle, embracing while driving, drinking while driving and leaving child in vehicle;
(12) General provisions—governing application of traffic regulations, obedience to police officer, riding animals or animal-drawn vehicles, fireman's private vehicle and emergency vehicles.

B. VEHICLE LIGHTING, BRAKES AND OTHER EQUIPMENT:
(1) Scope and effect of regulations;
(2) Lamps and other lighting equipment;
(3) Brakes;
(4) Other equipment—including horns, muffler, mirrors, windshield, tires, safety glazing material, flares and warning devices, air conditioning equipment, television viewers, anti-theft devices, seatbelts, safety rollbars, motorcycle and scooter requirements concerning goggles, face shields, helmets; sidebars, and standards for same, and required equipping of vehicles for sale, lease or rental.

C. INSPECTION OF VEHICLES:
(1) Vehicle equipment condition;
(2) Inspection by officer;
(3) Owner or driver to comply with inspection requirements;
(4) Roadside inspections;
(5) Inspection stickers;
(6) Prohibited practices—(repairs, etc.);
(7) Notice and approval of repair or adjustment.

D. DRIVER LICENSING AND SAFETY RESPONSIBILITY:
(1) School bus driver permits—(Article 1):
(a) Application of regulations;
(b) Denial of permit—(grounds)
(c) Application and examination requirements (scores, composition and frequency);
(d) Medical standards;
(e) Permit to be carried;
(f) Restricted permit;
(g) Cancellation of permit—(grounds);
(h) Suspension or revocation of permit—(grounds and duration);
(i) Re-examination—(grounds).
(2) Safety Responsibility—(Article 2):
(a) Application of regulations;
(b) Reports required—(time
(c) Security deposit—(form and beneficiary);
(d) Release from liability—(notarization required);
(e) Agreement for payment of damages—(Notarization required);
(f) Form of notice—(delivery and time limit).

E. DEFINITIONS—Traffic regulations:
This chapter defines various words and phrases used in the traffic regulations and in certain sections of AS 28.

Since the regulations are so extensive as to preclude inclusion in this notice, interested persons may inspect them at a regional headquarters office of the Alaska State Troopers, Anchorage or Fairbanks, or obtain a reasonable number of copies by a written request addressed to the Department of Public Safety, Pouch N, Juneau, Alaska.

Notice is also given that any person interested may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at Room 423, Capitol Building, Juneau, Alaska, at 9:00 o'clock a.m. on November 17, 1969.

The Department of Public Safety, upon its own motion or at the instance of any interested person, may at the hearing or after it adopt the above proposals substantially as above set out without further notice.

DATE: October 10, 1969
(s) Mel J. Personett
Commissioner
Department of
Public Safety

PUB: Oct. 13, 1969

ACCOUNTING SECTION
NOV 5 - 1969
RECEIVED

Proof of Publication

ANCHORAGE DAILY TIMES

JOSEPH P. KOLLER being duly sworn, according to law declares: That he is the ADVERTISING DIRECTOR of The Anchorage Daily Times, a daily newspaper published in the town of Anchorage, in the Third Judicial Division, State of Alaska; that the notice of PROPOSED CHANGES IN THE REGULATIONS OF THE DEPT. OF PUBLIC SAFETY: RULES OF THE ROAD... a copy of which is hereto attached, was published OCT. 13, 1969

in said Anchorage Daily Times, beginning with the issue of OCT. 13, 19 69, and ending with the issue of OCT. 13, 19 69.

Joseph P. Koller

Subscribed and sworn to before me this 13th day of OCT., 19 69

Notary Public for the State of Alaska.

My Commission Expires 6/19/, 19 73

PUBLISHER'S AFFIDAVIT

United States of America
State of Alaska } ss.
First Division

ACCOUNTING SECTION
JUNEAU, ALASKA
NOV 10 1969
RECEIVED

(Paste copy of publication here)

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF PUBLIC SAFETY

Notice is hereby given that the Department of Public Safety, under authority vested by AS 28.05.030-050; 28.20.020; and 28.15.130, proposes to adopt, amend and repeal regulations in Title 13 of the Alaska Administrative Code as follows:

GENERAL: A complete revision of the regulations governing rules of the road; equipping of vehicles; inspection of vehicles; safety responsibility; definitions of words and phrases used in the traffic regulations; and adoption of a complete set of regulations governing the issuance or denial of school bus driver permits, is being made. Revisions include the deletion of various existing provisions, the addition of new provisions and the technical amendment of wording throughout the regulations. Adoption of these regulations will repeal 13 AAC 01.101; 103; 104; 105; and 106 and will adopt 13 AAC 02 (Rules of the road); 13 AAC 04 (Vehicle lighting, brakes and other equipment); 13 AAC 06 (Inspection of vehicles); 13 AAC 08 (Driver licensing and safety responsibility) and 13 AAC 10 (Definitions-traffic regulations.) The provisions of these regulations concern the following: RULES OF A. RULES OF THE ROAD:

1. Traffic signs, signals and markings;
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5. Turning, starting and signals on stopping or turning;
6. Special stops required;
7. Speed restrictions;
8. Stopping, standing or parking.
9. Bicycles 10. Snow vehicles (equipment, restrictions on use, etc.); 11. Miscellaneous provisions—governing leaving vehicles unattended, backing, riding on cycles and scooters, obstructing driver's view, opening and closing doors, livestock on roadway, riding in trailers, coasting, following emergency vehicles, crossing fire hose, littering, carrying or towing persons on outside of vehicle, embracing while driving, drinking while driving and leaving child in vehicle; 12. General provisions—governing application of traffic regulations, obedience to police officer, riding animals or animal-drawn vehicles, fireman's private vehicle and emergency vehicles.

I, William H. James,

being first duly sworn, on oath depose and say: that I am the General Manager of SOUTHEAST ALASKA EMPIRE, a newspaper of general circulation, published in the town of Juneau, State of Alaska; that the publication, of which the annexed is a true copy, was published in said newspaper on the 17th day of October, 1969, ~~xxxxxx~~ ~~xxxx~~ xfax, ~~xxxxxxxxx~~ ....., the last date of publication being October 17, 1969.

William H. James

Subscribed and sworn to before me this 1st day of November, 1969.

Hazel Colbert

Notary Public in and for the State of Alaska.

My commission expires August 12, 1971

C. INSPECTION OF VEHICLES

1. Vehicle equipment condition;
2. Inspection by officer;
3. Owner or driver to comply with inspection requirements;
4. Roadside inspections;
5. Inspection stickers;
6. Prohibited practices—repairs, etc.
7. Notice and approval of repair or adjustment.

D. DRIVER LICENSING AND SAFETY RESPONSIBILITY

1. School bus driver permits—(Article 1);

a. Application of regulations;
b. Denial of permit—(grounds)
c. Application and examination requirements—(scores, composition and frequency);
d. Medical standards;
e. Permit to be carried;
f. Restricted permit;
g. Cancellation of permit—(grounds);
h. Suspension or revocation of permit—(grounds and duration);
i. Re-examination—(grounds).

2. Safety Responsibility—(Article 2);

a. Application of regulations;
b. Reports required—(time limits);
c. Security deposit—(form and beneficiary);
d. Release from liability—(notarization required);
e. Agreement for payment of damages—(Notarization required);
f. Form of notice—(delivery and time limit).

E. DEFINITIONS—TRAFFIC REGULATI

This chapter defines various words and phrases used in the traffic regulation and in certain sections of AS 28.

Since the regulations are so extensive as to preclude inclusion in this notice, interested persons may inspect them at a regional headquarters office of the Alaska State Troopers, Anchorage or Fairbanks, or obtain a reasonable number of copies by a written request addressed to the Department of Public Safety, Pouch N, Juneau, Alaska.

Notice is also given that any person interested may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at Room 423, Capitol Building, Juneau, Alaska, at 9 a.m. on November 17.

The Department of Public Safety, upon its own motion or at the instance of any interested person, may at the hearing or after it adopt the above proposals substantially as above set out without further notice.

Notice is hereby given that the Department of Public Safety, under authority vested by AS 05.20.070, proposes to amend regulations in Title 13 of the Alaska Administrative Code as follows:

GENERAL: A complete revision of the regulations governing ski lifts and tows and amusement rides is being made. Revisions include the deletion of various existing provisions; the addition of new provisions and the technical amendment of wording throughout the regulations. Adoption of the revised regulations will delete 13 AAC 01.107 and 108, and will adopt 13 AAC 13. 010-150 (Aerial passenger tramways) and 13 AAC 15. 160-320 (Amusement rides). The provisions of those sections of that chapter concern the following:

1. Aerial Passenger tramways—(Article 1):

a. Declaration of intent;
b. Aerial tramway; single and double reversible
c. Registration;
g. New construction and alterations;
h. Accident and injury;
i. Inspection, maintenance and repair;
j. Signs and lighting;
k. Storms;
l. Miscellaneous
m. Attendants;
n. Application of other codes (electrical, bldg. etc.)
o. Definitions.

2. Amusement Rides—(Article 2):

a. Purpose;
b. Structure and foundation;
c. Access and egress
d. Passenger loading platforms, ramps, stairways and railings;
e. Electric safety requirements;
f. Passenger carrying equipment;
g. Safety belts, bars and similar equipment;
h. Signal systems;
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j. Attendants;
k. Signs;
l. Extraordinary hazards;
m. Accident and injury
n. Inspection, maintenance and repair;
o. Exceptions;
p. Definitions.

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Commissioner
Department of Public Safety

Pub: Oct. 17, 1969 (1000-8)

AFFIDAVIT OF PUBLICATION

ACCOUNTING SECTION
U. S. A.
OCT 29 1969
RECEIVED

UNITED STATES OF AMERICA
STATE OF ALASKA
FOURTH DISTRICT

} ss.

Legal No. 724

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE DEPARTMENT OF PUBLIC SAFETY

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Before me, the undersigned, a notary public, this day personally appeared Pamela Goebel, who, being first duly sworn, according to law, says that he/she is the Classified Advertising Manager of The Fairbanks Daily News-Miner, a newspaper published at Fairbanks, in said Fourth District and State, and that the advertisement, of which the annexed is a true copy, was published in said paper on the 17th day of October, 19 69, and once each THEREAFTER for consecutive, the last publication appearing on the day of , 19 ; and that the rate charged thereon is not in excess of the rate charged private individuals, with the usual discounts.

Pamela Goebel

Subscribed and sworn to before me this 23rd day of October, 19 69.

Notary Public in and for the State of Alaska.

My commission expires June 21, 1972

10-23—320

C. INSPECTION OF VEHICLES:
(1) Vehicle equipment condition;
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The Department of Public Safety, upon its own motion or at the instance of any interested person, may at the hearing or after it adopt the above proposals substantially as above set out without further notice.

DATE: October 10, 1969

Mel J. Personett
Commissioner
Department of Public Safety

Published: Oct. 10, 1969

ORDER ADOPTING REGULATIONS OF

DEPARTMENT OF PUBLIC SAFETY

The attached 116 pages of regulations are hereby certified to be correct copies of the regulations which the Department of Public Safety adopts under authority vested by AS 28.05.030 - 050; AS 28.20.020; AS 28.15.130 and AS 05.20.070 and after proceedings had in accordance with the Administrative Procedure Act (AS 44.62).

This order takes effect on the 30th day after it has been filed by the Secretary of State as provided in AS 44.62.180.

DATE December 1, 1969

Commissioner

I, Robert W Ward, Secretary of State for the State of Alaska, certify that on December 1, 1969, at 1:00 P. m., I filed the attached regulations according to the provisions of AS 44.62.040 - 44.62.120.

Secretary of State

Copies faxed to Legislature Oct 7, 1969

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(1) AERIAL PASSENGER TRAMWAYS - (ARTICLE 1):

- (a) Declaration of intent;
- (b) Aerial tramway; single and double reversible;
- (c) Chair lift, gondola lift and skimobile;
- (d) T-bar, J-bar, platter and similar devices;
- (e) Fiber rope tow;
- (f) Registration;
- (g) New construction and alterations;
- (h) Accident and injury;
- (i) Inspection, maintenance and repair;
- (j) Signs and lighting;
- (k) Storms;
- (l) Miscellaneous provisions - (exemptions);
- (m) Attendants;
- (n) Application of other codes (electrical, bldg. etc.)
- (o) Definitions.

(2) AMUSEMENT RIDES - (ARTICLE 2):

- (a) Purpose;
- (b) Structure and foundation;
- (c) Access and egress;
- (d) Passenger loading platforms, ramps, stairways and railings;
- (e) Electric safety requirements;
- (f) Passenger carrying equipment;
- (g) Safety belts, bars and similar equipment;
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DATE October 10, 1969

Commissioner
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Copies to each Reg. mailed on Oct 7, 1971

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(2) Safety Responsibility - (Article 2);

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(b) Reports required - (time limits);
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DATE October 10, 1969

Commissioner
Department of Public Safety

Rough Draft

Stevens Village Investigation

SPECIAL
JUDICIARY SUBCOMMITTEE
MINUTES OF THE MEETING
APRIL 20, 1970
8:00 p.m.

The meeting was called to order by Chairman Fink at 8:05 p.m. in the Masonic Temple. Present were Miller, Cornelius.

Fink gave a synopsis of proceedings so far for the benefit of Mr. Cornelius who had not been present when this problem first came up.

Friday Mr. Young brought up on the floor that he had information from the council in Stevens Village that they were not in favor of an injunction and he questioned the propriety of the suit. John Sackett felt that things were in order. Saturday Mr. Fink met with John Hedland, and went over copies of the complaints. I have copies of the papers for the litigation signed by Mr. Evans, president of the council, Mr. Smoke, Mr. Silvers, and William Pitts.

I have a resolution dated in January signed by the native villages of Minto, Rampart, Alakaket, and Bettles. (There was mention of the DNH corporation at this point.) Requests to Revoke the release from all claims for right of way.

There was complaint of the suit of the various villages and natives against Hickel. (Peterson arrived 8:08) I have copies of the complaints and affidavits Allakaket, Bettles, Rampart, Stevens Village filed against Keith Miller, Beardsley, and Kelly.

We have requested a copy of the OEO guidelines on legal services. (Metcalf arrived as a spectator at 8:09)

There is also some information from Alaska Legal Services.

Copies of this information will be made for all subcommittee members.

~~First witness:~~ Cornelius wanted to ask some questions before he had to leave. What is DNH? It is an organization consisting of natives organized by the Tanana Chiefs to take care of the contract rights of the villagers. Are they a client of the ALS? Is DNH a profit making organization? It is hoped to be. Does Legal Services ordinarily represent profit-making organizations? Yes. When this initial suit was filed, was this done after legally constituted meeting of the Stevens Village council including 30% of the people?

Fink asked him to hold his questions and ~~have~~ allow the witnesses to testify first.

First Witness: Don Young - (Miller asked whether or not the testimony should be recorded. He meant with a recording device. No arrangements to this affect had been made. The secretary will take as complete a set of notes as possible.)

I may ramble a little on this. You have heard Friday's discussion and the orientation on the floor and you have had about enough of it. At that time I was not attacking ALS. Stevens Village happens to be a village that I represent even though I don't get that many votes out of it. It is my duty as a representative to inquire into any problem in my area. This was the sole purpose of bringing it to the floor. To try to defent the village. They will be thoroughly jeopardized now and until after all the oil is gone. I am going to do something tonight that maybe I shouldn't do. I made some allegations and they were wrong. After cooling down I went through all my records and found that there were two letters written. One to Isabel Holm. This is the one I have the answer to. I offer my apology to Mr. Croft. It is basically the same letter but it is pleading the cause of the state. It wasn't in the form that they would not receive certain things. It was a representative's inquiry of those people, the same things that I requested of Isabel. Many times the people are not present so I dealt with someone who knows what is going on, and that is the postmistress. The answer to my letter will be submitted. (a). He next submitted the letter to the village council (b). This is where we have the heat of battle. I apologize to Mr. Croft. They are basically the same letter. After this occurred, I contacted a friend. I have a good personal friend, Joe Nichols, in Fairbanks, and I called him. Joe, I have a letter. Are you going into Stevens Village in the near future? Would you find out exactly what happened? I am sending a letter to Charles Evans and xk asking him to answer. The letter and the man arrived the same day. I received a letter back with an answer. The letter he sent back to me that has caused so much trouble. (c). Next letter presented was on MMM DNH. (d). When I received that letter, as a legislator, I was in a quandary as to what to do. ALS asked why I didn't come to them. I was at a loss as to what to do. I believed that these people did not know what they were doing. Anybody can sell me anything if they are smooth talkers. Same way with the xxxxxxxx. natives. I went to the only lawyer I know that represented the people in the state of Alaska. I went to the AG's office. I asked for a legal form or affadavit. I requested that they send the AG in Fairbanks, Steve Cooper, into Stevens Village to find out if the xxx natives had been consulted and if they had voted on this issue. This is what I requested. (e). The original of this has been turned over to the AG's office today and another copy has probably gone to Washington, D.C. The originals of both "e" and "f" will be provided

for the subcommittee. (f). My opening statement was that I had no argument with ALS on Friday. I was trying to protect the people from Stevens Village from being abused. In doing so, I had to bring these things to light. ---remote area for a long while. I know that I can go there and receive a reverse affadavit to the one that was read on the floor today. I want to make sure that the people xxxxxxxxxxxxxxx who represent the people in the villages cover both sides of the issue. ----think they are helping the people who cannot help themselves. I will state what your purpose of a hearing is in this committee. The ALS and the committee want to see what happened before this was ever brought to light before this was ever considered. Did they truly represent the people in Stevens Village or not? Were the legal governing bodies consulted? If they were not, then the statement I made was true,then my information was true. (Miller) What is your opinion on whether the people were approached and fairly treated? I would say this. The Stevens Village people probably received more benefits-------for--approached-------as in the affadavits, this wasn't an attempt- -- they did not know that the information was going to be filed. Were they fairly treated? I don't think that they were because they were not exposed to all of the facts.

(Fink) It appears to me that we are going to xxxxxxxxxxxxxxxxx get contradictory xxxxxxxx affadavits. The original ones and the ones that you received. How will the committee solv this? I don't xx think we can solve this. The people of Stevens Village will have to solve this. The committee and ALS should be ------. The sad part about this is that the people in the remote areas don't really know. It is like they mentioned on the floor. Bill Carlowe. He is a native man. If they knew this would jeopardize their jobs

and their situation they never would have done this. It is so easy to go in and sell something to a group of people that don't really understand. If I think they understood this-----. They referred to the ecology and the game. There is nothering I can see that mentioned the litigation. The people of Stevens Village ----. The persons that have the legal need to give both sides of the story. Don, have you been in Stevens Village since this issue arose? [illegible] affadavits? Who drew up these papers? Do you know where he got the information to draw up these affadvaits? [illegible] Did he contact the natives before he drew up the affadavits? To my knowledge, he flew into the village to inquire about the letter. You don't know the source of this information? This [illegible] is information from the council of the village.

(Cornelius) Have you ever found out whether this initial action was taken in a duly constituted meeting of the [illegible] Stevens Village Council at which time ALS would file an injunction to stop the pipeline? The council [illegible] never met on the injunction and the affadavits were sworn to. -----to hiring legal services. Were [illegible] they informed that an injunction would be [illegible] requested? Were they told of any course of action that the ALS might take? I can't answer that. They may have. ----why Isabel in her answer stated she knew nothing about this injunction. She is the postmistress. She is active in village affaris and knew nothing about it. That is what prompted me to do what I did. When the suit was originally filed, it stunned me. Even more so when the injunction was granted. This is what prompted me to right these two letters. Have you inquired about their arrival? Would it be a charter airline. Legal Services. Definitely. They went in on Saturday and are here on Monday.

(Miller) I would respect your secrecy regarding the individual. Is it a person that would know these things? The person I am referring to has access to all persons entering or leaving the village. (Cornelius) Was he ever in Stevens Village? I don't think he was. (Miller) Would you recognize signatures of Evans and the others? Yes. In the council how many votes would it take to be a majority. The chief, is he an ex-officio member? He has a vote because they have a vote in their capacity. This is a majority of the council? I had no knowledge of any of these. The action I took was ~~xx~~ not before I knew.

Second Witness: Robert Price, AG's office. At this time I would like to perhaps correct the record. I really believe that the information you are looking for is something like Mr. Young submitted. I ~~xxxxxxxxxx~~ would merely like to comment on a question by Mr. Miller. Affadavits which had been brought back to Juneau and secured by Mr. Stephen Cooper, DA in Fairbanks. I discussed the ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ affadavits with him after his return from Stevens Village on the 14th. He said that he put the affadavit -------He discussed this first with the villagers as to what had happened. Same kind of factfinding that you are doing tonight. Then their own language was put in the form of a statement which they signed. That is the only statement that I have at this time. (Miller) Was any motion for discovery made? As far as we know we have not been served a summons. It was the inquiry of a legislator that ~~xxx~~ wanted to know what had happened to the people which he represented. The AG has broad powers. Merely to determine what set of facts or circumstances were ~~xx~~ true. Did the state at any time enter into amicus curiae? No. It depends upon what stage. There are three different law suits. The one in

Washington, D. C. There has been a preliminary injunction against Secretary of Interior Hickel. The state is xxx in no way involved. Just an interested party. Are there any suits against the state? A complaint against Miller, Beardsley, and Kelly. This was instituted ten days ago. The state has not yet received the summons. Was your Stevens village inquiry prior to that suit being brought? Probably, We still have not been served a summons in the suit. At the time Steve when up there were you anticipating that the state was going to be sued? Yes. We had been sued but we had not been served. Yes. Through the newspapers. Was your action in contacting the village not involved with that suit? I xxxxx don't really know. I may have been. Our greatest concern was in the Washington, D. C. suit. Were the documents you received in the village used in any way in any of these actions? They have not been used. They have been transmitted to the Department of Justice. For use in that suite? For whatever use the department sees fit to make of them. Do you have any xxx idea as to what that might be? No. Do you think it would have any effect on the suit as filed? I would assume that it could have a certain weight. As is sits now, do you still have the decision that you have to file a motion of discovery? We are still only an xxxxxxx extremely interested party in all of the suits filed. We have not yet been served. It is my xxxxx knowledge that xxxxx there is not litigation until you are served with summons, especially since this is more than a week ago. You can file an answer without being served, can't you? I am not aware of this. Then in your testimony to this committee your testimony was prepared in the xxxx villagers own words and transcribed from them. It could have been recorded, but wasn't.

Third witness: Alaska Legal Services - (1) There has been a tremendous amount of unsworn statements of an unidentified third person. -----conclusion by various witnesses. That the Executive director was not in Stevens Village, Mr. Price------ That the affadavits were obtained by Mr. Cooper after talking to the villagers. (Mr. Croft) I am interested in the scope of your investigation. Inquiry so far is to determine if they have the authority to institute the suits which they did. We do not plan to submit such evidence. The reason is because this constitutes correspondence between the attorney and the client. We do not have authorization from the client to release the correspondence that we have had sent to us. We would not in the presence of the AG's office give information regarding our strategy in this case. It is unfair to expect that we would come before the committee and tell them everything that we had advised our clients. We are willing to show that we did have authority to do what was done. We obtained the authority initially. We have affadavits which are not part of the litigation but are related to the inquiry here. We will present these. I am curious as to the scope of the committee in this case. (Fink) There were no specific guidelines. Question was raised on the propriety of a profit-making corporation------. We are just trying to see what everything looks like. Judiciary Committee might have an interest. -----AG's or ALS. Give any attorney/client information is not required. I just wanted it understood that we are willing to cooperate with the committee. Our clients have the same rights and respect as other clients. It is a matter of great public interest to the state. We will certainly within our limits answer your questions. David Wolf and John Hedland are here to testify.

(Miller) As I read that authorization, I wondered how suits are brought against the state. Certainly that might be something to be inquired into. The one one interested in this is the Secretary of Interior Hickel suit. Authorization is not as broad as the action that is taken. I don't intend to be limited in any aspect. I wonder about that authority, if it has not been exceeded. John Hedland, is on the Board of Directors of Alaska Legal Services. David Wolf, Director of Litigation and supervisory attorney in Fairbanks. William H. Jacobs if present Director of ALS. John - scope of the authorization granted to Bill Jacobs and any attorney that he cared to associate with. The affect is to permit and authorize ALS to take any action including litigation directed at restraining the grant of a pipeline permit by Hickel. Then the action of the governor. Against construction of the pipeline or the road. He was going to authorize road construction by himself. Secretary of Interior notified him and requested his assistance. He then went to the Interior and Insular Affairs Committee to see whether his prime action in lifting the land freeze would authorize this action. So any action TAPS took did not affect building. It is planned that the pipeline---------by the Secretary of Interior, unless a road is built. I believe that the scope of this committee is necessary. Prevent TAPS from building the pipeline across land owned and claimed by natives.

(Miller) Were you authorized and directed to take any action to release a claim granted on the pipeline system? That apparently is a contract. ----right to do anything you can to release that claim. The second goes to the Secretary of Interior regarding the right of way. The governor took another older authority. Has the provision that he can grant the right of way-----and he

has taken these steps. Suits have been filed on this. The only suit filed against the state was directed at enjoining ------ federal court in Washington in the case in which we are not involved.. The Secretary of Interior has no authority to issue right of way permit for a road. He cannot issue a pipeline construction ----------there will be no answers for it.

Do you have an authorization from the Stevens Village council to sue the state. Yes, we have now. When did you obtain that? 18 of April 1970. -------6 of April. You feel that the authorization is broad enough? Yes. If that was so, why did you feel it necessary to obtain further authorization. This was when the newspaper reported that we were----------. You were given authorization on April 18 to continue the suit. I was aware of the fact that they were circulating these documents since last Tuesday. Nobody from the AG's office had been involved in obtaining them. This authorization signed by the Village Council, where is it? It is not on here. It was signed on the 30th of January. This was in the possession of ALS when they entered the village. It was the intent of ALS to ask for this authority. We had previously represented the DNH Corporation. ------about our inability to get contracts from TAPS. They though this was their right in the agreements with TAPS. DNH was the beneficiary of the arrangement between DNH and TAPS. If they intended to rescind the waivers as a means of putting pressure on TAPS that it would be necessary for the villages to execute the recision. The firm, DNH, without the ALS and obtained from them -----to rescind the waiver. One further thought I became involved in the matter.

ALS went back along with people from DNH. They would have to themselves rescind the waiver. We had forms as well as the authority

from--------. When problems like this come up-------. We want evidence that we have been acting on the request of our clients. Was Stevens Village ----------. It was not intended to obtain them as a client. Yes. To solicit them as a client. We were seeking to protect the rights of the DNH Corporation. You also sought authority from the council? They had already ---- authority DNH to rescind the waivers. This is the resolution about DNH. Is ALS authority the same as any other attorney? Can you solicit clients? Yes. We have been instructed that it is our duty and our right to advise a person whose rights are being violated. This was the result of an informal complaint. We were instructed to do it and criticized because we did do it. We have concluded that it would be proper where a practice that is detrimental, even if he does not request it. We sent it to the ethical matters for the board of governors. After the ---- meeting. I talked to Skip Matthews. Merely advising the client does not mean that you go out to seek a client. Didn't you have to have the client come to you first? Yes. Supported by United States vs. Button. In this case you had prepared authorization with you when you went into the village to have them become your clients. You feel that you haven't solicited them? I don't think it is improper for any attorney to suggest that the third party become a party to the action. We represented DNH it their request. The only say to protect the interest in the contracts was for these other parties who had made a contract for the benefit of DNH to support this other action. In order to adequately represent my client, could I go out and solicit another client. Example was in a airline crash. I needed further evidence. There are three of four other survivors. Not because I wanted the additional fees but I wanted to get further evidence for my own case. I need that other client

so I could adequately support my other case. I have read your complaint. The authority that you had at the time authorized you to take such action as was necessary. What did the villagers consider just compensation? The considered preferential hiring. ----and in contracts in DNH. Suit against Keith Miller has nothing to say about compensation or contracts. If you don't mention what your authority tells you to do. You are to do these things until just compensation has been made. It is our view in the action of the ----------governor would have been illegal. Is it your view or is it your people's view? I have made my own judgment on that point. Should not you have received an authorization as broad as your action? We have already received that in my opinion. You consider that a ratification? As I read the authorization, and perhaps I am wrong. This authorizes whatever action is necessary to stop taking land for the pipeline until they have been adequately compensated for this. What is the precedent of "any action"? It is limited by (practical) capability to do something for his client. Getting a release to these claims. ----limited on the right of way against Hickel. (Miller) Seems to be a very limited authority. Our action was authorized and it was the understanding that the village authority covered this. There has been a lot of talk about the time the AG went to Stevens Village to speak to our clients to get them to sign papers to drop our law suit, but they say they haven't been served so there is no litigation. (2) The position of the state at that time we have been told is that the state was planning to intervene in the Washington action against Hickel and had in fact had filed documents in support of this. -----active part in the litigation. In my mind there is no question that this action was proper.

(Wolf) I suppose it is an aside at this point. Compensation. There isn't a legal provision for the type of land you are dealing with her. There is no recognized provision where you could sue for the money involved----------is to insist through that injunction until the consent is given. That is why both suits say nothing about money. There are many provisions for just compensation. Do you have an opinion as to what compensation means? Originally in July 1969 ------- The Tanana Chiefs had a meeting and they agreed on what it meant. I don't know what they did consider proper. I have no answer. What about the subject of eminent domain? We are talking about a right of way. I am not sure that they do. ----over private land now. Villages claim this land. Title is not the same as what you and I own. It is unique from all other titled land. It is in some other form. There is no analogy.

(Five-minute recess) (Croft) I might say that I discussed what was my understanding about the question of authorization. The ---- had been my understanding and it is now that the suit originally was instituted aginst the Secretary of Interior Hickel enjoining him from issuing a permit for the pipeline. The governor shortly thereafter announced that he could issue --------permit for the right of way for the construction of a road. --------did not have to wait for the authorization from Interior to go ahead. It was the opinion of ALS that if a permit were obtained by the governor of Alaska that the governor could authorize the secretary of Interior to construct the pipeline. Since the basis of our suit had nothing to do with the ecology. (Wolf) I went to Stevens Village and other people went in at my direction. Yes, there were forms prepared ahead of time so that one would be large enough to cover everything.

Preparatory to going we were representing DNH and they had gone to the villages and obtained the resolution that I gave you. The village of Bettle signed their resolution and sent Evans to Fairbanks to sign. He came to my office. He signed that resolution in my office. By then several days later we had decided that that did not suffice in the situation. It was in my office that Bettles signed their authority. Having discussed it with the village council with no one present. After that------- I didn't go to Allakaket ----and other people-- ----did to people for DNH with the forms that we had prepared. I went to Stevens Village with Ruby. I did not go to Minto. Others did. Ruby and the lawyer who had gone to each of the other places also a law clerk. The -----each-----stage we spent three or four hours. In Evans home. All members of the council were present. I had a stack of these authorizations. And the recisions. After an hour and a half of talking--------I gave one copy to everybody. I explained all terms contained in the papers regarding any action we would be taking. I don't think I solicited these people as clients. You don't go in with an authorization saying you don't do anything. I don't think the situation was the type of situation that we had the authorization to do. Was a village meeting called where 30% of the people were present? We advertised over the radio that we would like to meet with the council. There were several other people who wanted to sign but I told them I didn't think they should sign. A village meeting calling for 30% of the people signed the agreement. We sis not ask for a village meeting. I was operating under the opinion that this was a council decision. Do you feel that the council had the authority to bind the whole village? -------TAPS when it obtained its waivers in the first place which was all right to lift the land freeze. The

releases were only signed by the president. These were signed only at Fairbanks. At that particular meeting did you state what your course of action would be to stop the pipeline or that you were going to place an injunction? I told them we would issue a restraining order. The state has not funded this organization (ALS) this past year, did it? And so far the federal government hasn't? No. We had a slight amount of money which carried us a way this year. You are a public organization (ALS) a nonprofit corporation. We have contracted with the federal government to render legal services on the behalf of poor people in the State of Alaska. You have borrowed this money to continue your operation now? How big a budget do you have a month? We have the figures for 14 months. We have used approximately $490,000 in the 14-month period. We have applied for approximately $460,000 for a 12-month period. $40,000 or less per month. Where have you obtained your funds to operate? Rural CAP. Authority came for OEO out of Washington, D.C. to lend the money to ALS. That has been your sole source of support for the last two months. Have you obtained any funds for this project from any conservation groups? We have two other sources of funding: (1) Services allegedly rendered by contributions in kind, and (2) we have three foundation-type----of attorneys ---pays salary-----is paid by the foundation but we supplement their pay. We receive no contributions of any kind. Attorneys have done this without charge. Did you personally go back on the April 18 meeting? Why did they change their mind from the affadavit from what Mr. Young had? Mr. Evans gave me two documents - signed.--------5------- one from each village council member. Horace Smoke's affadavit is

the most interesting. This is after the village council meeting April 19. He said he went to Evan's house-----taken from affadavit. The rest of the affadavits indicate that the letter that was signed by all village council members. Written by Allan John after Nichols came on that Saturday and had it in his possession when Bill Karlow came in on Monday. ---FNA meeting that week on Tuesday or Wednesday night stating that he was taking this letter to the DA. What happened to it, I don't know. Steve Cooper typed up a version of that letter and had everyone sign it. This was going on at the same time. -----handed out other affadavits. There was a great deal of tension when I came to the village. They felt that a village meeting ought to be held. There was one held from 4-7 p.m. on the 18th. After that meeting that Evans showed me the two documents sent by Cooper. Until that time-----that the council members told me about the affadavits. I knew Cooper had been there but I didn't know what was going on. At the same time, there were other people-- (Al Ketzler)---(He was in attendance at the committee meeting.) ----also a BIA official. ----get the air cleared was my intent. This was typed in the village. The rest of these were handwritten. This explains that there was a village meeting. There was some confusion because Evans did not show the other council member the letter that I had sent and in fact he had not opened the last one I sent. Two members were not in town at the original decision. Also the letters had not been distributed. There was some confusion as to what was going on. (Fink) I cannot understand where they sit. The one form by Evans to Young. Did Mr. Evans write this letter? Yes. (Miller) Get Don Young's permission to let someone see the documents.------whether or not these people have been misled and whether they do or do not want an

injunction.

April 18 there was a meeting. There was the Chief of Minto. The three villages originally in the suit ------ that we dismissed from the suit. Was a meeting of the people of Stevans Village---------. Misconception in the press. Minto and Stevens Village are IRA villages and the law applies the same. Allakaket, Rampart, and Bettles are not IRA villages. The regulations that applies is different. Brings the same result. Judge Hart heard arguments with respect to an IRA village and decided at 3:00 that he would issue the injunction as from Stevens Village even though Minto was only a mile away. Minto was not included in the injunction. At the time the attorney asked the judge if he would like to hear about the other three villages and he said no, not at this time. I don't need to talk about the other three villages. Their claims are still alive and they are parties in the law suit. Minto's claims seems to be unclear. Because of the confusion there is no injunction from Minto. How do you reconcile the affadavits that are entirely contradictory? In one case they say yes and in the other they say no we do not want to have anything to do with this. Do the people know that they are suing or not? These affadavits are explaining how the other affadavits were obtained and when the visits were made. The villagers signed the papers to tell you to stop the law suit and they refused -------state officials at state expense that they did get such things as power plants and freezers because they were visited by the AG's office and Representati Young told them that they wouldn't get an airport. The state official Nichols in ----------He did not file a law suit because he had children. There is a great deal of troubles. People losing

their jobs. There are no jobs for negroes or natives ------- this was to provide jobs projects in the villages through a state office. The very same things that the people say they want. This man goes on to -----to the village and tells them that they are going to get these things. He also told them they should drop the law suits and to be careful because of their children. -----and with the AG's attorney telling them to crop the law suit. Did someone tell them that the state would lose a lot of funds if the pipeline was stopped. Was the economic affect stated to them? The original discussion at the first meeting ------and I feel I cannot tell you about this. Do you have any objection to have members of this committee go into the village? How long have you been in the state? Two years in Alaska. Both of them. ------Earth Project or Sierra Club members, either of you? No. It is not the intent of the villages and ALS to stop the pipeline. There is no way the villages can get favorable results----was to have the pipeline. Get themselves jobs and contracts in the construction of the pipeline because their land and subsistence economy is going to be affected by the pipeline. Hasn't their action stopped all the rights? What rights to they have left now that the injunction is in effect? It is the reason that the pipeline isn't being built ------because of the Stevens Village injunction. Do you not contend that Secretary Hickel gave them authority that he would be cited for contempt of court? If this is so, you continue what is the most important to you or to Stevens Village. I said it was my judgment as to whether this could be legal authorization for the road. The value is the same for any person. If somebody is going to take your land without paying for it----- There is nothing that would match a monetary settlement. The injunction says that the secretary is enjoined from issuing right

of ways ------pipelines without consent of the villagers. --- if the people wanted to give their consent. Would they have to talk to you to consent? You would have no objection to them enter-into such an agreement without your authorization? ----if I think they are making a mistake. I would give them my opinion.

(Fink) Can I ask you when you became involved with DNH? In the last couple of weeks of January 1970. I knew the people in DNH and knew about it by also being contacted about legal problems. DNH organized in 1969. It is your opinion that 9,000 Athabascan Indians---------being held in trust to have a roll call. All the people in the Tanana Chiefs. All are equally stockholders. When were the waivers signed? July 27, 1969. The following month DNH was organized. ------8 or 9 on the board and they have an executive board of three. Do they have a full time chairman? Tim Wallace. Ruby Tanzy in Secretary/Treasurer. When they felt TAPS did not cooperate they felt their agreement was being breached? DNH said we are not doing business with you. The villages ought to consider revoking your provision because we haven't lived up to their agreement. I don't know what Tim said. ------without any lawyers going out. Tim went out first. No one from ALS was present. You had nothing to do with DNH operations? I did not go out when it was signed. You did not represent the village at that time? It was subsequent to this that you ----------. Did you advise these people to go to the villages. The decision, I think, had already been made. He had sent a telegram on the 21st. ---- was sent to Hickel and oil company ----- because of the problems DNH was having with them that --------. You knew at the time of the resolution that this was being done. Yes. Question was some of the wording.

You went to the villages on the 18th and talked to these people ------ that they advised you that they would like to drop the law suit. Did they advise of the affadavits given to Don Young? They indicated some documents had been signed but did not tell me what they said. I asked them about this. Were they sticking to that story when you arrived there? The council didn't meet and make a decision one way or the other. Didn't they meet, the entire village, the time you were there? They wanted the whole thing to be -------. We did not have enough funds to stay long enough to have a village meeting. There never have been any of these problems. There was a meeting of the whole village. What did they do at that meeting? They discussed whether or not to continue the suit. Did any one speak on the opposing side? Yes. I am concerned about that part. Discussed if the records that had to do with settlement---------. This was at that time. It is not a privileged communication. The whole village is a client. I don't think it was an open meeting. ------times others were asked to leave. Larry Braaten was there and the council asked that he leave. Because it was their understanding that he was a newsman. I told that they could ask him to leave if they wanted to. You more or less directed the meeting while you were there? You gave the best legal advise to them. I told them what the choices were. You didn't seem to care what the ------. Action of a city council is that the hearings are public records. Do you not consider these council meetings as public records? I don't think so when you are involved with litigation possibility. Were there other people there other than natives? Me, Larry Braaten, and Larry's wife. Is the postmistress there a native? Are they all of the descent that they would own property in the village? -----have these rights under the 1934 Act. Yes. I think so. If you are excluding people who have rights under

the IRA xxxxxxxxxx Village Act. Evans has lived in the village 10 years. He was born in Rampart. They have the rights of the villages that they are residents of. They have given affadavits xxxx two different ways. Do you consider that area privileged? I told them now that it was going to this committee and it would be public. They are privileged communications. Either in your xxxxxxx documents or in the ones Don Young presented to us? I think the one with the affadavit that I know of signed by five members of the xxx council referring to the first meeting-----/ I think that was confidential or privileged. I would be willing to consider it xxxxx if the council said, "yes". ----waived where you give a public statement. ---- joined the control of the attorney. We have three statements here on this. Do you still consider those privileged even though they xxxx have become public documents? I don't think they were free choice of the villagers. Nichols-----Frank xx Gardler-----. Three hours is how long they were there. Later-----. (Miller) You are saying due to the fact that some-----things xxxxxxxxxxxx they are not freely given. Even though they have been made public------. I think so. -----any subject that might relate to the xxxxxxx affadavit. If the affadavits were used in court-------. -----could be opening yourself up for some sort of cross examination. You got involved with the villages because you represented DNH and this was necessary for you to do the best job for DNH. The village members are stockholders and DNH was third party beneficiary. (3) W Any settlement that would come at the time ------and it would go to the villages. It was doubtful that DNH would ever profit from the law suit. We went in because of the involvment of DNH. As a result of one village coming to my office. The way things stand now the villages are the prime client in the returns from the law suit. It cannot go directly

to DNH and they may decide not to give them anything. Why didn't they file against labor unions instead? Jobs seem to be emphasized. Some were actually employed while we were there. Some eventually got jobs on the ice bridge. -----merely compensation for a piece of property. This in the confusion of the press is being overlooked. What is the stake? It is a lot more than jobs. The value is greater than jobs on a pipeline or road for a year or two. Villages need water, airports, power plants, and other things. This is what they want in exchange for this property; not to be under BIA control but have some economic base for that village. That is worth a great deal more than jobs. I believe jobs is a smoke screen. It was in the paper that a member of Legal Services said that. How could you limit it to jobs? It would give them an opportunity for training and money that would not be available for just mere jobs. I was going to say that the article he was referring to-----. ----.---jobs and construction contracts------. Refusal to settle on jobs and contracts. Croft read an article to the committee from the Saturday paper. One of the reasons for DNH was to perform contractual services and not just perform manual labor. When the waivers were given by the villages were they for jobs or for contracts? Hedland read some information regarding this to the committee. Wolf read the covering resolution. -----corporations owned will receive contracts. Do not want to stop the pipeline but want to profit from it. These were drawn by Barry Jackson.

DNH----Ketzler and Mr. Sackett. There have been some allegations that the villagers are not kept informed. There are 12 affadavits signed. ---------March 22. ------included advance notice. Miller would be in favor of asking authorization for the committee to visit the village to talk to them regarding this. What

would be the purpose? (Five minute recess - 10:30)

Our position that we are not at this time willing to give consent on behalf of ourselves or our client. We are not capable of making our own decision. Not without conferring with our clients. I don't think the committee has to get consent from anyone. Maybe not as attorneys but if we go over there as laymen we probably would have the right. Croft I think there is a concern on our part and we would like to investigate it further with our client. As to the committee coming into the village and investigating--nobody has suggested that the attorney for TAPS could be called in and asked any question about TAPS. There is some reluctance on our part in the behalf of our clients. (Miller) It is not to investigate attorney-client relationship but to determine the two sides of the issue that have been charged.--------because of attorney/client privilege. Why did they give Young affadavits and you affadavits? Signed by the same people.

Tanana Chiefs-------a little insight on the indians.--------dealing with the whites, attorneys, and others in authority over them. Through the years, I have been involved in the council at Tanana. (Ketzler) I have gone through this process. The whites, attorneys, agency heads, come in ; have all education; and things we don't have. Say we will give you this if you do this for us. So they do it. Without any thought to their legal rights. This is the case in Stevens Village. The people came in to Stevens Village; talked to them telling them ---------. When I ended up I would sign anything. When he went in on the 18th. ------being head of the AFN. I look at both sides of the questions. Trying to determine what the affect will be. When I went in to the meeting I tried to give them the opposition and what their legal rights were.

From this meeting the one from Minto who believes they have legal rights. They made this decision. You could lead them with your questions and get anything out of them that you want. Someone would have to know exactly what the legal rights were. ---not what they know to be right but what they think that you want to hear so you will go away. (Miller) By your comments, you think that we are going there to get support for some attorneys. I would like to ask why they signed, without the influence of anyone. Just ask the individual natives what they want. Forget what anyone has told them. (Cornelius) Their attorneys should have a right to be present so that they would know what was said at this particular meeting. I don't think the committee nee our counsel to do this. Now we are not going to tll you how-------- This is an unusual assignment for this committee. We needed to kno We can't get answers from you. Letters go to the people. (1) Will they believe that you have no interest? What is your point of view (2) Another problem you have to face. People who have never had th rights ------litigate before. Or had anyone ever considere that they had rights to this land. Hickel tried to issue permits denying they had any rights. It took a court order to stop that. ------should have hearing is a problem for people that are not used or part of extensive experience in owning property. They are i a terrible crises. Not something they have ever done before or do everyday. When a legislative committee comes in what are they afte and what to they want me to say. I think you have to recognize this fact. If this is true. If whatever they say is wha you want, you have a problem. I have made a recommendation that they had rights to this land. I would protect these rights Problem I am raising is not limited to Indians. We are representin

people who have never been represented before. Especially in the big suits and the pressures are great. ------if you go in there now. I am not sure how these people will feel. These people are involved in the native land claims. They are not under pressure like this. I would like to ask one thing. ----nobody thinks that it is unusual that this committee would inquire into the attorney/client relationship. Nothing unusual?? Sending the DA to investigate between the villages and the attorneys. There is not a single member of the legislature or the AG's office that would suggest that the legislature should inquire into the delay by the TAPS------ advice given about the method of obtaining the rights of way. They don't think of talking to Humble Oil without seeing their attorney. (Cornelius) In that case-------TAPS at their own free will, while these attorneys ----------. ------bad for them. In this case how do you render services covering legal problems in the bush unless you go there? Stevens Village-------. When you go to Stevens Village --------. You should be --------. -------a need in going to see if you have a problem. ------if you went to every village.

What the (Price)/Action of the AG has been in the case. We had been consulted by a legislator about a problem which has been ------ citizens of the state. There was a question of whether or not there was adequate representation. Representative Young sent someone. (Mr. Cooper only listened to the villagers.) No suggestion of pay-offs are other details. He merely listened to their story. Then he put it down for them and they signed it.

Larry Braaten and Al Ketzler - They wanted a piece of the action. The thing that comes to mind here is that we don't understand that

we ourselves hire attorneys. There isn't one person that knows how fill fill out an application and get money from Operation Mainstream. I am an official----you will have an opportunity to get some money. I think this is what is involved here. They talk to the people. They have put together a DNH Corporation and want to work together. We better cut out----------, This is that simple. What's the name of the game? Issue I am raising because I have been involved in this. -------taking jobs from natives. I worked near native villages. No natives were on the job. The only place where I say natives was on the Dewline and at Bettles. I did a survey ----I think that already TAPS has a very poor record. The state has been well aware of this. --------jobs for the pipeline. Having been a surveyor I was very much aware of this. If ----I am not sure-----every surveyor on that survey to Valdez was from some other state or not from the immediate area. I gave this ------to the other -------there were two people that were trained surveyors; several at Barrow; One at Glennallen; and 20-25 from the Fairbanks area. Not one of these people were hired. This is what is bothering a lot of us. --------Congressional office. Deals with internations unions. They will go outside and bring in labor. I think it is that the natives want to be a piece of the action.

Joe Nichols did not just visit Stevens Village. Sunday April 12 he went to Minto and went to Peter John and wanted to see all the papers on this case. It is not due to some letters to Don Young and in Stevens Village that is involved.

Is it customary for the AG to respond to a request for investigation from members of the legislature? ----adequately represented by their attorneys. I can't speak for the custom on this matter

which is xxxxxxx of exceptional nature. It should be looked into. The affadavits speak for themselves. It is also xxx exceptional because TAPS is unwilling to settle. As long as this issue is open ----------. Unless the clients back out. That Judge in Washington gives the justice department-------. If at any time he believes that these villages are being unreasonable in their demands.

Wolf - Would you say that TAPS wasn't willing to settle?

Fink - DNH We need to know more about and then we will see where to go from there. We will go into DNH xxxxx tomorrow at 1:30.

Meeting adjourned 10:55 p.m.

ka Empire, Juneau, Alaska, Mon., Apr. 20, 1970

Alaska Legal Services Corp. Denies Villagers' Charges

A spokesman for Alaska Legal Services Corp. has denied that the people of Stevens Village asked the organization to halt the injunction against the Trans Alaska Pipeline System (TAPS).

The denial came in response to a statement from Rep. Don Young, R-Ft. Yukon, to the state House of Representatives that the people of the village had signed affidavits swearing that they did not want the injunction and wanted the pipeline to go through.

John Hedland, director of litigation for Alaska Legal Services, said he hadn't seen a request to have the suit dropped, according to the Anchorage Daily News.

Young charged Friday that Alaska Legal Services has "maligned and misled the people of Stevens Village in the pipeline injunction suit.

The Associated Press reported that:

The corporation represented Stevens Village and several other villages in a suit seeking to prevent the 800-mile-long Trans Alaska Pipeline from crossing village property. Federal District Judge George L. Hart Jr. of Washington, D. C., issued a temporary injunction April 1 to keep the pipeline away from the village.

The $900 million pipeline, proposed to carry oil from Alaska's North Slope to the warm water port of Valdez, would have to cross some 20 miles of Stevens Village lands.

Young charged Friday that Stevens Village did not want an injunction against the pipeline and did not realize that that is what Alaska Legal Services was seeking. He said the villagers thought they simply were joining an action to force TAPS to provide better jobs for natives.

However, the Stevens Village suit is not the only one holding up the start of TAPS construction. On Monday, a U.S. District Judge in Washington granted another injunction to three conservation groups of-way permit for a road to the oil fields. This also holds up start of pipeline construction, and industry spokesmen said the move could delay oil flow for as much as a year.

A year ago, oil companies paid the state $900 million for North Slope oil leases in the greatest bidding competition in industry history. The pipeline to Valdez is to be built and owned by eight of the companies.

Young said Friday, "the people of Stevens Village did not want this injunction. They wanted jobs. What bothers me is when Legal Services in Alaska under the guise of helping the poor, takes advantage of their inability to know exactly what they're getting into."

Young produced an affidavit signed by Charles Evans, president of the Stevens Village Council, and the four other members of the council. It had been obtained by representatives of the state attorney general's office at Young's request, Young said.

In it, the council members said they opposed the injunction and that was not what we intended. We never told them they could represent us in that kind of a suit."

The affidavit continued, "we just thought they were asking us to join the effort to have natives hired by TAPS. They had us sign something. We read it but thought it was to help natives get hired."

In an accompanying statement the council members said, "We would like this case thrown out of court as soon as possible. We would like the pipeline to go through."

Young said, "I think the people of Stevens Village were honorable. I don't think they knew what they were getting into."

Young said he is requesting that a resolution be written asking the Department of Interior "to thoroughly scrutinize any further suit by the Alaska Legal Services Corporation."

Rep. Barry Jackson, D-Fairbanks, told the House, "I think allegations have been made on the legality of actions of the Alaska Legal Services Corporation. I would like the Judiciary Committee to investigate the allegations."

Jackson is committee chairman.

Rep. John Sackett, R-Galena, objected to Young's position. Sackett is a member of the board of DNH, an organization resenting 32 native villages interior Alaska, and which w ed with Alaska Legal Servi in the suit.

Sackett said, "We are holding up the pipeline in way, if the suit was dismis tomorrow, the pipeline could not go ahead."

He said DNH was created guarantee employment of tive people because "hist has shown that whenever n industry comes to the state people who were there origina remain unemployed."

He said that in seeking pi line right-of-way, TAPS h presented a letter of intent the villages saying it planned hire native labor.

Sackett continued, "Si then, the TAPS people have tri every method possible to out of their letter of intent..."

He added that he objected Young's comments that village people didn't kn what they were doing and t they were taken advantage

He said. "This displays a ternalistic attitude."

SE Env Alaska 4-21-70

House Opens Probe Of Alaska Legal Services

JUNEAU (AP) — A House Judiciary subcommittee began an investigation Monday into charges that Alaska Legal Services Corp. misrepresented the people of Stevens Village in a pipeline injunction suit.

The hearing was prompted by accusations made in the House Friday by Rep. Donald Young, R-Fort Yukon.

The corporation represented Stevens Village and several other villages in a suit seeking to prevent the Trans Alaska Oil pipeline from crossing village property. On April 1, Federal District Judge George L. Hart Jr. of Washington, D.C., issued a temporary injunction to keep the pipeline away from the village.

Young charged Friday that Stevens Village did not want the injunction and did not realize that that was what Alaska Legal Services was seeking. He said the villagers thought they simply were joining an action to force TAPS to provide jobs for natives.

Young produced an affidavit signed by members of the Stevens Village Council in which they said they opposed the injunction.

However, in the House Monday, an affidavit by the council was produced granting the corporation the right to proceed with the suit.

Young told the subcommittee that when he first suspected the inhabitants of Stevens Village did not favor the suit, he wrote to Charles Evans, president of the council. He said Evans wrote back and said he'd like to have the suit thrown out of court.

Young continued "Then I went to the only lawyer I know that represents the people of the State of Alaska—the attorney general."

He asked the attorney general's office to obtain for him an affidavit from the council stating the council's wishes.

"It would behoove all of us to see what happened before this was brought to light by myself. Did the Alaska Legal Services really represent the people of Stevens Village or were they representing people who did not exist?" Young asked.

Subcommittee chairman Tom Fink, R-Anchorage, said, "Apparently we're going to get conflicting affidavits. How are we going to resolve this? Are these people changing their minds?

"These people didn't understand," Young replied. "It would behoove those who would represent them to present them with both sides of the information."

Testifying for the attorney general's office was Asst. Atty. Gen. Robert Price.

He said the affidavit Young presented Friday was obtained at the request of the attorney general's office by the district attorney from Fairbanks.

"He talked with the villagers to determine what happened, then put their own language into the document, which they signed," Price said.

Subcommittee member Eugene Miller, D-Fairbanks, asked Price if, before he sent someone in there, he knew the state was being sued.

Gov. Keith Miller and several other state officials have been named defendants in another pipeline suit brought by Stevens Village through Alaska

Price replied, "Yes, we had knowledge from the newspapers that a suit had been filed against the governor."

He added, however, that the state did not consider itself a defendant in a lawsuit because it had not been served with any papers.

Speaking for Alaska Legal Services was John Hedlund, the corporation's supervisor of litigation.

He said a document signed by the village council authorized Alaska Legal Services to take any action necessary to obtain desired concessions from TAPS.

Villagers to continue three suits

JUNEAU (Special)—Two attorneys for Alaska Legal Services Corp. arrived in Juneau today armed with a resolution adopted Saturday by Natives of Stevens Village saying they will continue three suits filed against the Trans Alaska Pipeline System and against federal and state officials.

The resolution states that "because of the injunction won in court, by the Native village of Stevens, many sources of pressures have been brought to bear to have the village drop the suit." The resolution was adopted unanimously by 18 members present at the meeting. The village has approximately 25 eligible voters.

John Hedland, director for litigation, and David Wolf, attorney for Legal Services, will testify at a meeting tonight of the House judiciary subcommittee formed to investigate charges made Friday that the people of Stevens Village were "misled" and may have been "stampeded" into filing suits against TAPS, Interior Secretary Walter J. Hickel and a third suit filed against Gov. Keith H. Miller and two of his commissioners after he announced that the state was considering construction of the TAPS pipeline road.

Fbx Daily News-Miner 4-20-70

issuing a special land-use permit authorizing TAPS to construct a haul road over such land;

(f) That defendant Hickel and his subordinates be permanently enjoined from issuing a special land-use permit authorizing TAPS to construct a haul road over land owned and/or used or occupied by plaintiff villages Allakaket, Bettles, Rampart and Stevens Village and the first six individual plaintiffs;

(g) That plaintiffs be awarded such other and further relief as may be just and equitable under the circumstances.

Respectfully submitted,

ARNOLD & PORTER

By_____

Bruce L. Montgomery
Daniel A. Rezneck
Reid Peyton Chambers

Attorneys for Plaintiffs

AELE

Americans for Effective Law Enforcement INC.

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January 30, 1969

The Honorable Speaker of the House
State of Alaska
State Capital
Juneau, Alaska

My dear Sir:

Enclosed are two drafts of model bills which our organization considers to be vitally necessary for effective law enforcement. One concerns electronic surveillance, the other the police authority of "stop and frisk".

Also enclosed are AELE position papers upon both subjects.

We are sending the enclosures to all state Governors, Attorneys General, Presidents of the Senate, and Speakers of the House, with the request that consideration be given to such legislation in their respective states.

To acquaint you with our organization, we are enclosing a copy of our recent newsletter in which you will find a history of AELE, its aims and objectives.

Respectfully submitted,

Fred E. Inbau

Fred E. Inbau
President

FEI:oke
encl.

A MODEL STATE STATUTE ON ELECTRONIC SURVEILLANCE

Prepared and Distributed
by
Americans for Effective Law Enforcement, Inc.

(A national, non-partisan, non-political, not-for-profit, tax exempt educational corporation, with headquarters at 33 North Dearborn Street, Chicago, Illinois 60602)

SECTION I

DEFINITIONS

As used in this statute

(a) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications;

(b) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(c) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device;

(d) "person" means any official, employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(e) "investigative or law enforcement officer" means any officer of the State or political subdivision thereof, who is empowered by the law of this State to conduct investigations of or to make arrests for offenses enumerated in this statute, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(f) "contents" when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(g) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed;

(h) "state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

SECTION II

APPLICATION FOR COURT ORDER TO INTERCEPT COMMUNICATIONS, BY ATTORNEY GENERAL OR PROSECUTING ATTORNEY [District Attorney, State's Attorney, etc.]

The Attorney General of this State or the Prosecuting Attorney (District Attorney, State's Attorney, etc.) of any county (district, parish, etc.) is hereby authorized to make application to a ( ) court judge in the county where the interception is to take place for an order authorizing or approving the interception of wire or oral communications, and such judge may grant in conformity with section IV of this statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, [any other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year], or any conspiracy to commit any of the foregoing offenses.

SECTION III

AUTHORIZATION FOR DISCLOSURE AND USE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS

(a) Any investigative or law enforcement officer who, by any means authorized by this statute or Ch. 119, Title 18 of the United States code as heretofore or hereafter amended, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(b) Any investigative or law enforcement officer, who by any means authorized by this statute or Ch. 119, Title 18 of the United States code as heretofore or hereafter amended, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(c) Any person who has received, by any means authorized by this statute or Ch. 119, Title 18 of the United States code as heretofore or hereafter amended, or by a like statute of any other state, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this statute may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding in any court or before any grand jury in this State, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(d) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this statute or Ch. 119, Title 18 of the United States code as heretofore or hereafter amended, shall lose its privileged character.

(e) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (a) and (b) of this section. Such contents and any evidence derived therefrom may be used under subsection (c) of this section when authorized or approved by a ( ) judge where such judge finds on subsequent application, made as soon as practicable, that the contents were otherwise intercepted in accordance with the provisions of this statute, or Ch. 119, Title 18 of the United States code, as heretofore or hereafter amended, or by a like statute.

SECTION IV

PROCEDURE FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS

(a) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a ( ) judge and shall state the applicant's authority to make such application. Each application shall include the following information:

(1) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(2) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (a) details as to the particular offense that has been, is being, or is about to be committed, (b) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (c) a particular description of the type of communications sought to be intercepted, (d) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(3) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(4) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(5) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(6) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(b) The judge may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. Oral testimony shall be reduced to writing.

(c) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the county in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

(1) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section II of this statute;

(2) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(3) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(b) Any investigative or law enforcement officer, who by any means authorized by this statute or Ch. 119, Title 18 of the United States code as heretofore or hereafter amended, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(c) Any person who has received, by any means authorized by this statute or Ch. 119, Title 18 of the United States code as heretofore or hereafter amended, or by a like statute of any other state, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this statute may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding in any court or before any grand jury in this State, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(d) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this statute or Ch. 119, Title 18 of the United States code as heretofore or hereafter amended, shall lose its privileged character.

(e) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (a) and (b) of this section. Such contents and any evidence derived therefrom may be used under subsection (c) of this section when authorized or approved by a ( ) judge where such judge finds on subsequent application, made as soon as practicable, that the contents were otherwise intercepted in accordance with the provisions of this statute, or Ch. 119, Title 18 of the United States code, as heretofore or hereafter amended, or by a like statute.

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(3) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(4) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(5) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(6) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(b) The judge may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. Oral testimony shall be reduced to writing.

(c) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the county in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

(1) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section II of this statute;

(2) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(3) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(b) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(c) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a ( ) judge the serving of the inventory required by this subsection may be postponed.

(i) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in any court of this State unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(j) (1) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(a) the communication was unlawfully intercepted;

(b) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(c) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this statute. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice.

(2) In addition to any other right to appeal the State shall have the right to appeal

(a) from an order granting a motion to suppress made under paragraph (1) of this subsection if the Attorney General or Prosecuting Attorney shall certify to the judge or other official granting such motion that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order of suppression was entered and shall be diligently prosecuted as in the case of other interlocutory appeals or under such rules as the Supreme Court [or Court of Appeals] may adopt;

(b) from an order denying an application for an order of authorization or approval, and such an appeal shall be ex parte and shall be *in camera* in preference to all other pending appeals in accordance with rules promulgated by the Supreme Court [or Court of Appeals].

SECTION V

REPORTS CONCERNING INTERCEPTED WIRE OR ORAL COMMUNICATIONS

In January of each year, the Attorney General of this State, and the Prosecuting Attorney of each county shall report to the Administrative Office of the United States Courts such information as is required to be filed by Title 18 U.S.C. Section 2519, as heretofore or hereafter amended. A duplicate copy of such reports shall be filed, at the same time, with the Administrative Office of the Courts of this State.

SECTION VI

SEVERABILITY

If any portion or subsection of this Act or the application thereof to any person or circumstance is invalid, such invalidity shall not affect other sections or applications of the Act which can be given effect without the invalid section or application, and to this end the provisions of this Act are declared to be severable.

Note

This model statute is limited to provisions enabling prosecuting attorneys to obtain authorization or approval for electronic surveillance, and to provisions regulating the admission of evidence thereby obtained. Its coverage has been kept within the bounds of the June 19, 1968 federal electronic surveillance statute.

Criminal penalties for violations of this model state statute were omitted because (a) the federal statutory penalties probably pre-empt the states from enforcing their own; and (b) the draftsmen of this model state statute thought it advisable to leave to federal authorities the matter of violation of electronic surveillance prohibitions, in order to achieve uniformity of application and construction.

These various considerations also account for the fact that the model state statute is patterned very closely after the federal one.

ELECTRONIC SURVEILLANCE

Position Paper #1

of

Americans for Effective Law Enforcement, Inc.

(A national, non-partisan, non-political, not-for-profit, tax exempt educational corporation, with headquarters at 33 North Dearborn Street, Chicago, Illinois, 60602)

The *spoken* word is more important to criminals than it is to the rest of us. They value it far more than the *written* word, for a piece of writing carries the risk of tangible evidence of guilt.

Spoken words are also indispensable to the commission of certain crimes: extortion, solicitation of bribery, and syndicated gambling.

There are two basic ways in which evidence of a conversation may be obtained and used in court. The first is to have someone testify as to what he heard. The second is to record the conversation word for word.

Testimony by a witness as to what he heard is subject to all the frailities of human nature, from misunderstanding to forgetfulness. It is also subject to attack as a false accusation.

Of far greater dependability is an electronic recording of a conversation. Instead of the testimony of one witness against another as to what was said, a recording can supply the judge and jury with the conversation itself. Moreover, the recording not only furnishes an accurate account of what occurred; it may also be a source of subsequent identification of the speakers themselves, by means of "voice print" comparisons with the recorded voices of suspected persons.

Today's law enforcement officers need the legal authorization to record the conversations of criminals and others who are reasonably suspected of serious crimes, and particularly organized crime. Gambling, extortion, bribery and intimidation are all working tools in the arsenal of organized crime that can be successfully fought with electronic surveillance.

AELE does not advocate, and indeed it opposes, the indiscriminate or uncontrolled or unsupervised use of electronic surveillance by law enforcement officers or agencies. It is also unalterably opposed to any electronic surveillance by private individuals or corporations. The latter ought to be completely prohibited and violations severely punished, and law enforcement usage should be allowed only upon court approval and supervision. Moreover, any unauthorized electronic surveillance by law enforcement personnel should be punishable as a criminal offense.

Congress has granted electronic surveillance authority to *federal* law enforcement officers and agencies, but upon strict limitations, the primary one being prior court authorization. The state legislatures must do likewise with regard to *state* and *local* law enforcement needs and efforts.

In accordance with these principles, AELE has prepared and submitted to all of the state legislatures a model electronic surveillance bill. Such legislation is vitally needed for effective state and local law enforcement.

The AELE bill measures up, in our opinion, to the constitutional requirements delineated by the Supreme Court of the United States.

"STOP AND FRISK"

Position Paper # 2
of
Americans for Effective Law Enforcement, Inc.

(A national, non-partisan, non-political, not-for-profit, tax exempt educational corporation, with headquarters at 33 North Dearborn Street, Chicago, Illinois, 60602)

On June 10, 1968 the Supreme Court of the United States, in *Terry v. Ohio* (and two companion cases), declared that the police practice of "stop and frisk", when properly used, was constitutionally permissible. In other words, it does not constitute an unreasonable search and seizure within the meaning of the Fourth Amendment of the Constitution of the United States. This is the conclusion **Americans for Effective Law Enforcement** had urged upon the Court in the amicus curiae ("friend of the court") brief which it had filed in that case.

Legislation in conformity with the *Terry* case decision is needed in all of the states in order to avoid the uncertainty of a case-by-case adjudication of the powers of the police and the rights of the citizens. Accordingly, AELE has prepared and is distributing to governors, attorneys general, and legislative leaders throughout the country a model "stop and frisk" bill for their consideration.

An appreciation of the need for "stop and frisk" legislation and a proper understanding of the nature of the practice requires answers to the following questions: What is a "stop and frisk"? How does it differ from an arrest and search? When may it be employed by the police? What is the risk of police abuse?

The Meaning of "Stop and Frisk"

The following hypothetical case discloses the meaning of "stop and frisk":

Two police officers are on a routine beat patrol at 3:00 A.M. in a residential neighborhood. It is dark and the streets are deserted. As the police car proceeds down an alley, the figure of a man is seen. He steps to the side, behind a telephone pole. The police car speeds up, and when the officers arrive at the scene they find a man dressed in dark non-descript clothing, standing next to a garage. For all the police know at that moment, he might be a householder who owns the garage—or he may be a recently paroled burglar; he may live next door—or he may live miles away; he may be able to give a good explanation for being there—or he may be prepared to tell a demonstrably false story.

In our hypothetical case three things are clear: (a) the actions of the man are suspicious; but (b) there is no probable cause to *arrest* him for the commission of a *crime*, and yet (c) the police ought to *do something*. The question is, what should they do? What can they do? Are they forced to choose between doing nothing, proceeding on their way, or falsely arresting the suspect for a "crime".

If the officers do nothing, a burglar, robber or rapist might be left in the alley to proceed with his plan unhindered. If the officers make an arrest, the arrestee may turn out to be an innocent resident of the neighborhood, who will thereafter have a police record. Moreover, even if developments subsequent to an actual arrest establish that the suspect was in fact plotting a crime, or had committed one unknown at the time of his arrest, a gun or other evidence obtained from him may be excluded from usage in court because of an arrest made without the constitutional requirement of "probable cause".

Because of these various difficulties, proper police investigative technique demands the employment of another procedure—a middle ground approach—one between police inaction and illegal action. What is needed is the employment of an authorized "stop and frisk" procedure. In this hypothetical case, for instance, the police officers would stop their car, alight from the vehicle and ask the suspect such questions as "Who are you?", "What are you doing in the alley?", "May we see some identification?". The officers must also have the right to frisk the suspicious person if they reasonably think that he may be armed with a dangerous weapon.

Necessarily, the right to ask the questions includes the power to temporarily detain the suspect, even against his will, for a brief time. Since a suspect could defeat the whole purpose of stop and frisk simply by walking away from the inquiring police, under "stop and frisk" authorization he will not be privileged to do so.

over

Since even a brief detention is a "seizure" of the person within the meaning of the Fourth Amendment of the Constitution, it must be "reasonable", that is, based upon some identifiable and objective standard of suspicion of criminal behavior. It cannot be based upon an officer's whim, caprice, prejudice or inarticulated "hunch".

Suppose that the suspect in our hypothetical case refuses to answer questions asked by the police. He cannot, after all, be compelled to do so, and he may take advantage of his Fifth Amendment right to say nothing. What then? Does this destroy the value of the "stop and frisk" power? The answer is a sure "no", because a quick investigation of the surrounding area may provide enough evidence to give the police probable cause to arrest him for a criminal offense. For example, suppose that in shining their flashlights on the door of the garage next to which the suspect was found the police find fresh "jimmy" marks. They would then have probable cause to arrest the suspect for attempted burglary. If, upon searching him after the arrest, they find a jimmy, or screwdriver that matches the marks on the door, another burglar may well be on his way to the penitentiary.

Even when the police are forced to release the suspect because of his refusal to answer questions or because no evidence of an attempted crime is found at the scene, the very act of temporary detention and questioning may deter, at least for that night, a potential criminal act of violence. That, in itself, would be a worthwhile result, since the duty of the police is not only to apprehend persons who have already committed criminal acts, but also to prevent crimes from occurring in the first place.

Moreover, in many instances a person stopped under circumstances such as the one involved in our hypothetical case will respond to the questions asked by the police; and his answers may supply the necessary information either to dispel the police suspicion or else escalate the suspicion into probable cause for an arrest.

"Stop and frisk" may be used in a number of fact situations: for instance, a teenage boy walking from car to car and apparently testing the windows or looking in for keys left in ignition locks; the person who furtively and repeatedly looks into the window of a business establishment about to close; the man who has been trailing two teenage girls for several blocks. The possibilities are numerous.

The Objections to "Stop and Frisk"

The charge has been made by some persons that "stop and frisk" is a tactic for the repression of minority groups; that it is a racist practice designed to keep the ghetto resident "in his place"; and that it is a tactic to show the teenage gang member, the addict, and the prostitute who "rules the turf" on the officer's patrol beat.

As with all other professions or occupations, there are some policemen who do not deserve the honor of a police badge and the privilege of carrying a gun—just as there are misfit doctors, unethical and incompetent lawyers, and corrupt public officials. On occasions some police, in all parts of the country, have used the power of their office to engage in various kinds of illegal and coercive practices. But that fact does not warrant the withholding of needed authorization to those police officers who do conform to proper standards, and who must have such authorization for the protection of the public and also for their own safety.

The Answer

The basic answer to the concern over possible police abuse of the power of "stop and frisk", as well as of all the other powers the police possess, is the development of better procedures for the selection of police applicants, so as to reject the psychological misfits, the ones whose past conduct evidences a lack of the required integrity, and those whose social values are incompatible with the role of protector of all members of our society.

Adequate compensation must be provided in order to attract applicants with the required qualifications, and to retain in office those who are selected.

Proper internal supervision will also be needed, along with meaningful sanctions for the police who misuse the powers of their office.

FORM SA-1B

Jud

MEMORANDUM State of Alaska

TO: Representative Barry Jackson
Chairman, House Judiciary Committee
Sixth State Legislature

DATE : February 14, 1969

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: Committee Appearance
Our File #151

In answer to your request, I have no plans to leave the capital city, and will be available to appear before your committee at your pleasure.

Susan —

please set up

April 2, 1969

Mel J. Personnett
Commissioner of Public Safety
Room 103
State Capitol
Juneau, Alaska

Dear Commissioner Personnett:

The House Judiciary Committee has considered the amended regulations submitted by you to the committee on March 6, 1969.

With the following changes, the regulations as proposed in this amended version meet with the approval of the committee.

The changes are as follows:

25.210: Do not abbreviate NCIC.

25.220: After "REQUIRED INFORMATION", add "(a)". Change the period after "follows" in the same sentence to a colon. Delete second sentence, and place it after (14) as subsection "(b)".

25.220 (9): Delete the word "your" in second line and use some other language.

25.220 (10): Do not abbreviate M.O.

25.220 (14): Change this subsection to subsection (15). Add new subsection (14) to read: "Ultimate disposition of each proceeding, such as dropping of charges, dismissing a case or finding of "not guilty'".

25.250 (b): Change "department shall" to "department will".

25.250 (c): Change "deems" to "considers".

25.250 (d): Change "shall" to "may". (this does not change a mandatory statement to a permissive one.)

25.260: Change reference to "section 210" to "section 220".

25.260: Before "officers of the United States", insert, "law enforcement."

25.260: After the last word, delete the period and add, "for the purpose of the detection of crime and the detection of criminals."

25.290 (6): Add the term "probation officers" and delete paragraph (12) entirely since it is a duplication.

25.290 (8): After the word, "investigators," add, "of the state or a local fire department."

The committee is concerned with preserving the intent of AS 09.25.120 (2) and AS 47.10.090, and requests that the provisions of these regulations be consistent with those statutes.

If any additional information is needed concerning these changes, please contact Arthur Peterson.

Sincerely,

Barry Jackson
Chairman
House Judiciary Committee

FORM SA-18

file

MEMORANDUM State of Alaska

TO: Representative Barry W. Jackson
Chairman, House Judiciary Committee

DATE : March 6, 1969

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: Regulations
Criminal Identification Records
Our File #334

Enclosed are draft copies of an amended version of the original regulations submitted to the legislature as required by AS 18.65.060.

The amendments change those items in the original regulations which seemed to cause the greatest concern.

It is intended that this amended version be considered by the legislature in lieu of the original.

Enclosures

FORM SA-18

MEMORANDUM State of Alaska

TO: Speaker
House of Representatives
Sixth State Legislature

DATE: January 27, 1969

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: Regulations
Our File #314

As required by AS 18.65.060 (Ch. 107 SLA 1968), the attached regulations are submitted to the legislature for review.

Attachments 2

CITY OF SITKA

POLICE DEPARTMENT

P.O. BOX 1240 · SITKA, ALASKA 99835



February 28, 1969

Representative Stan Cornelius
House of Representatives
Alaska State Legislature
Juneau, Alaska 99801

REF: The Department of Public Safety's regulations requiring local departments to supply the Department with certain information.

Dear Mr. Cornelius:

I have reviewed at length the proposed regulations as proposed by Commissioner Mel Personett for Legislative Action requiring information from various Departments to set up a central records depository.

Speaking as Chief of Police of the City of Sitka and the President of Alaska Peace Officers Association, I wholeheartedly endorse this concept. Alaska law enforcement has long been hindered by the lack of a central depository for Records and Identification. It has, likewise, been hindered by various Departments of the State using various and sometimes, inadequate reporting proceedures. I, therefore, feel it is imperative that if we as a state are to progress toward professional police and to enable us to be adequately prepared to receive and utilize this Federal Bureau of Investigation's National Crime Information Center, we must take this step in the right direction.

My only concern is, as a municipal Chief of Police, the cost factor. In as much as if this were to become effective immediately it would catch various Departments, including Sitka, in the middle of a fiscal year without funds to meet demands for personnel and equipment that these regulations would require. However, it is my understanding that these regulations would become effective over a period of time, perhaps three years, and the cost of the reporting forms, if necessary, would be born by the State. With this understanding, I wholeheartedly endorse your proposed rules and regulations.

Very truly yours,

Paul Mullenix

Paul E. Mullenix
Chief of Police - Sitka
President -- Alaska Peace Officers Association

TELEGRAM

1929 Communications Group (ACS) USAF
FEDERAL BLDG. ROOM 137 PHONE 6-7477
JUNEAU, ALASKA

1969 4 PM 7 13

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BEA312 NL PD
KODIAK ALASKA 4
REPRESENTATIVE STAN CORNELIUS
HOUSE OF REPRESENTATIVES JUN 0223

THE CITY OF KODIAK PROTEST THE DEPARTMENT OF PUBLIC SAFETY REGULATIONS REGARDING REPORTS WHICH MUST BE MADE TO THE STATE. REGULATIONS SUCH AS THESE WILL SERIOUSLY INCREASE THE DAY TO DAY POLICE COSTS WITH NO BENEFIT TO THE CITY AND THE TAXPAYERS WE WILL CONTINUE TO PROVIDE OUR EXISTING REPORTS TO THE STATE AND FBI HOWEVER WE CANNOT FUND ADDITIONAL PERSONS TO HANDLE THE STATE RECORDS AS REQUIRED UNDER THIS PROPOSAL THE EFFECT OF SUCH REGULATIONS WILL BE TO OVERBURDEN SMALLER UNDER STAFFED POLICE DEPARTMENTS WITH ADMINISTRATIVE FUNCTIONS WE URGE THAT THESE REGULATIONS NOT BE PLACED INTO EFFECT

W ROY GOODMAN CITY MANAGER.

TELEGRAM

1929 Communications Group (ACS) USAF
FEDERAL BLDG. ROOM 137 PHONE 6-7477
JUNEAU, ALASKA

V

CEA053 NL PD

TDAN KODIAK ALASKA 4

1969 MAR 5 AM 6 42

REPRESTENTIVE PETER M CE VEAU

HOUSE OF REPRESENTITIVES JUN

PLEASE CONTACT REPRESENTITIVE STAN CON CORNELIUS CONCERNING HEARINGS N CRIMINAL AND IDENTIFICATION RECORDS PROPOSED BY THE DEPT OF PUBLIC A SAFTEY HEARINGS TO BE 5 MAR 10AM THIS REGULATION WILL INCREASE THE ADMINISTRATIVE COSTS AND PERSONELL OF THIS DEPT WITH NO DIRECT BENEFIT TO THE CITIZENS OF THE CITY. WE CAN NOT AFFORD ADDITIONAL FUNDING TO KEEP STATE RECORDS I RESPECTLY REQUEST AND URGE YOU TO TAKE POSTITIVE ACTION TO ASSURE THESE REGULATIONS ARE NOT PUT INTO EFFECT.

RESPECTLY SUBMITTED

JACK L RHINES CHIEF OF POLICE KODIAK ALASKA

5 10AM.

—B 200 - Paw Fish

TELEGRAM

V

1929 Communications Group (ACS) USAF
FEDERAL BLDG. ROOM 137 PHONE G-7477
JUNEAU, ALASKA

CEA054 NL PD

TDAN KODIAK ALASKA 4

REPRESENTITIVE STAN CORNELIUS 5 AM 6

HOUSE OF REPRESENTITIVES JUN

I WOULD LIKE TO PROTEST THE PROPOSED ARTICLE NUMBER 2, CRIMINAL AND INDENTIFICATION RECORDS OF THE DEPT. OF PUBLIC SAFETY THIS TYPE OF REGULATION WOULD INCREASE THE ADMINISTRATIVE COSTS I AND PERSONELL OF THIS DEPT WITH NO DIRECT BENEFITS TO THE CITIZENS OF THIS CITY MAJOR PETE RESOFF HAS BEEN ADVISED OF THIS PROPOSAL AND HAS STATED THAT KID KODIAK CAN NOT JUSTIFY ADDITIONAL CITY FUNDS TO HANDLE STATE RECORD I WILL CONTINUE TO PROVIDE REPORTS TO THE STATE WHEN REQUESTED AS WE HAVE IN THE PAST I RESPECTLY REQUEST AND URGE YOUR TAKE POSITIVE ACTION TO ASSURE THESE REGULATIONS ARE NOT PASSED RESPECTLY SUBMITTED

JACK L RHINES CHIEF O F POLICE KODIAK ALASKA

2.



DEPARTMENT OF POLICE
AREA CODE 907 • PHONE 586-1414

CITY OF JUNEAU
P. O. BOX 9 | JUNEAU, ALASKA 99801

JOSEPH L. GEORGE
MAYOR

JAMES P. WELLINGTON
CHIEF OF POLICE

February 28, 1969

The Honorable Stanley P. Cornelius
House of Representatives
Alaska State Legislature
Capitol Building
Juneau, Alaska99801

Dear Representative Cornelius:

I plan on appearing before the Judiciary Committee on March 5, at 4:00 p.m., to give testimony concerning the proposed Department of Public Safety regulations, relative to the submission of criminal and identification data by local police departments to the Department of Public Safety.

Sincerely,

James P. Wellington
Chief

JPW/pl

CITY OF KETCHIKAN

334 FRONT STREET P. O. BOX 1110 – KETCHIKAN, ALASKA 99801 TELEPHONE 907-225-3111

February 7, 1969

The Honorable Stan Cornelius
Alaska House of Representatives
Juneau, Alaska

Sir:

I have been informed by Don Berry that you have been appointed to study the Department of Public Safety regulations.

We have had some correspondence with Commissioner Personett on this matter. I am enclosing a copy of my letter to the Commissioner, and his answer to me.

As explained in our letter, we are not trying to "shoot down" his program. Since it does contain some objectionable items, we believe that these regulations should not be allowed to become law, at least until after the Chiefs Association meeting in June. The Association has not had an opportunity to act as a group. We believe that several of the regulations usurp the powers of Municipal Chiefs and in effect makes the Commissioner of Public Safety a commissioner of municipal departments.

We also believe that, since these regulations will affect our budgets, the League of Alaska Cities should have the opportunity to review them and make their recommendations before they become law.

We, therefore, respectfully request that these regulations not be allowed to become law during this session of the legislature.

Very truly yours,

T. H. Miller

T. H. Miller
Chief of Police
Ketchikan Police Department

THM:ld

cc: Brad Phillips
W. K. Boardman
Robert Ziegler

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

POUCH N, CAPITOL BUILDING
JUNEAU 99801

December 17, 1968

Our File #332

Chief T. H. Miller
Ketchikan Police Department
Ketchikan, Alaska 99901

Dear Chief Miller:

I have received your letter regarding criminal and identification records and the proposed regulations to implement the procedure. (Chapter 107, SLA 1968)

We are well aware of the budgetary problems that would be involved if an early compliance date were suggested. We are, however, bound by the language of the statute: ". . . regulations proposed by the department shall be submitted to the presiding officer of each house on the day the house convenes." Delay until June would, therefore, be impossible.

However, budgetary and implementing problems (both yours and ours) have been taken into consideration. These problems have been discussed at both previous Chiefs gatherings and in comments received on this and previous proposed regulations. For this reason, it is planned that implementation should be on a step by step basis with full implementation several years away.

As an example, we feel that we should furnish most, if not all, of the necessary forms, etc., and that a system of retrieval and dissemination of the information must be available. It would seem extremely doubtful if this would happen overnight.

Chief, I know that you as a professional peace officer agree on the need for a statewide centralized criminal justice information system. You can rest assured that this Department will do nothing to make it impossible for all agencies to take part. I would hope that not only at the June meeting, but continuously, we are able to discuss its progress and suggest changes to make it a more valuable tool.

Very truly yours,

Mel J. Personett
Commissioner

cc: Chief J. L. Rhines
Chief Paul Mullenix
Captain R. L. Burton

December 13, 1968

Mel J. Personett, Commissioner
Department of Public Safety
Pouch K, Capitol Building
Juneau, Alaska

Re: Your File #334

Dear Commissioner:

In your letter of November 12, 1968, you ask for comments concerning your proposed rules and regulations regarding Criminal and Identification records.

This program is of such magnitude that it would affect the budgets of, at least, the smaller departments. It would require the addition of personnel, additional copies of our present forms, and in some cases, new forms. Since most of us work on a calendar year budget and our budgets have already been presented, it would be impossible to add these items for 1969.

Also, I believe that proposed changes and additions of this magnitude should be presented to the Chiefs Association for their consideration before it is presented to the Legislature.

In view of the above, it is requested that you do not present this to the Legislature until after the next Chiefs meeting, which will be held in June.

I have talked to Chief Mullenix of Sitka and Chief Rhines of Kodiak. They both agree with the above approach and have authorized me to speak for them in this matter.

Yours very truly,

T. H. Miller
Chief of Police
Ketchikan, Alaska

ld

cc: Chief Mullenix
Chief Rhines
Captain Burton, President
Alaska Association Chiefs of Police

FORM SA-1B

MEMORANDUM State of Alaska

File

TO: Representative Barry Jackson, Chairman
House Judiciary Committee
Sixth State Legislature

DATE : March 4, 1969

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: Requested Information
Our File #151 - 1969

The following is submitted in answer to the February 26 request of your committee.

#1. "Stop & Frisk" -- Law or regulation?

As previously stated, I feel that departmental regulation and policy should satisfactorily solve any problem that may arise.

In reviewing "Terry vs Ohio", U. S. Supreme Court, we find that permissive legislation is not necessary since Ohio had no such law.

Departmental regulations which we are drafting follow, to a great extent, the New York State law and the New York State Police regulations.

I would propose that these regulations be used for one year by this Department before a final choice of statute vs regulation is made.

Attached is the first draft of those departmental regulations.

#2. Retirement Plan for State Troopers.

Although at the present time most of the thinking seems to lean toward something comparable to the Anchorage Police Department plan, I personally feel that other state and city plans and fiscal problems should be researched thoroughly prior to any final decision. I would not suggest that legislation be introduced prior to this study.

#3. Priority Needs of Law Enforcement in Alaska (not limited to State Troopers).

A. Improved and expanded training capabilities.

B. Centralized information, and the ability to gather, store and retrieve it instantaneously. This includes, of course, communications.

C. Specialized or technical groups for certain types of investigations. This includes criminal evidence lab capabilities, either by contract, state-owned, or a combination of both.

D. Modern equipment.

CHAPTER 320

STOP & FRISK

Sec. 320.010 Introduction

A. Alaska laws do not include provisions authorizing the arrest of persons on the so-called "Open Charge" or "Suspicious Person" as is allowed in some other jurisdictions. Such laws were intended to provide the police with a means of holding a person, while at the same time conducting an investigative inquiry into the circumstances which reasonably brought that person under suspicion.

These laws, in their application, have generally been ruled unconstitutional; however, the courts have at the same time recognized the need for the police to inquire into a person's actions under certain circumstances, and the very practical need for the police to be able to protect themselves from bodily harm at the hands of the person stopped.

Toward this end, court decisions indicate that whenever possible the court will uphold the officer's right to approach, interrogate and conduct a street search of a suspicious person, and that such action does not conflict with the Fourth Amendment prohibition against unreasonable search and seizure. (People vs Rivera, 14 NY 2d. 441; People vs McErlean, 38 Misc. 2d 634; People vs Russo, 38 Misc. 2d 957; People vs Peters, 18 NY 2d 238; United States vs Vita, 294 F. 2d 524; Rios vs United States, 364 US 253; People vs Marendi, 213 NY 600; People vs Entrialgo, 19 App. Div. 2d 509; Sup. Ct., Terry vs Ohio 6-10-68).

B. State Troopers will continue to stop and question a person, for a reasonable time, whom they observe in public under suspicious circumstances or who is acting in a manner which reasonably makes that person suspect.

They will also search that person for dangerous weapons, if the member reasonably suspects he is in danger of life or limb.

C. The limiting guidelines within which a member may conduct a "stop and frisk" are as follows:

1. The person is abroad in a public place; and

2. The member reasonably suspects the person:

   (a) Is committing; or
   (b) Has committed; or
   (c) Is about to commit a crime.

The member may demand the person's name, address, and proof of same, and an explanation of his actions, and, if he reasonably suspects he is in danger, he may conduct a search of that person within the following guidelines:

1. The member may take weapons or anything, the possession of which may constitute an offense, and keep them until he completes the questioning of the person, and then:

   (a) Return them if they were possessed lawfully; or
   (b) If not, he must arrest the person.

D. For purpose of interpretation of the various phrases and wording applicable to "stop and frisk", members shall be guided by the following:

1. "Public place", should be considered a place to which the general public has a right to resort, not necessarily a place devoted solely to the use of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the public. This would include, for example, the hall and stairs of an apartment house (People vs Whitman, 178 App. Div. 193; People vs Peters, 18 NY 2d 228).

2. "Reasonable" suspicion or suspect is less than would be required to constitute grounds for arrest. When facts and circumstances existing at the time make it not unreasonable for an alert member to suspect a person, he may stop the person and interrogate him in detail as to his actions. Such things as the hour, the neighborhood, the actions of the person, items he might be carrying which are out of place, actual resemblance to wanted person, clothing matching description of wanted suspect, etc.

3. "Reasonable" belief of danger to the member must be based upon facts and circumstances existing at the time which do not make the search unreasonable. Such things as the neighborhood, absence or presence of assistance, time of day, apparent character of the person, person's actions, crime for which person is suspect, etc. will be considered.

4. "Reasonable time" during which a person may be stopped and questioned should generally not extend beyond fifteen minutes without substantial justification for delay.

E. Members must keep in mind that a "stop and frisk" situation is not an "in custody" situation, and does not constitute an arrest. However, the person may be temporarily detained, even against his will, for a brief time, even though he need not answer questions. This can include returning to the near scene of the suspected crime or a survey of the surrounding area for evidence of the crime suspected.

In view of the fact that the "stop and frisk" does not constitute an arrest, members may not conduct a search of the person or his belongings merely for evidence of a crime, but by the same token, the "Miranda" warning is not required, even though the provisions of the fifth amendment do apply.

Mr. Harris
Here is a copy
you requested
Larry Fulton
File -
State Police

GRAND JURY SUPPLEMENTAL REPORT TO
THE SESSION COMMENCING MAY 18, 1970

Upon formal request and by virtue of information coming to the attention of this Grand Jury, an inquiry was made into the activities of the Alaska State Troopers. As a result of our investigation and the evidence presented to us, we find that the rumors concerning criminal activities of the State Troopers committed by either individuals or in concert, are vicious, irresponsible, and malicious attacks without merit or foundation of any kind. We have found in connection with this investigation that the case load of the investigators of our law enforcement agencies is appalling. That under the existing circumstances, the ratio of criminal acts to available law enforcement personnel is such as prohibits detection of the perpetrator, proper investigation, and punishment of offenders, encouraging criminal activities in the Third Judicial District of this State. Throughout the week we have heard many witnesses, and there were many people not heard who requested to be heard. Because of their number, a spokesman for the group was requested and did appear before the Grand Jury. Because of the nature of their request and the explanation of their spokesman as to the general content of their testimony, the Grand Jury determined that the subject thought to be related to the Grand Jury was outside the scope of its investigation.

The Grand Jury was honored by the appearances of the Honorable James M. Fitzgerald, Presiding Judge of the Superior Court, the Honorable Eben H. Lewis, the Honorable C. J. Occhipinti, the Honorable Ralph E. Moody, Judges of the Superior Court, and the Honorable Paul B. Jones, Presiding Judge of the District Court in and for the Third Judicial District, State of Alaska. We express our appreciation for their explanation concerning this

I sent the list of lawyers who were
not heard Thursday to Tom Brown

Grand Jury's supplemental report of May 1, 1970. In connection therewith, the Grand Jury compliments those judges and the court system in this judicial district for the application of philosophical ideals applied to sentencing. We believe, however, that those concepts adopted by the court are many years ahead of the physical facilities now available to make such sentencing practice practical and functional. We note the extreme case load of the parole and probation officers is such as to make their efforts and assistance in the rehabilitation processes practically ineffectual. The physical detention facilities are extremely inadequate and therefore do not lend themselves to the separation of those persons convicted of crime in any manner which would allow any effective rehabilitation practices to be effected during confinement. It is with unanimous consent that we urge the courts to adopt a more stringent sentencing practice looking to the protection of the public and giving effect to the constitutional guarantee of our citizenry that they indeed be secure in their persons, houses, papers, and effects.

We would further recommend a more substantial bail be required on persons charged with the commission of crime and more particularly on those who have demonstrated, by prior offenses, their danger to persons and property in the community and their unwillingness to comply with the laws of the community. We appreciate the difficult problems in the administration of justice and readily recognize that sentencing and bail is a matter of which the minds of reasonable men regularly differ, and that those persons charged with the most serious responsibility of sentencing their fellow man to incarceration for a term of years is not and has not been a matter taken

lightly by the judiciary of this judicial district. While we accord these judges our highest respect, we believe that the sentence and bail practice adopted by them should conform to the needs and demands of our community in these times. We have given serious consideration to the impediments to the administration of justice as well as administration of the courts by the statute allowing disqualification of judges. It is our belief that the preemption of judges, not being subject to question, is seriously abused. We conclude that the statute is invoked not for those purposes contemplated by the statute but rather to disqualify a judge whose sentencing practice differs from that believed to be in their clients best interest. We seriously urge the amendment of this statute to allow opposing counsel to challenge the good faith of the disqualification and require its use in conformance with the statutory purpose. The Grand Jury has found that the general public is not well informed as to the convictions of criminals or the punishment meted out by our courts for criminal acts. This, we believe, results in a lack of trust and loss of faith in law enforcement as well as the administration of justice. We strongly recommend that the news media adopt a reporting practice that will provide the public with a complete and accurate reflection of sentence and punishment by the court without selecting particular cases of interest. Such reporting practice will be an added contribution by the news media to public service which, we feel, will have a strong, deterrent effect on further crime.

DATED at Anchorage, Alaska, this 22nd day of May, 1970.

_____

GRAND JURY FORMAN

TAPS -

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
308 "G" STREET, SUITE 313
ANCHORAGE, ALASKA 9950
TELEPHONE 272-9431

WILLIAM H. JACOBS
EXECUTIVE DIRECTOR

PHILIP B. BYRNE
DEPUTY DIRECTOR
JOHN S. HEDLAND
LITIGATION SUPERVISOR

May 7, 1970

The Honorable G. Kent Edwards
Attorney General
Department of Law
Pouch "K"
Juneau, Alaska 99801

Dear Mr. Edwards:

On May 6, 1970, you spoke with me about the propriety of our submission to the Judiciary Committee of a memorandum giving our views as to the legality of state construction of the TAPS road. This memo was submitted at the request of the Judiciary Committee and fully disclosed the fact that we represented persons with partisan views on the matter. You suggested that this was improper because of pending litigation involving the same issues. Mr. Price of your office also contacted Mr. Regan in the same vein. So as to clear up any possible misunderstanding, I would like to refer you to the appropriate provisions in the Code of Professional Responsibility and Canons of Judiciary Ethics of the American Bar Association, effective January 1, 1970.

DR 7-107 (G) and (4) of the Code provides as follows:

> (G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to . . .
>
> > (4) [h]is opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

DR 7-107 (I) provides as follows:

> (I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or

from participating in the proceedings of legislative, administrative, or other investigative bodies.

Under the circumstances, I think you will agree that our actions were not calculated to prejudice the impartiality of the pending litigation, and are plainly proper under ethical standards.

Sincerely,

ALASKA LEGAL SERVICES CORPORATION

/s/ William H. Jacobs

William H. Jacobs
Executive Director

WHJ/dp

cc: Representative Barry Jackson ✓
Chairman
House Committee on the Judiciary
Pouch "V"
Juneau, Alaska 99801

Dickerson Regan, Esq.
Alaska Legal Services Corporation
Juneau, Alaska 99801

Vital Statistics

JOHNSTON JEFFRIES
ATTORNEY AT LAW
P. O. BOX ~~XXX~~ 2940
~~SOLDOTNA, ALASKA 99669~~
Kenai, ~~A~~laska 99611
TELEPHONE ~~XXXXXX~~ 283-7838

April 16, 1969

Mr. Peter LaBate
Anchorage Bar Association
731 I Street
Anchorage, Alaska

Re: Divorce Fees and Vital Statistics

Dear Pete:

Would you please give this letter to the proper Committee of your Association.

No doubt you, like other attorneys, have had to contend with Statute No. 18.50.280, which requires the plaintiff in a divorce case to furnish the court with a lot of confidential information on a blank form. Frankly, some of my clients feel they should not have to furnish this information because it is confidential and not absolutely necessary for the granting of a decree of divorce. I usually end up having to fill out the forms myself, and this takes a lot of time.

We still adhere to the $300.00 minimum for an uncontested divorce, which I feel is too low in view of having to furnish this additional paper work for the Bureau of Vital Statistics. I very frankly feel that we should not have to do free work for the Bureau of Vital Statistics and I think this is an imposition upon the lawyers as well as the clients.

I am, therefore, suggesting as an individual attorney that we increase our fees accordingly or that proper action be taken to repeal this law which I think imposes upon attorneys and may be very questionable from the standpoint of its constitutionality.

COPY

In other words, I question that there is any reasonable relationship between the exercising of this police power (if so it may be called) and the furnishing of this confidential information.

Very truly yours,

Johnston Jeffries

JJ/blk

cc: Mr. James E. Fisher
Fisher & Hornaday
Attorneys at Law
P. O. Box 397
Kenai, Alaska 99611

Chairman of the Judiciary Committee
Alaska State Legislature
Juneau, Alaska

NO.1

HB

JUDICIARY COMMITTEE REPORT

1-31-70 ad

ON

HOUSE CONCURRENT RESOLUTION NO. 1

The reasons and need for this resolution are set out in the "whereas" clauses. The committee amendment would add the words "for a full day's service" in the last line. This amendment is to suggest that the court's rule dealing with jurors' fees be flexible enough to allow for various situations but without creating an undue administrative burden for the courts. The maximum fee would be $35 per day. Some factors to consider in determining a person's fee are the amount of time spent as a member of a panel or in reporting to the court and the fact that such service for any portion of a day may make it impossible for the person to pursue his regular livelihood that day.

Barry W. Jackson, Chairman

1-31-70
(Judiciary)

A M E N D M E N T

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: HOUSE CONCURRENT RESOLUTION NO. 1

Page 1, Line 24: After the "$35" and before the period insert "for a full day's service".

5/22/70

FREE CONFERENCE COMMITTEE REPORT

ON

FCCS SCS CSHJR 11

The need for and the reasoning behind this resolution are set out at page 427 of the 1969 House Journal. In its amendment of Art. IV, Sec. 2 of the Alaska Constitution, the free conference committee substitute makes clear that a justice serving as chief justice may not succeed himself in that office although he may again serve as chief justice after one or more intervening terms. It is understood that when a "vacancy" occurs in the office of chief justice this is not a vacancy to be filled by the governor under Art. IV, Sec. 5, but simply a situation that requires the remaining justices to again select one of their number to serve as chief justice; the man selected begins a new three-year term and does not serve only the remaining portion of his predecessor's term. In this situation the governor will follow the normal procedure to appoint a new justice, leaving the selection of the chief justice to the members of the court.

Senator Terry Miller, Chairman

Rep. Barry W. Jackson, Chairman

Senator Robert H. Ziegler

Rep. Wendell P. Kay

Senator Edward A. Merdes

Rep. Tom Fink

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE
GEORGE F. BONEY, ASSOCIATE JUSTICE
ROGER G. CONNOR, ASSOCIATE JUSTICE

Supreme Court
State of Alaska
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

File
HJR 11

February 27, 1969

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Capitol Building
Juneau, Alaska 99801

Dear Chairman Jackson:

You have asked that I comment on House Joint Resolution No. 11 which proposes amendments to the Alaska Constitution making the office of Chairman of the Alaska Judicial Council elective among the members of the Council and rotating the office of chief justice among the justices annually.

In my opinion these amendments would not be in the public interest. The Alaska Court System is a unified court system patterned after that of New Jersey which was in turn created after the pattern developed by the American Bar Association to be the ideal court system for a state of the United States.

The main concept of the unified court system is that all of the courts of the state are tied together as an administrative unit under the supervision of the supreme court which is given rule-making power and headed by a permanent chief justice. The unified court system eliminates the traditional inefficient court pattern where each layer of courts from the justices of peace up through the district court judges, superior court judges, as well as the supreme court operates as an independent entity. In fact, each of the judges, being elected, is totally independent of any central administrative or budget control. The unified court system not only ties all of the courts together administratively, it places them under one budget and under one set of rules promulgated by the supreme court.

Before going further let me make it clear that objection is not based on a desire on my part to retain the office of Chief Justice or the chairmanship of the Alaska Judicial Council per-

manently. I will have reached retirement age by June of next year and it has for some time been my intention to retire at that time. This would be before the proposed constitutional amendment would have been voted on at the next general election in 1970, even if it were approved by this legislature.

My real concern is to see that the modern constitutional provisions that are a substantial part of the reason why the Alaska Court System has in a period of ten years become one of the most modern and advanced court systems in the United States are not destroyed.

First, consider the proposal that would remove the Chief Justice as permanent chairman of the Alaska Judicial Council and make the chairmanship elective among the members of the Council. The Council is composed of three members appointed by the Alaska Bar Association and three lay members appointed by the governor and approved by the legislature. The Chief Justice of the Supreme Court, who by the constitution is also made the head administrator of the court system, is the permanent chairman.

If the chairmanship of the Council is made elective there seems to be little doubt but that in most years the chairmanship would go to a lawyer member of the Council. With a membership of three out of seven, including the chairmanship, the Council would be weighted and oriented to the Bar. The objection to this is that the Judicial Council was intended to be judicially oriented. This can be best accomplished by having a judge as chairman. In the event a lay member was elected he would be considerably handicapped in attempting to discharge the duties of that constitutional office in view of his unfamiliarity with the administrative problems of the Alaska Court System, not to mention the other intr cate problems connected with the evaluation of a court system d recommending studies and changes to improve its efficiency. .th only one judge on the Council it is not likely that he woul. see much service as the elected chairman.

The constitutionally stated purpose of the Judicial Council is to sponsor studies designed to lead to the improvement of the administration of justice by the courts. The reason the constitution makes the permanent head administrator of the court system the permanent chairman of the Judicial Council is because he is the person best suited because of his intimate knowledge of the court system to advise the Council as to the needs of the courts.

My experience as chairman of the Alaska Judicial Council for the past ten years convinces me that the balance in the membership of the Council is too delicate. It has been my observation

that with respect to questions which affect the members of the Bar the three attorney members of the Council will generally vote as a block. This is understandable since the main sphere of their interest is the common welfare of the members of the association which appointed them. It has also been my observation that the three lay members are not committed to a point of view or school of thought and try to approach each problem with the objective intent of doing what is in the best public interest. The seventh member of the Council, the Chief Justice, under the theory of the constitutional article, is supposed to act as the swing vote. However, the fine balance of the Council is immediately upset if a lay member of the Council is absent from any given meeting, or, for that matter, if a law member is absent from any given meeting.

In my opinion the membership of the Alaska Judicial Council should be broadened along the lines of the membership of similar councils in other states. For example, the Judicial Council of California has 21 members. Fifteen are judges, four are lawyers and two are legislators. The Judicial Council of Washington has 17 members. Thirteen are judges and laymen and four are lawyers. The Judicial Conference of New York has 15 members, most of whom are judges. The Chief Justice is the permanent chairman in each state.

I think the Alaska Judicial Council should include three judges instead of one. Three legislators should be added and the lay membership increased to six. Since it is supposed to be a judicial council, there is every reason why, in addition to the Chief Justice, there should be a judicial member representing the superior and the district courts. In order to create and maintain a better understanding of the functions of the Council by the legislature, legislators should also serve on the Judicial Council as they do in most other states. I am proposing such expansion at this time.

The most important duty of the Alaska Judicial Council is the selection and nomination of candidates for judicial office to the governor. There is nothing technical about the selection of candidates for judicial office. The education and experience of every applicant is established by the known facts of his life. The applicant's integrity, character and reputation in the community, as well as his reputation as a practitioner, are matters that are well known to everyone in the community or can be determined with small effort. It is not necessary that the selection and nomination of judicial candidates be confined to a body which is entirely dominated by judges and lawyers.

The Missouri Plan of judicial selection has now been adopted by the states of New Jersey, Kansas, California, Iowa, Illinois, North Carolina, Colorado and Nebraska. Many other states are attempting to amend their constitutions to adopt this plan. Under the plan state bar associations have always, and understandably, been given representation on the nominating body. For example, in California thereare 4 lawyers of 21 members and in Washington 4 lawyers of 17 members. In no state has the Bar been given as many as 3 out of 7 seats, not to mention the chairmanship which is invariably retained in the Chief Justice. Alaska should make a change but it should be in a direction opposite from that proposed by House Joint Resolution No. 11.

With respect to rotating the office of Chief Justice, as has been mentioned, Alaska has adopted the unified plan for its court system. Under the present functioning of the judicial article the Alaska Judicial Council selects the nominees for the office of Chief Justice. Since he is to be the head administrator of the courts the Council is naturally charged with the responsibility of nominating only those candidates for judicial office who not only have judicial ability but also have administrative ability to the end that they could perform both important functions. Many candidates for judicial position on the Supreme Court with excellent qualifications to be a justice of that court are nevertheless not particularly qualified to be head administrator of the court system. In fact, many have no interest in any part of the function of the Supreme Court except the traditional duty of hearing and deciding cases and writing opinions expressing the views of the court.

To be concerned with the annual budget, with the problems connected with justifying the budget to the finance committees and the legislature, with the overall efficient administration of all the layers of the court system including keeping calendars current, requiring that all of the judges of the courts comply with all of the rules of administration in connection with their day to day operations is not a task that would appeal to every person who might otherwise be qualified to be a justice of the court. It was with this in mind that the American Bar Association recommended the concept of the permanent head administrator of the court system, who was to be the chief justice, who was to be a man selected for his dual abilities and on the basis that he desired to be the permanent head administrator of the court system.

The proposed constitutional amendment would make it mandatory that the office of Chief Justice be rotated among the five justices of the supreme court of Alaska annually. Under such a provision a justice of the court would have no choice but to be-

come Chief Justice for a period of one year when his turn came under the rotation plan. He may be interested in performing the administrative duties of the Chief Justice or he may not be. Upon assuming the duties of that office under the rotation system he would be required to spend a major part of his time for his first year in office learning all the details of administration with which he had not been concerned prior thereto. He would always be administering a budget which he had no part in preparing. It would not be possible for the judge to carry his regular judicial duties as well as spend the time required in order to familiarize himself with his new administrative duties before his term of office as Chief Justice would have expired. The next Chief Justice would then assume office under the same circumstances and would again be administering a budget with which he had absolutely no part in the preparation. No Chief Justice under these circumstances would be in a position to obtain a good perspective of the administrative problems of the Alaska Court System in time to effect any needed improvement, not to mention the planning of any overall improvement program.

Under a rotation plan there would be no continuity of policy and more important, there would be no continuity of responsibility. There would undoubtedly be a tendency by some to put off the tough administrative decisions since the term of office is short. The Administrative Director of Courts cannot make the tough decisions which affect judges and highly classified employees. The authority of the office of Chief Justice as well as his affirmative backing is necessary. The Chief Justice is made the head administrator by the constitution, not the Administrative Director. If the budget is administered in a given year to a deficit, it is the Chief Justice who is responsible to the legislature, not the Administrative Director. Furthermore, administrative directors come and go. Alaska has had four since statehood. All have resigned to accept better positions. It requires a minimum of one year for a new Administrative Director to become familiar enough with the system to assume the full responsibility of the office in every area of its responsibility.

While, as has been mentioned, many of the justices of the Supreme Court may have no particular interest in assuming the administrative duties of Chief Justice, nevertheless it is not likely that any justice would decline to assume those duties in view of the honor and prestige the position can reflect.

It has been said that the practice of rotating the office of chief justice has been quite successful in the state of Washington and in other states. The fact is that the state of

Washington does not have a unified court system. The supreme court of that state does not have supervisory control of all of the other courts of the state and does not have the constitutional rule-making power. That court does not budget for the entire court system and has no direct responsibility for example, for the efficient operation of the superior courts or the justice courts of that state. In short, the state of Washington does not have a unified court system although at least two members of that court have mentioned to me on occasion that it would be extremely desirable from their point of view if the state of Washington did have the unified court system.

The unified court system, with respect to administration has been adopted in whole or in part in the states of New Jersey, Kansas, California, Iowa, Illinois, North Carolina and New York. The office of chief justice is not rotated in any of these states. In fact, the office of chief justice is not rotated in 30 states. In 20 states the office is either elective by the voters, elective by the court, or rotated by court rule. In less than 5 states is rotation required by statute or constitution.

The chief justice is not, as is sometimes alleged, the administrative ruler of the court system. He can only act through rules of administration which are promulgated by the supreme court as a body.

It is my view that amending the Alaska Constitution to make the office of Chairman of the Judicial Council elective among the members of the Council and providing that the office of Chief Justice be rotated annually among the members of the Supreme Court would strike at the very heart of the concept upon which the unified court system is based.

Sincerely yours,

Buell A. Nesbett

Buell A. Nesbett
Chief Justice

BAN:eb

HJR 11

HJR 11

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE
GEORGE F. BONEY, ASSOCIATE JUSTICE
ROGER G. CONNOR, ASSOCIATE JUSTICE

Supreme Court
State of Alaska
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

February 25, 1969

The Honorable Jalmar M. Kerttula
Speaker of the House
Alaska House of Representatives
Capitol Building
Juneau, Alaska 99801

Dear Speaker Kerttula:

In a recent communication from me to the Chairman of the House Judiciary Committee expressing my views on the merits of pending House Joint Resolution No. 11, I pointed out in some detail, why, in my opinion, that resolution is not in the public interest. The resolution proposes that the office of Chief Justice of the Supreme Court be rotated annually among the justices of the Supreme Court; that the Chief Justice be removed as permanent chairman of the Alaska Judicial Council and that the chairman be elected annually by the members of the council.

Without repeating the detail contained in my letter to the chairman of the House Judiciary Committee as to why House Joint Resolution No. 11 should not be adopted, I will only reiterate that if the present proposed constitutional amendment is effected the chairmanship of the Alaska Judicial Council would, in most years, go to a law member of the Council. The objection to this is that the Judicial Council was intended to be judicially oriented. This can be best accomplished by having a judge as chairman. In the event a lay member was elected he would be considerably handicapped in attempting to discharge the duties of that constitutional office in view of his unfamiliarity with the administrative problems of the Alaska Court System, not to mention the other intricate problems connected with the evaluation of a court system and recommending studies and changes to improve its efficiency.

I have served as Chairman of the Alaska Judicial Council for approximately ten years. Based on this experience it is my opinion that the present membership of the Council is too finely balanced.

The constitution provides that the Council be composed of three attorney members appointed by the Alaska Bar Association; three non-attorney members appointed by the governor and confirmed by the legislature. The seventh member is the Chief Justice.

It has been my observation that with respect to questions which affect the members of the Bar the three attorney members of the Council will generally vote as a block. This is understandable since the main sphere of their interest is the common welfare of the members of the association which appointed them. It has also been my observation that the three lay members are not committed to a point of view or school of thought and try to approach each problem with the objective intent of doing what is in the best public interest. The seventh member of the Council, the Chief Justice, under the theory of the constitutional article, is supposed to act as the swing vote. However, the fine balance of the Council is immediately upset if a lay member of the Council is absent from any given meeting, or, for that matter, if a law member is absent from any given meeting.

In my opinion the membership of the Alaska Judicial Council should be broadened along the lines of the membership of similar councils in other states. For example, the Judicial Council of California has 21 members. Fifteen are judges, four are lawyers and two are legislators. The Judicial Council of Washington has 17 members. Thirteen are judges and laymen and four are lawyers. The Judicial Conference of New York has 15 members, most of whom are judges. The Chief Justice is the permanent chairman in each state.

The most important duty of the Alaska Judicial Council is the selection and nomination of candidates for judicial office to the governor. There is nothing technical about the selection of candidates for judicial office. The education and experience of every applicant is established by the known facts of his life. The applicant's integrity, character and reputation in the community, as well as his reputation as a practitioner, are matters that are well known to everyone in the community or can be determined with small effort. It is not necessary that the selection and nomination of judicial candidates be confined to a body which is entirely dominated by judges and lawyers.

It is my recommendation therefore, that the membership of the Alaska Judicial Council be broadened and that instead of three non-attorney members there be six non-attorney members and that there be included in the membership three members of the legislature who are not lawyers or retired judges and that the judicial membership be increased from one to three. This would create a Council of 15 members which is more in line with the type membership which exists in other states.

It is recommended that the following resolution be approved by this session of the legislature:

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Sec. 8 of Art. IV of the Constitution of the State of Alaska is amended to read:

Section 8. The judicial council shall consist of fifteen (SEVEN) members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Six (THREE) non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Three members of the legislature who are not lawyers or retired judges shall be selected for year terms by the legislature. One superior court judge and one district judge shall be appointed for six-year terms by the chief justice. Vacancies shall be filled for the unexpired term in like manner. The appointment of lay members shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the fifteenth (SEVENTH) member and chairman of the judicial council. No member of the judicial council, except the chief justice, the superior court judge, the district judge, and the members of the legislature, may hold any other office or position of profit under the United States or the state. The judicial council shall act by concurrence of eight or more members and according to rules which it adopts.

It had been my intention to propose the above amendment to the next Constitutional Convention. However, since House Joint Resolution No. 11 has come before this session of the legislature I have decided to act before the next Constitutional Convention.

Therefore, in the utmost sincerity, and believing it to be in the best interests of the State of Alaska, I ask that this resolution be introduced and approved by this session of the legislature.

Sincerely yours,

Buell A. Nesbett

Buell A. Nesbett
Chief Justice, Supreme Court
of Alaska

BAN:eb

FORM FG-74
(REV. 2-67)

HJR 15

MEMORANDUM

State of Alaska

DEPARTMENT OF FISH AND GAME

TO: Honorable Eugene Miller
House of Representatives
State Capitol, Juneau

FILE NO:

DATE : April 5, 1969

FROM: Wallace H. Noerenberg WHN
Deputy Commissioner of
Commercial Fisheries

SUBJECT: HJR ~~13~~ 15

In response to your request of yesterday for specific information on Continental Shelf problems, and Alaska's specific involvement, I regret that I have not had time to do a thorough research job. Documentation of the precise volume and value of all fisheries of the Alaskan Shelf areas has only recently been attempted.

I will briefly summarize the latest estimates of the key species which are found on Alaska's Coastal and Shelf areas: (Alaska has 65% or 550,000 square miles of the Nation's Shelf areas -- giving us a very special interest in obtaining exclusive use!)

1. Halibut. 1967 catch 58 million pounds; resource is presently thoroughly utilized by U. S., Canadian and Japanese fishermen; a drop in catch to less than 50 million pounds in 1968 reflects losses due to incidental catches by U. S. S. R., Japanese and South Korean trawlers on other fisheries.

2. Salmon. 263 million pounds caught in 1968; about 500 million pounds available if runs rehabilitated; presently all taken inside territorial waters by U. S. fishermen except for about 15 million pounds of Alaskan stocks intercepted by Japanese in Central and Northern Bering Sea and Aleutians. Massive movement of most of this resource into high seas zones, Shelf and beyond during ocean life means Alaska's principal fishery resource would be susceptible to destruction by foreign fleets if treaty arrangements failed.

3. Sablefish or black cod. Average present catch 1 million pounds per year in Alaska, Japanese presently catching many times this amount (12 thousand metric tons or 26 million pounds in 1968) off Alaska. This valuable resource estimated at 60 million pounds potential annual catch. Distributed all along Alaska's Shelf area and in places to great depths beyond.

4. Pacific Ocean perch. No Alaskan catch at present by Alaskans; 300 million pound catch by Japan in 1968; USSR catch not known; estimated annual yield of resource nearly 1 billion pounds if managed properly. Distributed at edge of Shelf from Ketchikan to tip of Aleutians.

5. Herring and other fish suitable for industrial use (meal production). Only a few million pounds of herring presently caught by Alaskans; annual production of all Alaskan areas might reach 1 billion pounds if fully utilized. Japan caught 23,000 metric tons in the Bering Sea alone in 1968. Other ground and flatfish, i.e., yellow fin sole, rock sole, turbot, flathead sole, are very abundant, especially in the Bering Sea. Estimated annual catch could reach 1.5 billion pounds; the codfish group adds another 500 million annual potential at least. Japan managed a catch of 1.4 billion pounds of Alaska pollock in the Bering Sea in 1968 -- mostly caught by fish sausage fleets just off the Shelf north of Unimak Island.

6. The various shellfish potentials are also impressive:

   a. King crab. 1966-68 U.S. catches have ranged from 80 to 167 million pounds; with Bering Sea stock added, sustained yield should be over 125 million pounds per year.

   b. Dungeness crab. 1966-68 U.S. catches in Alaska of 8-12.5 million pounds. New grounds off Peninsula are just being developed. Annual production may reach 25-30 million pounds.

   c. Tanner crab. About 3 million pounds taken in 1968 by Alaskans in first attempt. USSR and Japan caught over 30 million crab incidentally in eastern Bering Sea king crab tangle nets in 1968. Sustained yield for Alaska Shelfs estimated to be nearly 200 million pounds.

   d. Shrimp. Biggest potential of any shellfish -- e.g., about 400 million pounds annually. Present U.S. catch in Alaska 35-45 million pounds annually; Japan 29 million pounds in 1968; USSR probably more than Japan?

   e. Scallops. 1.8 million pounds of meats (equivalent of 20 million pounds of live scallops) landed in Alaska in 1968 -- was 15 percent of U.S. total production. Look for 10 million pounds in 1969 (fleet tripling, 1st full season). Potential yield not established but probably at least 15 million pounds of meats annually.

f) Clams. Health problems (potential poisoning) have temporarily stopped industry except for bait. Potential yield from several species is about 50 million pounds if means can be found to clear beaches (testing) for operations.

Gene, this hopefully gives you some examples to work with. The fisheries, if fully developed, would be worth many times the $219 million wholesale value of 1968. Extension of the contiguous fishing zone beyond 12 miles -- to at least the edge of the Continental Shelf -- would certainly assist U. S. development which at present is stymied not only by price and market problems (70% imports consumed by U. S. public) but by shear competition of foreign fleets for fishing space adjacent to our coasts. Many of the stocks mentioned -- i.e., Pacific Ocean perch, yellow fin flounder, Bering Sea halibut -- are in serious biological condition due to too much foreign fishing.

I also enclose copies of three Continental Shelf conventions developed in Geneva in 1958 and gradually being adopted by ratification by various nations.

Enclosures (4)

JUDICIARY COMMITTEE REPORT

ON

HOUSE JOINT RESOLUTION NO. 51

This resolution proposes to amend the Alaska Constitution so that no one can be deprived of his right to vote because he is unable to read or speak the English language. At the constitutional convention, the opinion which evidently prevailed was that "regardless of whether they are intelligent or informed, the very nature of the mechanics by which we set up our means of voting, which is by the written word, they must be able to read what that word is."

However, with today's transportation facilities and communications media, all Alaskans can be well informed as to the candidates, the issues, and the mechanics of voting, although the language may vary from one community to another. Communication need not be in English to be effective; justice decries such arrogance. And with today's understanding of the requirements of the United States Constitution, there is serious question as to the validity of our state provision which, on the basis of ability to read or speak English, deprives citizens of the right to vote even though that language is not the language of their community.

Barry W. Jackson, Chairman

HJR 51

TO JOHN HEDLAND February 13th, 1969

FR JIM SPILLANE

RE VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

PROPOSED AMENDMENT TO THE ALASKA CONSTITUTION

Replace Article V, paragraph 1, sentence 3 which reads:

"He shall be able to read or speak the English language as prescribed by law, unless prevented by physical disability." with

"Any person who speaks a language which is spoken in common in the community in which he was born, raised or lives shall not be required to read or speak the English language as a requirement to vote in any national, state, or local election."

Replace A.S. 15.05.010(5) which requires a voter be able to speak or read English, with

"Any person who speaks a language which is spoken in common in the community in which he was born, raised or lives shall not be required to read or speak the English language in order to vote in any national, state or local election."

Repeal A.S. 15.15.200, Sents. 3 & 4 which reads:

"If an election judge is doubtful as to the ability of the person to speak the English language, a satisfactory showing is made with the person briefly conversing with the election judge by the use of simple English words. If an election judge is doubtful as to whether there is a physical disability preventing the speaking or reading of the English language, a satisfactory showing is made by a written statement by a licensed physician that a person is so disabled."

February 13th, 1969

RE VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

In the alternative, change the constitution and statute to read

"No person born in the United States or its territories shall be required to read or speak English as a requirement to vote in any national, state or local election. ~~Other persons~~ (Those not born in U.S. territories) shall be able to speak the language which is spoken in common in the community in which they live."

The requirement that a voter be able to read or speak English is unconstitutional because it was intended as a means for determining who was an informed voter, but when applied to communities in which another language is spoken in common, it lacks any rational connection to that purpose and it causes these natives who satisfy that purpose to be discriminated against.

Requiring that all voters speak English goes beyond assuring that the voters are informed. It disqualifies natives that become informed through communication in another language.

The criteria for being informed is not whether you can speak English but whether you can speak the language that is commonly spoken around you.

The notion that information is only communicated in English is based on our own background of having everyone around us speak in English. We could communicate and thereby be informed, not because we could speak English but because we would speak the language everyone else was speaking. This helps to explain how a native could be informed even though he could not speak English. This is because he is in a different situation. For him to be informed, he must be able to communicate in the language which

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RE: VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

All criteria for measuring must relate to what they are measuring.

The rational between speaking English and being informed only applies to those people who cannot speak English and who are in English speaking communities. There is no reason for requiring a native speak English when he can become informed, and, thus, satisfy the purpose of the statute, by speaking the common native language of his community.

Without a rational connection between the requirement and the purpose, the requirement is invalid and unconstitutional if it denies someone his constitutional right.

The English requirement does not accomplish what it was intended to accomplish but does discriminate against informed voters, just the opposite of what was intended. The English requirement is an ineffective test of who is informed because information is not only communicated in English but in any language that is spoken in common in the community. Therefore the better test would be whether a voter can speak the language that is spoken where he lives.) The English requirement makes sense in a state where English is spoken in common throughout the state. But the rational connection between being informed and speaking English does not exist in a state like Alaska where there are whole communities in rural sections of the state which speak another language in common. This language is not only native to Alaska but is the language of the natives of this land.

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RE VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

When a requirement does not fulfill the purpose for which it was intended, it is susceptible to being used for purposes for which it was not intended. Because the terms of the requirement are broad, they leave a broad area of discretion in the election officer, and a broad area for abuse of that discretion. The problem is it is difficult to measure who is qualified to vote in a state where people become informed through different native languages. Any attempt to say who is informed falls either on its face as being too restrictive or, if the terms are broad enough, it falls for granting the election official too much discretion.

The only voting requirement which would have a rational connection to its purpose would be that a voter understand a language. This would be too difficult to apply without multilingual election officers in every village. Therefore, no speaking or reading requirement is better than one which cannot be applied and leans itself to discriminatory application. Our experience with the English requirement is that it is used to discriminate against people the election officer doesn't like.

Cases have held that where too much discretion is placed in the election officer's hands, the law is unconstitutional.

Louisiana's requirement that a voter be able to understand and interpret the Constitution was declared unconstitutional in Louisiana v. United States, 380 U.S. 145, 13 L. Ed 709 (1965), because it bore no relationship to a reasonable voting requirement as it was administered

and because it made the registrar the sole judge without setting standards for him to decide if a person was qualified to vote. The Court said the state constitution vest discretion in the registrars of voters to determine the qualifications of applicants for registration while imposing no definite and objective standards upon registrars of voters for the administration of the interpretation test. The Court found that Louisiana provides no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or recressed. 380 U.S. 152-153.

Mississippi required the voter to demonstrate his ability to interpret and understand the state constitution. The court in United States v. Mississippi, 380 U.S. 128 (1965) held that a statute, fair on its face, vested uncontrolled discretion in the county registrars in selecting the provisions to be interpreted and was therefore unconstitutional.

The Court in Davis v. Schnell, 93 L. Ed 1093, (195_) held that a statute that required a voter to be able to understand and explain the Constitution was unconstitutional because it vested too great a discretion in the registrar. The Court said the statute became a device in which the registrar could discriminate.

Katzenbach v. Morgan, 384 U.S. 641 (1966) held that the state must apply voting requirements in a non-discriminatory fashion. State of South Carolina v. Katzenbach, 383 US. 301 (1966) held that whenever a voting requirement which appears fair on its face is used in a discriminatory manner to disenfranchise potential voters, the

particular use of the voting requirement can no longer be constitutionally tolerated.

With United States v. Guest, 383 U.S. 745 (1966) holding that discrimination by an individual as well as by a state is prohibited by the Fourteenth Amendment, the two Katzenbach cases can be applied to discrimination by an individual.

The Katzenbach decisions did not have to resort to Constitutional law because the Voting Rights Act of 1965 (42 USC 1973b(e)(2)) covered the situations. However, the cases do show the Supreme Court is willing to consider discrimination in practice as well as discrimination on the face of a statute.

Besides cases that held literacy tests to be discriminatory in their application, Justices Douglas and Fortas have said that such English reading requirements are unconstitutional on their face. Cardona v. Power, 384 U.S. 672 (1966). The majority did not decide if such a requirement was a denial of equal protection, but remanded the case to the state court to decide. 384 U.S. 674.

The United States Constitution does not require a voter speak English. The only places literacy tests have been upheld are in states in which English is the only native language to that state. What may be a reasonable measurement of who a qualified voter is in one state may not be a reasonable measurement in another state.

Because the English speaking requirement does not measure what it was intended to measure, that is who is informed, it becomes an inadequate measurement of the use of the election officer's discretion. Without an adequate

standard to check the election officer's decisions of who is qualified to vote, the officer is left with an opportunity to apply his own standards and discriminate against whomever he wishes.

These then are the two reasons the Alaska requirement that all voters be able to read or speak English is a denial of equal protection. It does not measure who is an informed voter, nor is it an adequate standard on which to measure the election officer's decisions on who is informed to vote.

Because no reason exists for the classification of English-speaking people in villages which communicate in another native language in common, the classification of English-speaking people is discriminatory.

Last November, pre-registration of voters became law. Now for the first time we have an alternative method for determining who is an informed voter. The informed voter will have to know about the pre-registration requirement. This is an added reason why we do not need a second safeguard, such as the English requirement, to determine who is an informed voter, especially when this English requirement has the harmful side effect of disenfranchising informed native Alaskans who were here before Alaska ever became a state.

Exhibit A - map of native communities

February 13th, 1969

RE: VOTING REQUIREMENT OF READING OR SPEAKING ENGLISH

Other alternative wording include:

1. He shall be required to read or speak English or a language which is common to the community in which he lives (is from, or is born).
2. Or speak a language which is native to Alaska.

English Literacy Requirement for Voting in Alaska.

I. Present law.

Alaska Constitution Article 5, Section 1.

"Every citizen of the United States who is at least 19 years of age, meets the registration requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. He shall have been, immediately preceding the election, for one year a resident of Alaska and for 30 days a resident of the election district in which he seeks to vote. He shall be able to read or speak the English language as prescribed by law, unless prevented by physical disability. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions."

Alaska Statutes Section 15.15.200. Questioning A Voter of Doubtful Qualifications.

"An election judge may question any person of doubtful qualification attempting to vote and may require identification. Upon a satisfactory showing that the person is qualified to vote, the election judge shall allow the person to vote. If an election judge is doubtful as to the ability of a person to speak the English language, a satisfactory showing is made by the person briefly conversing with the election judge by the use of simple English words. If an election judge is doubtful as to whether there is a physical disability preventing the speaking or reading of the English language, a satisfactory showing is made by a written statement made by a licensed physician that the person is so disabled."

II. Proposed Changes.

Delete from Article 5, Section 1, Alaska Constitution sentence reading:

"He shall be able to read or speak the English language as prescribed by law, unless prevented by physical disability."

Delete from A.S. 15.15.200 sentence beginning:

"If an election judge is doubtful as to the ability of a person to speak the English language, a satisfactory showing is

made by the person briefly conversing with the election judge by the use of simple English words. If an election judge is doubtful as to whether there is a physical disability preventing the speaking or reading of the English language, a satisfactory showing is made by a written statement made by a licensed physician that the person is so disabled."

HJR-63

Arguments for bi-cameralism:

The original reasons for dividing the legislature into two houses, basdd upon class or religion, has completely disappeared. For a time, one house represented the people, and the other represented geographical areas. With the "one man, one vote" decision of the Supreme Court, this reason has evaporated. Both houses now represent the same people.

It is sometimes argued that the two houses are a part of our system of "checks and balances". This is an incorrect application of the term. "Checks and balances" is properly used to apply to the three branches of the government, the legislative, the executive, and the judicial. It does not apply within one branch. It is sometimes argued that x bi-cameralism protects against error by providing a double check on legislation. In actual practice, however, legislation often receives casual condideration in one house because "if there is anything wrong the other house will catch it." One conscientious, careful, deliberate consideration should be enough, as it is in our city councils and borough assemblies.

Arguments for Unicameralism:

The primary job of the legislature is to legislate. Obviously a one house system avoids unnecessary duplication of effort, reduces expenses, and promotes legislative efficiency.

A one house legislative system wquarely fixes responsibliiy, and avoids passing the buck. It enables the voters to accurately and fairly assess the conduct of the representatives, and to reward the good legislators and punish the bad.

In order to resolve differences between the two houses of a bi-cameral legislature, it has been necessary to devise the conference committee system. The conference committee is undemocratic and eases the work of the lobbyist. Of course with a one house legislature the conference committee disappears.

In this century the role of the state legislature with respect to the executive has been stedily diminished. The "strong executive" concept, and the calibre of work performed by the average state legislature, have combined to reduce many legislative bodies to the proverbial "rubberstamp" position. With a strong one house legislature, this trend may be reversed.

Details of the resolution:

CSHJR 63 would vest the legislative power of the state in a single house of 61 members, elected for four year terms, one half each two years.

To ensure deliberation, no final vote on a bill could be taken until the 6th dax legislative day after introduction, and after appearing on a public calendar for at least one day. 47 xxxxxx or more members could shorten the period of time.

With the passage of this resolution and its approval by the people in the general election of 1970, Alaska would be the first state to join Mebraska in a unicameral legislature. England, and eitht of the provinces of Canda, Finland, and the Phillipppine Islands, have had a single house legislature.

Report on H.J.R. 63:

This resolution seeks to amend the state constitution to abolish our bicameral system and establish a legislature consisting of a single house.

The bicameral legislature is a product of history and ingrained custom. The historical reason, distinction of class, has long since disappeared, leaving the 2nd house ~~hanging~~ perched on our political system like a wart on the nose of progress.

Historical Background:

Early legislative bodies were assemblies called by the monarch to ratify his orders, usually to collect more taxes. As these bodies became representative and assumed some genuine legislative functions, they gradually turned into groups representing various social interests. Thus an early four-part Parliament consisted of four houses, representing the clergy, nobility, cities, and people. England evolved the House of Commons and the House of Lords. Such was the historical background at the time of the American revolution.

HJR 79
SJR 7

THOMAS F. EAGLETON
MISSOURI

COMMITTEES:
LABOR AND PUBLIC WELFARE
PUBLIC WORKS
DISTRICT OF COLUMBIA
APPROPRIATIONS COMMITTEE,
EX OFFICIO MEMBER

re HJR 79

United States Senate

WASHINGTON, D.C. 20510

March 17, 1970

To Chris Johnson

Honorable Jalmar M. Kertula
Alaska State House of Representatives
P. O. Box 2199
Juneau, Alaska 99801

Subject: Electoral Reform --
The Federal System Plan

Dear Mr. Speaker:

As you know, the subject of electoral reform has received a considerable amount of attention in the 91st Congress. The House has passed a direct election resolution, and Senator Bayh's S. J. Res.1, which would establish essentially the same system, is now before the Senate Judiciary Committee.

While it is difficult to deny the essential rightness of the one-man, one-vote concept embodied in the direct election plan, it has seemed to many in the Senate that this principle requires a more stable institutional framework than a nationwide direct election would provide.

We have therefore introduced a modified direct election formula. Our "Federal System Plan" would work, very briefly, as follows:

1. A President would be elected if he (1) won a plurality of the national vote and (2) won either pluralities in more than 50% of the States and D. C., or pluralities in states with 50% of the voters in the election.

2. If no candidate qualified, the election would go to an Electoral College where the states would be represented as they are today, and each candidate would automatically receive the Electoral votes of the States he won.

3. In the unlikely event that no candidate received a majority of the Electoral votes, the Electoral votes of states which went for third-party candidates would be divided between the two leading national candidates in proportion to their share of the popular votes in those states.

We see several advantages in the Federal System Plan:

.It would give far greater weight to the one-man, one-vote principle than does our present system.

.It would help legitimate presidents by compelling them to show widespread support throughout the country, rather than just winning big in a few areas.

.It would avoid the uncertainties and horsetrading of a runoff.

.It would discourage the formation of ideological splinter parties, and encourage continued compromise within a broadly-based two-party system.

We are enclosing a portion of the Congressional Record containing the text of our amendment and a more complete explanation of it.

Since the Judiciary Committee does not at this time plan to hold further hearings before it reports a bill to the floor, we would doubly appreciate having your comments on our proposal so that we may share them with our colleagues before this matter reaches the floor.

Sincerely,

Robert J. Dole
United States Senator

Thomas F. Eagleton
United States Senator

TFE/acc
Enclosures

United States of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 91st CONGRESS, SECOND SESSION

Vol. 116 WASHINGTON, THURSDAY, MARCH 5, 1970 No. 33

Senate

SENATE JOINT RESOLUTION 181—INTRODUCTION OF A JOINT PRESIDENTIAL ELECTION PROCESS REFORM

Mr. EAGLETON. Mr. President, one of the most urgent challenges before the 91st Congress is to reform the presidential election process.

During the 1968 election, doubts that had accumulated over the years about the adequacy of the electoral college were transformed into very real fears—fears that a President might be elected who had not received a plurality of votes, fears of a deal for votes within the electoral college, fears of an election thrown into the House of Representatives.

Of all the legislative work before us now, none is of greater importance than finding a new and better electoral process which will measure up to the intent of our democratic Constitution and at the same time give new stability and durability to our governmental institutions.

Under the leadership of the distinguished junior Senator from Indiana, (Mr. BAYH), this Congress has responded to the demonstrated need and growing demand for electoral reform. On September 18, 1969, the House of Representatives took the historic step of approving a constitutional amendment to abolish the electoral college and replace it with the direct election of the President. Hearings have been held before a subcommittee of the Senate Judiciary Committee on that amendment and the Judiciary Committee will soon begin its own consideration of the best method of changing the presidential election process.

Of the four major alternatives that have been advanced in the Congress—the district plan, the proportional plan, the automatic electoral college plan, and the direct election plan—the latter has seemed to me to be preferable. It is the only option which respects the principle of popular sovereignty and adheres to the general proposition that the President of the people should be the choice of those people. Therefore I have cosponsored and supported Senate Joint Resolution 1—the direct-election plan introduced by Senator BAYH in this body and enacted in substance by the House of Representatives.

In recent months, however, a number of troubling problems have been raised about possible consequences of the proposed direct election plan—questions that I believe cannot be ignored.

First, under the direct election plan it would be possible that a candidate could be elected President who lacked a broad base of support throughout the country. For example, in a multiparty race, the victorious candidate could receive 40.1 percent of the popular vote without being the popular choice of the voters in any State. Or a candidate in a two-way race could lose the contest in most of the 50 States and the District of Columbia by a close margin and yet be elected President by piling up a substantial margin in only one or two States.

Would either of these results be any more acceptable to the American public than the election, under our present system, of a candidate who had won in the electoral college but had lost the popular vote? I doubt it. In my judgment, a President of the United States who hopes to govern effectively must be able to demonstrate not only that he has a plurality in the popular vote, but also that he has widespread support throughout the entire country.

Second, the runoff which is a necessary ingredient of the direct-election plan would, I believe, lead inevitably to the proliferation of political parties. These parties would not necessarily be national or even regional parties. They would probably be ideological parties formed around a particular issue or based on a "personality cult" centered on a particular individual. And if these parties were formed it does not require much imagination to foresee the kind of bargaining for endorsements, withdrawals and votes that could occur, both prior to a close election and between an election and a runoff.

Why should people not "vote their conscience" in a first election when the system will probably permit them a later opportunity to vote for a so-called compromise choice? Why should blacks, or farmers, or doctors, or conservationists, or feminists bother to compromise within the two-party context when their most direct route to influence would appear to be through running candidates who can toss presidential elections into a runoff situation?

I, for one, am concerned about these possibilities. In my judgment, the well-being of this country would suffer if its presidential elections were marked by a multitude of splinter parties, each appealing for votes on particular questions. Our political system would become factionalized, with numerous groups taking uncompromising stands and rejecting the realistic compromises which are so essential in a democratic society. At a time when the tendencies toward political fragmentation and ideological division are all too evident in this country, we must view with the gravest concern any change in our electoral processes that may aid and accelerate these tendencies.

Third, the direct-election plan raises awesome problems relating to vote recounts and the possibility that fraud

committed in isolated precincts throughout the United States might taint an entire national election.

Let us remember that there are over 150,000 polling places in the United States. In 1960, the miscounting of a single vote in less than half of these polling places could have altered the entire election outcome. In 1968, a change of less than two votes in every polling place would have changed the outcome. Are we prepared to deal with an electoral system in which local decisions as to the counting of certain incorrectly marked ballots may be the crucial factor in determining whether a particular candidate has attained 39.9 percent of the popular vote or 40.1 percent of the popular vote? And are we ready to adopt a presidential election system in which the actual outcome may not be known for weeks or even months, even in the absence of a runoff?

Today, on behalf of myself and the Senator from Kansas (Mr. DOLE), I wish to introduce an alternative proposal in the form of a new joint resolution.

Our proposal, which we call the "federal system plan," has been developed by a Washington attorney, Mr. Myron Curzan, in conjunction with my staff. It has been reviewed and approved by several constitutional law scholars who view it as a substantial improvement over the proposed direct-election plan.

The federal system plan embodies the essential rightness of the one-man, one-vote principle, but modifies the direct-election plan in an effort to eliminate some of its dangers.

It provides that the popular vote winner will be declared President so long as there is also a showing that his victory is based upon widespread national support.

It eliminates the need for a runoff, thereby removing the paralyzing effect which third parties may have under the present system and could have under the proposed direct election plan.

It insures that the results of a presidential election will be known as soon as the count is completed, with no period of uncertainty and no opportunity for the kind of horse-trading that is possible either under the present system or under the direct election plan.

The federal system plan would operate as follows:

First. A candidate who had won a plurality of the total popular vote would be declared President if he had also won either a plurality in States—including the District of Columbia—which contain more than 50 percent of all voters participating in the election, or a plurality in more than 50 percent of the States—including the District of Columbia. We call this second initial qualification the "50 percent rule."

Second. If the popular vote winner failed to satisfy one or the other of the 50 percent rule requirements, then the President would be selected on the basis of electoral votes. The presidential candidate with the most popular votes in a particular State would be automatically awarded the State's electoral vote, which would equal the number of Senators and Representatives to which that State is entitled in the Congress. The District of Columbia would be treated as if it had three congressional votes. A candidate with a majority of electoral votes would win.

Third. If no candidate received a majority of the electoral votes, the federal system plan would then eliminate all but the two national candidates with the most electoral votes and redistribute the electoral votes of the others. The electoral votes won by third party candidates would be awarded on a State-by-State basis to the two national candidates in proportion to their relative share of the popular vote in the respective States. The candidate receiving a majority of the electoral votes following this redistribution would be elected President.

In this proposal, we have attempted better to mesh two of the concepts upon which our governmental structure is based—the concepts of popular sovereignty and federalism.

In my judgment, this proposal adds an essential ingredient lacking in a simple nationwide popular victory—a legitimating factor. It provides the means for insuring that any popular vote winner will have the backing of the people of both large and small States and of States distributed throughout the country. No man would be able to attain the Presidency by merely winning an overwhelming popular vote in one or two States, or in a particular region. Rather, he would have to show that his support is sufficiently broad to give him a true mandate to be the Chief Executive of the entire Nation.

Aside from providing this legitimating factor, the federal system plan should have a number of other salutary effects:

It should, I believe, reinforce and strengthen the two-party system. For under its provisions, the objective of each of the major parties would not only be to win the national popular vote, but also to win in each State. In addition, the power of third parties to affect the outcome of an election, and hence their appeal to the electorate, would be substantially reduced.

The significance of swing States would be retained and minority groups within those States would continue to have power to affect the result of a presidential race within the two-party framework.

The federal system plan would permit recount and fraud problems to be contained and dealt with on the State level.

The possibility of qualifying by winning States with 50 percent of the votes would be a new and powerful incentive to get out the vote.

Mr. President, I am aware that the proposal I am introducing today on behalf of myself and the Senator from Kansas (Mr. DOLE) comes late in the debate on electoral reform. I am also aware that it is a complex proposal and one that must be subjected to close scrutiny. I believe, however, that it is essential that it be given the most serious consideration. The step we are about to take in electoral reform is a momentous one, and it should not be taken without first examining all of the alternatives.

I ask unanimous consent that the joint resolution embodying the federal system plan be printed in the RECORD at this point. I also ask unanimous consent that a detailed memorandum explaining both the federal system plan and the problems with which it is meant to deal be printed as a supplement to my remarks and the resolution. I send to the desk the joint resolution and ask that it be appropriately referred.

The PRESIDING OFFICER. The joint resolution will be received and appropriately referred; and, without objection, the joint resolution and memorandum will be printed in the RECORD.

The joint resolution (S.J. Res. 181) proposing an amendment to the Constitution to provide for the direct popular election of the President and Vice President of the United States and for the determination of the result of such election introduced by Mr. EAGLETON, for himself and Mr. DOLE, was received, read twice by its title, referred to the Committee the Judiciary, and ordered to be printed in RECORD, as follows:

The material submitted by Mr. EAGLETON is as follows:

S.J. RES. 181

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. The people of the several States and the District constituting the seat of Government of the United States shall vote directly for the President and Vice President. In such elections, each voter shall cast a single vote for two persons who shall have consented to the joining of their names on the ballot for the offices of President and Vice President. No persons shall consent to their name being joined with that of more than one other person.

"SEC. 2. The voters in each State shall have the qualifications requisite for the voters of Members of the Congress from that State, except that any State may adopt less restrictive residence requirements for voting for President and Vice President than for Members of Congress and Congress may adopt uniform residence and age requirements for voting in such elections. The Congress shall prescribe the qualifications for voters from the District of Columbia.

"SEC. 3. The persons joined as candidates for President and Vice President having the greatest number of votes in the election shall be declared elected President and Vice President if such persons have also obtained the greatest number of votes among the candidates running for President and Vice President in States containing more than 50 per centum of the total number of voters in such election or in more than 50 per centum of the States.

"If the pair of perrons joined as candidates for President and Vice President who received the greatest number of votes throughout the United States failed to obtain the greatest number of votes in States containing more than 50 per centum of the total number of voters in the election or in more than 50 per centum of the States, then the votes received by each pair of persons joined as candidates for President and Vice President shall be separated according to the States in which they were received and in each such State, the pair of persons joined as candidates for President and Vice Presi-

dent who received the greatest number of votes therein shall be automatically credited with a number of electoral votes which shall be equal to the whole number of Senators and Representatives to which such State is entitled in the Congress, and if any pair of candidates for President and Vice President shall have received a majority of the electoral votes of all of the States they shall be declared elected President and Vice President.

"If no pair of candidates for President and Vice President shall have received a majority of these electoral votes, then all but the two pairs of such candidates receiving the greatest numbers of electoral votes of all of the States shall be eliminated, and the electoral votes which any of these eliminated pairs of candidates received in any State shall be credited to the two leading pairs of candidates in proportion to the numbers of people who voted for these two pairs of candidates in such State. In making this computation, fractional numbers less than one one-thousandth shall be disregarded. The pair of candidates receiving the greatest number of electoral votes after such crediting of electoral votes shall be declared elected President and Vice President.

"SEC. 4. The days for such elections shall be determined by Congress and shall be the same throughout the United States. The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations. The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed by the Congress for such elections in the District of Columbia.

"SEC. 5. The Congress shall prescribe by law the time, place, and manner in which the results of such elections shall be ascertained and declared.

"SEC. 6. If, at the time fixed for declaring the results of such elections, the presidential candidate who would have been entitled to election as President shall have died, the vice-presidential candidate entitled to election as Vice President shall be declared elected President.

"The Congress may by law provide for the case of the death or withdrawal of any candidate or candidates for President and Vice President, for the case of the death of both the President-elect and Vice-President-elect, and for the case of a tie.

"SEC. 7. The Congress shall have power to enforce this article by appropriate legislation.

"SEC. 8. The District of Columbia shall be treated as a State for purposes of this Amendment.

"SEC. 9. This article shall take effect on the 1st day of May following its ratification."

ELECTORAL COLLEGE REFORM—A CASE FOR THE FEDERAL SYSTEM PLAN

As Congress considers reforming the electoral process through which this country selects its Presidents, both the simplicity and the apparent fairness of the "one man, one vote" principle constitute strong arguments in favor of a direct election system. Certainly, these considerations appealed to the House of Representatives when it adopted a resolution calling for the direct election of the President on September 18, 1969.

DIRECT ELECTION PITFALLS

There are, however, at least seven serious pitfalls in the direct election (winner must have at least 40% of the total votes cast) system which the House adopted and which is now before the Senate Judiciary Committee. These pitfalls are as follows:

1. A Presidential Candidate could be elected even though he failed to receive a plurality of the popular votes in most—or conceivably in any—of the states. In 1968, Hubert Humphrey was the popular choice of only 13 states plus the District of Columbia. Had he simply carried New York State by half the popular vote margin by which Lyndon Johnson carried it in 1964 and lost the seven states which he won by relatively close margins, he would have been elected President by approximately 250,000 votes. He would, however, have been the preferred choice of the voters of just six out of 50 states and the District of Columbia. In a federal system such as ours, it would certainly seem no more acceptable that a man should be President when he is the popular vote winner but the choice of only a handful of states than when he is the winner in the electoral college but the loser in the popular vote. A Chief Executive who hopes to govern effectively in the United States must be able to show that he is not simply the choice of the people, but rather that he is also the choice of the people of a number of states.

SPECIAL INTEREST PARTIES

2. An electoral system involving possible runoffs inevitably invites a proliferation of special interest, sectional, and charismatic figure parties.

Professor Maurice Duverger has written about the United States: "The absence of a second ballot . . . in the Presidential election constitutes in fact one of the historical reasons for the emergence and the maintenance of the two-party system." Under the proposed direct election system, many racial, ethnic, and interest groups would feel that they had lost all power in the election process since their ability to influence the outcome in key swing states with large blocs of electoral votes would no longer be relevant. Their only hope for regaining leverage under a direct election system would be through the creation of new Presidential parties. These parties would then solicit votes to promote their parochial causes—the National Gun Party, the National Dairy Farmers' Protective Party, the National Students' Party, the Black Welfare Rights Party—with considerable certainty that they would have an opportunity to trade off their votes in either a runoff election or immediately before the initial election when surveys indicated the closeness of the vote between the two major party candidates or the uncertainty that either of these candidates would obtain 40% of the popular vote. To quote Richard Scammon of the Elections Research Center:

"If you really want to stop proliferating candidates under any system you give people one vote. This is really why we have two parties operating in this country in November. You only get one shot at voting. Once you allow people a second shot under any conditions you give the opportunity, for example, for Mr. Wallace to in effect say to his electorate, 'Now, on the first ballot vote your convictions. Stand up for what you really believe in. You will get another chance on the second ballot if you have to. Besides, we might make second place.' . . . [The direct election with a runoff] is why in some parts of the South in primaries you get the first ballot loaded up with candidates, sometimes enormous numbers . . . because everybody knows, though, they are going to have a second shot at this." (Hearings on Electoral College Reform Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. at 341.)

A multiplicity of Presidential parties taking ideological positions—often irresponsibly—could only produce the tragic effect of polarizing this country on a wide variety of issues, and leaving our polity without the underlying harmony which makes it governable.

Moreover, a direct election system built upon a 40% plurality requirement could lead to the creation of new parties centered on specific individuals, which in turn might have the effect of ensuring the election of comparatively unpopular candidates. For example, let us assume that in a direct election system, Party A were to select a candidate whose ideological position on a number of issues made it appear to many in Party B that Party A's candidate could never hope to win more than about 45% of the popular vote. Let us also assume that Party B were to contain two charismatic figures and that one of them, Mr. X, were certain that the other, Mr. Y, had the Party B nomination sewed up. What if Mr. X were then to calculate that it made sense for him to run as well since he was certain that he could:

Take 25% of the total popular vote which formerly was committed to Mr. Y,

Take 7% of the voters committed to the candidate from Party A, and thereby

Deny both candidates the requisite 40% and ensure a runoff in which he would be the second candidate and the probable winner.

However, should Mr. X prove wrong in one calculation—that he can take 7% of the vote away from Party A's candidate—this nation might well find itself faced with the unfortunate prospect of living with one man's blunder. In short, it might awake to find that it had elected an unpopular and ideologically unacceptable President from Party A—a President who has been given his "mandate" under the direct election system with some 40.1% of the popular vote.

RECOUNTS

3. In close elections, like those of 1960 and 1968, the recount problem could be staggering, as would the temptation to commit fraud. Under a simple direct election system, it would not be possible or relevant—as it is today to isolate the states in which vote-count problems had arisen.

There are over 150,000 polling places in the United States. It should be remembered that under a direct election system, two miscounted votes in each polling place in the United States would have shifted the 1968 election from Richard Nixon to Hubert Humphrey. The miscount of only one vote in half of this country's polling places in 1960 could have changed the result in that Presidential election.

One need have little imagination to conjure up visions of elections in which the country anxiously awaits word of who its new President is to be while recounters puzzle over discarded or poorly marked ballots in rural and urban counties throughout the entire United States.

Finally, it must be added that recount problems will be further complicated in the proposed direct election system by questions which may arise if the issue is whether a particular candidate has received 40.001% of the popular vote or 39.999% of the popular vote.

COST

4. The cost of Presidential elections would soar once a number of parties had become involved and runoff elections had become part of the system. Each of our major parties is already sagging under the burden of financing Presidential campaigns. What new problems relating to campaign fund suppliers and their influence on substantive decisions will be raised if parties are forced to obtain double or triple the present sums to finance two-tiered Presidential races?

FEDERAL SYSTEM WEAKENED

5. A direct election system would drastically weaken the federal system. Candidates would ignore small and medium-sized two-party states and focus either on the most populous areas (comprised of a few fairly homogenous states) or on one-party states, where substantial popular margins could be obtained.

Under a direct election system, the objective of each candidate will be to concentrate on those States and regions where he can maximize his popular vote and minimize

the popular vote of his opponents. Under the present electoral college system, it is crucial for a candidate to win in medium-sized and small two-party States. For today, a hard-fought victory in such States as Indiana, Iowa, Maryland, South Dakota, and Washington together is of greater value than a victory in California. Under a direct election system, this will no longer be the case. If a candidate can carry California or New York by a wide enough margin, he can offset losses in the four named, as well perhaps five or ten other, States.

Moreover, the medium-sized and smaller two-party States will also get shunted aside in a Presidential campaign in favor of one-party States. For why should a candidate strive to win a close election in a State with two million voters when he can realize a greater advantage by obtaining a huge margin in a one-party State with only one million voters? And—if one wishes to carry this logic further—why should a candidate even make a great effort in an extremely close race in one of the large States, when he knows that he can easily make up any differential in a small one-party State?

MINORITIES

6. A direct election system would curtail the power—which exists within a two-party electoral college context—of urban-oriented racial, ethnic and other minority groups, since these groups would have reduced ability to affect the outcome of a Presidential election. This reduction in power for various urban voting blocs would occur for the same reason as the reduction in the power of small, medium, or even large two-party states.

The best interests of this country do not lie in removing the power which these urban groups have in Presidential races. To ask them to rely on the Congress for that representation is unfair. Even with the gains which have resulted from reapportionment decisions, the Congress remains most responsive to rural and suburban constituencies.

The passage of a direct system might well ensure that all of these voting blocs—in an effort to be heard and to obtain influence in the selection of the President—would take the only logical step left open to them, namely, the creation of Presidential parties, which can barter votes for power in subsequent runoff election.

ADOPTION UNLIKELY

7. A direct election system stands little chance of being adopted by three-fourths of the states since small two-party states which come to understand the power they are relinquishing under a simple direct election system will reject it. Such a rejection will have the unfortunate effect of legitimating the present electoral college system, and will set back the cause of an electoral reform for many years.

The District Plan and the Proportional Plan, which have been suggested at various times in our history, do not offer any clear advantages over the present electoral college system. In fact, both of these plans provide even less assurance than does the present electoral college that the popular vote winner throughout the country will become President. Retention of the present electoral college system—but with an automatic electoral vote to avoid faithless electors and a revised contingency election system in which the President is selected by a vote of the individual members of Congress—has the built-in disadvantage that it provides no procedures to deal with the possibility of a divergence between the popular vote winner and the electoral college winner.

Is there a way to avoid the pitfalls involved in all of these electoral college reform proposals, while at the same time fashioning an electoral system which maintains basic adherence to the popular sovereignty principle of one man, one vote?

THE FEDERAL SYSTEM PLAN

The Federal System Plan, outlined below, may offer a viable alternative. This system—which builds upon the simple direct election formula as enacted by the House of Representatives and proposed in the Senate by Senator Bayh—would provide that any candidate who was the popular vote victor under circumstances which demonstrated that this victory was based upon support throughout the nation would be elected President. Moreover, it would provide a method for effectively eliminating the paralyzing effect which third parties may have under both the present electoral college and under the direct election system.

The Federal System Plan would work as follows:

1. A President would be elected if he (1) won a plurality of the national vote *and* (2) won *either* pluralities in more than 50% of the states and D.C., *or* pluralities in states with 50% of the voters in the election. The latter would be called the "50% rule."

2. If no candidate qualified, the election would go to an Electoral College where the states would be represented as they are today, and each candidate would automatically receive the electoral votes of the states he won. A candidate who won a majority of the electoral votes would be elected President.

3. In the unlikely event that no candidate received a majority of the electoral votes, the electoral votes of states which went for third-party candidates would be divided between the two leading national candidates in proportion to their share of the votes in those states.

THE "50 PERCENT RULE"

The "50% rule" is designed to reconcile the principle of federalism with the principle of popular sovereignty. It would award the Presidency to the national popular vote winner of he had been able to demonstrate that he had a broad base of support across the country. The "50% rule" would provide a better indication of whether a popular vote winner had the national support needed to govern this country effectively than would the 40% minimum popular vote formula contained in the present direct election proposal.

ELECTORAL VOTES

If no candidate qualified under the 50 percent rule and an election went to the Electoral College, the Presidential candidate with the most popular votes in a particular state would be automatically assigned that state's Congressional vote quota (hereinafter referred to as "electoral votes")—namely, the number of Senators and Representatives it is entitled to under the Constitution. The District of Columbia would have three electoral votes. If one candidate obtained a majority of the electoral votes assigned to all of the states, he shall be declared President.

The real key to eliminating third party fragmentation in a Presidential election system is to persuade the voter that he would be wasting his power to choose the next President if he voted for the candidate of a narrowly based party. The Federal System Plan achieves this result by providing that if the popular vote winner has not satisfied the "50% rule," then the President will be selected on the basis of the vote outcome broken down on a state-by-state basis.

REDISTRIBUTION OF ELECTORAL VOTES

If no candidate has an initial majority of the electoral votes—which might occur because of the presence of third party candidates—the Federal System Plan would then eliminate all but two leading candidates from consideration and redistribute the electoral votes won by any other candidates in particular states. Redistribution of the electoral votes won by "third party" candidates would be done proportionally, based on the relative number of popular votes obtained by the two leading national candidates in the particular state being redistributed.

In a redistribution situation, proportionalisation of electoral votes is fairer than the winner-take-all method which will be used when counting electoral votes initially.

It is expected that this redistribution technique will rarely be used since virtually all "third parties" which do not have a broad national base—such as the Bull Moose Party had in 1912—will be discouraged from entering candidates. People will not vote for such candidates when they realize that by doing so, they are throwing away their votes and leaving the choice of the President to other residents in their state who vote for the candidates of the two major parties.

BENEFITS OF PRESERVING THE FEDERAL ELEMENT

By melding the direct election plan—as enacted by the House of Representatives—with a concept that takes this nation's federal design into account, it is possible to reduce the difficulties which are inherent in a simple one man, one vote proposal.

Under this hybrid Presidential election system, the objective of each of the major parties will not only be to win in the national popular vote, but also to win in each state.

Candidates can be persuaded to pay attention to the needs of all states—including small ones.

The power of swing states and the minority groups who live in them can be retained and the prospect of flourishing splinter parties negated.

The problem of voter fraud can be localized, the complexities relating to vote recounts can be more easily avoided.

Finally, by building into the electoral process a factor which is dependent upon the total number of people voting in each state in that election, we would create (1) an incentive to encourage voting and (2) a mechanism which takes account of population shifts not reflected in the current electoral college system which is based upon a census that may be ten years old on the date of an election.

HYPOTHETICAL EXAMPLES OF PRESIDENTIAL ELECTIONS UNDER THE FEDERAL SYSTEM PLAN

1. Candidates A and B are the only two significant candidates running for the Presidency. Candidates A receives 50 million popular votes; candidate B receives 40.5 million popular votes. Candidate A has been the popular vote victor in 29 states (including the District of Columbia). Under the Federal System Plan, he would have satisfied the 50% rule and would be declared President.

2. Candidates A and B are the only two significant candidates running for the Presidency. Candidate A receives 50 million popular votes; candidates B receives 40.5 million popular votes. Candidate A has been the popular vote victor in only 22 states. However these states contained approximately 55% of the people voting in that election. Under the Federal System Plan candidate A would have satisfied the 50% rule and would be declared President.

3. Candidates A and B are the only two significant candidates running for the Presidency. Candidate A receives 50 million popular votes; candidates B receives 49.5 million popular votes. Candidates A is the victor in 28 states containing approximately 48% of the people voting in that election. Under the Federal System Plan candidate A would not have satisfied the 50% rule which would automatically make him President on the basis of his popular vote victory. The contingency plan would then come into effect and the popular votes won by candidates A and B would be translated into popular vote victories in each of the 50 States plus the District of Columbia. Under the hypothetical given it is quite probable that the 28 states won by candidate A would provide him with

enough electoral votes to become President. On the other hand if candidate A had obtained a popular vote victory while being the popular vote choice in only 5 or 6 states, the electoral vote contingency plan would make candidate B the President since he would have demonstrated a much broader base of national support.

4. Candidates A, B, C, and D run for the Presidency. Candidate A obtains 40 million votes; candidate B obtains 39.5 million votes; candidate C obtains 10.8 million votes; and candidate D obtains 10 million popular votes. Candidate A has been the popular vote victor in 22 states containing 42% of the people voting in that election and possessing 240 electoral votes. Candidate B has been the victor in 18 states containing 40% of the people voting in the election and possessing 200 electoral votes. Candidates C and D have each been the victor in 8 states (for a total of 10) containing about 18% of the people voting in that election and possessing a total of 98 electoral votes.

Under the Federal System Plan, candidate A would not have satisfied the 50% rule which, with his popular vote victory, would have automatically entitled him to the Presidency. Under the contingency electoral vote system, neither candidate A nor candidate B would have a majority in the initial count. The Federal System Plan would therefore redistribute the electoral votes won by candidates C and D.

The redistribution would be done in proportion to the popular votes won by candidates A and B in the particular state whose electoral votes were being redistributed. If candidates A and B both had a national appeal, the redistribution would probably favor the candidate who was ahead under the initial electoral vote count. Thus in the above example, it would be quite probable that under the redistribution formula, candidate A would wind up with something like 288.5 electoral votes and candidate B would wind up with something like 249.5 electoral votes. Candidate A would then be declared President. (Note should be taken, however, that this last hypothetical is extremely implausible under the Federal System Plan. The presence of a redistribution formula in the Presidential election system will work to discourage regional or ideological parties from putting up candidates like the above candidates C and D since voters will probably not waste their ballots voting for them.)

HISTORICAL EXAMPLES

The Federal System Plan would not have changed the outcome of any past American election. It would however have averted some awkward contingencies which could easily have occurred. The following cases help illustrate the stabilising effect the Federal System Plan would have had in these situations, as well as some of the weaknesses of the direct election plan.

1888—HARRISON VERSUS CLEVELAND

Cleveland had a popular vote margin of 98,000, but Harrison was elected by an electoral vote of 233 to 168. Cleveland's popular majority came almost entirely from the "solid South."

Under a direct election system, Cleveland's overwhelming victory among Alabama's 176,000 voters would have offset the popular preference of 2.9 million voters in New York, Ohio and Illinois.

Under the Federal System Plan, despite his popular victory, would have failed to qualify under the 50% rule: he won only 18 out of 88 States, and won state with only about 30% of the voters. The election would have gone to the Electoral College where Harrison's broader geographical base of support would have made him President.

1916—WILSON-HUGHES

Wilson won by a popular majority of 580,000. He won in 31 states—mostly small ones—with 277 electoral votes, while Hughes' electoral vote total was 254. A change only of 1,904 votes would have given California's 13 electoral votes—and the election—to Hughes. Wilson would have lost, although his popular margin would still have been over half a million and he would still have been the preferred candidate in well over half the states.

Under the Federal System Plan, Wilson would easily have qualified with his popular plurality and with victories in over 50% of the states (although he did not win states with 50% of the voters). Wilson could have lost as many as six states, still had a popular plurality, and have been the victor under the Federal System Plan.

1948—TRUMAN-DEWEY-THURMOND

Truman won by over 2 million popular votes. The electoral count was Truman 303, Dewey 189, Thurmond 39.

A shift of 24,294 votes from Truman to Dewey in California, Illinois, and Ohio could have shifted 78 electoral votes, giving Dewey an electoral vote majority by one vote. Under the Federal System Plan, Truman would still have won with a popular plurality and victory in 28 states—over 50%.

If Dewey had won California and Illinois, but not Ohio, neither he nor Truman would have had an electoral majority, and under the present system the election would have been thrown into the House. Under the Federal System Plan, the election would not even have gone as far as the Electoral College, because Truman would still have won a popular plurality and over 50% of the states.

1960—KENNEDY-NIXON-BYRD

Under the present system, this election would have been thrown into the House if Kennedy, the popular vote winner, had lost three very close states: Illinois (margin: 8,000 votes, electoral votes: 27), South Carolina (margin: 9,600, electoral votes: 8), and Hawaii (margin: 115 votes, electoral votes: 3).

Under the Federal System Plan, Kennedy would have been elected without the risk of horsetrading and without delay because he would still (a) have been the popular vote winner, and he would still (b) have won states with a majority of the voters.

Mr. EAGLETON. Mr. President, I yield to the Senator from Kansas for his presentation on the same subject.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

THE FEDERAL SYSTEM PLAN

Mr. DOLE. Mr. President, the 1968 election did more to stimulate concern for our system of choosing the President than any other election in recent history. A very real possibility existed that Congress would determine the two highest officeholders in the land.

There is agreement among most Americans of all political and ideological persuasions that the present electoral system should be changed. Considerable study, effort and thought have gone into a number of proposals which have been presented to Congress. I withheld support of any of the several electoral reform proposals because, in my opinion, each appeared to contain a number of significant deficiencies. To change from one set of deficiencies to another would seem an exercise in futility, as well as perilous tinkering with our constitutional processes. I am especially pleased, therefore, to cosponsor the federal system plan—which I believe has considerable merit.

In essence, the federal system plan introduces the direct-election concept to presidential politics, while assuring continued, decisive importance of broad and widespread national support for candidates.

THE FEDERAL SYSTEM PLAN COMPARED

The junior Senator from Missouri has described the federal system plan and its advantages over the direct-election plan and the present electoral college.

Briefly, I will compare the federal system plan with three other major electoral reform proposals.

THE DISTRICT PLAN

Under the district plan, popular vote results would tend to be reflected more accurately in electoral vote results than they are under the present system. The all-or-nothing system of assigning a State's electoral vote would be eliminated.

The major weakness of the district plan is its inherent tendency to encourage jerrymandering. The problems and temptations for political manipulation would surely not be diminished over present difficulties with congressional districts, and the situation could become even more involved.

Under the federal system plan, voting would take place on a statewide basis, free from the administrative complications of districting the results.

Also, the district plan could have a significant adverse effect on the establishment and maintenance of viable two-party State political systems. The stimulus for a minority party to turn out the vote would be severely diminished when it saw no chance to carry any district within a State. Under the federal system plan, however, a minority party would know its votes would not be frozen within the State but would have significance on a national scale.

THE PROPORTIONAL PLAN

The proportional plan would eliminate the unit rule for distribution of a State's electoral votes and would prevent an electoral victory for a minority popular vote-getter by tying the electoral vote directly to the popular vote.

The proportional plan would not strngthen the two-party system. Instead of discouraging the minority party, it would encourage formation of many minority parties tending to represent narrow and perhaps extreme viewpoints because minority parties would be assured electoral vote reflection of their strength. At the same time, it would discourage the major parties from attempting to broaden their appeal and assimilate diverse groups and factions. The federal system plan, on the other hand, by diminishing the potential impact of any third or multiparty development, would encourage a vigorous and broadened two-party system.

By entirely abolishing presidential electors and by permitting States to have separate ballots, the proportional plan would make a practical, as well as a theoretical, possibility of electing a President and Vice President from different parties. The federal system plan requires presidential and vice-presidential candidates to be paired, thus avoiding a split election, and it retains an electoral system as a backup procedure with a favorable influence on the two-party system.

THE AUTOMATIC ELECTORAL PLAN

The automatic electoral plan has the appeal of simplicity and close adherence to established practices, but it locks in the all-or-nothing rule which has evolved over the years, whereby each State's entire electoral vote is allocated to the winner of the popular vote. No real improvements are offered in the electoral influence of minority voters, possibilities for the election of narrow-basis Presidents or enhancement of State significance in the electoral process. The federal system plan, as the junior Senator from Missouri has pointed out, affords substantial advances in each of these important areas.

QUESTIONS ABOUT THE FEDERAL SYSTEM PLAN

I think it might be well to anticipate some of the questions which may be raised concerning the federal system plan. I have discussed this proposal with some of my colleagues and others familiar with the different electoral reform proposals. A number of questions have been raised, and I am certain others would be in the event hearings were held.

Let me state briefly a few of them:

First. If the electoral machinery is used—as it would be under certain circumstances in the federal system plan—would the unit or bloc system of casting votes be continued, and would this within a State nullify votes cast for an unsuccessful candidate?

Second. The question has been raised that this plan would make possible the election of a President who may have fewer popular votes than the unsuccessful candidate.

Third. One area of concern is that the federal system plan would bring into effect two relatively untried and untested features embodied in the backup system, and an untried and untested feature in the division of electoral votes of minority candidates, whereas the runoff election has been tested and has worked successfully in various States.

Fourth. There is a general feeling that the plan is too complicated and subject to uncertainty and might be productive of unexpected results.

I believe that these questions can be answered satisfactorily and the changes could be made in the proposal being introduced today by the junior Senator from Missouri and myself. It is important, however, to look carefully at the advantages of this proposal:

First. It adheres in principle to the direct election plan, but eliminates the runoff feature of the direct election plan.

Second. It removes the possibility—like the direct election plan—of contingent elections by either House of Congress.

Third. It does minimize the election of the President and Vice President by the electoral vote process.

Fourth. This plan preserves as a backup procedure the electoral vote system, which some persons feel should be continued as a matter of tradition and because it is conducive to a two-party system.

Fifth. This plan does look to ultimate assertion of influence of the vote for minor candidates within the framework of the two-party system, rather than as support for independent or splinter parties.

OPERATION OF THE FEDERAL SYSTEM PLAN

The junior Senator from Missouri has ably described our proposal, but again, let me emphasize its relative simplicity—and its operation:

First. The popular vote winner would be declared elected if—

He has carried States which contain more than one-half of persons who voted in the election; or

He has carried more than one-half of the States.

Second. If neither of the above is satisfied, the winner would be decided by electoral vote.

Third. If there is no electoral winner, the electoral votes of minor candidates would be distributed among two front-runners by giving the electoral votes carried by minor candidates to the two front-runners in each particular State in proportion to their popular vote totals.

CONCLUSION

Mr. President, interest in electoral reform is high and support for change is broad based. The federal system plan does strengthen the one-man, one-vote principle, and at the same time avoids the serious pitfalls in the direct election proposal. A summary of these pitfalls will be made a part of the record, but it should be emphasized that under the direct election plan, a presidential candidate could be elected even though he failed to receive a plurality of the popular votes in most—or conceivably in any—of the States. Those of us from small and middle-size States are naturally concerned about any system which would permit States with large populations to have a distinct advantage. We recognize that numbers are important and that the one-man, one-vote principle should be adhered to, but we also strongly feel that anyone elected to the Presidency of the United States should have broad-based support throughout the country. This important consideration is embodied within the federal system plan.

Let me add that all the electoral reform proposals submitted have certain advantages and certain disadvantages. The district and proportional plans do not assure that the popular vote winner would necessarily become President.

The issue of electoral reform is so vital that I would hope the Judiciary Subcommittee on Constitutional Amendments will consent to immediate hearings on the federal system plan proposal. In addition to introducing the federal system plan resolution today, the junior Senator from Missouri and I are contacting a number of experts in this field across the country, asking for their comments on this proposal.

Let me conclude by saying that any proposal approved by the House and the Senate must be ratified by 38 States. In my opinion, the federal system plan would be acceptable to large States because of the direct election features and to small States because it requires broad-based support by virtue of the "50-percent rule."

Again, I commend the junior Senator from Missouri for his leadership in this most important area and also acknowledge the efforts of Mr. Myron Curzan, a Washington attorney who has spent countless hours in the formulation of this proposal.

Mr. EAGLETON. I thank the Senator for his cogent summation of the issues involved and his able presentation of the Federal system plan.

Mr. BAYH. Mr. President, will the Senator yield?

Mr. EAGLETON. I yield.

Mr. BAYH. I would like to compliment my colleagues from Missouri and Kansas for adding to the debate which has been going on for some time over the importance of revising the present electoral college system. I appreciate the comments of the Senator from Missouri in his initial remarks as to my interest in this particular area.

As chairman of the Subcommittee on Constitutional Amendments, as the Senator has pointed out, it has been the responsibility of the Senator from Indiana to delve into that particular matter. I think a great deal of heart can be taken from the interest expressed by the Senator from Missouri and the Senator from Kansas.

First, it demonstrates that two of our distinguished colleagues are concerned about the need to do something about the present system.

Second, their proposal embodies as a fundamental principle the direct popular vote. I know that time has been allotted here this morning to others of our colleagues to speak on other subjects. So it is not my intention to continue this discussion at any great length.

I personally will do all I can to study this matter. As the Senator from Missouri knows and the Senator from Kansas knows, this matter has been debated at length. We have held three different sets of hearings. The matter is now before the full Judiciary Committee, and an agreement has already been arrived at to vote no later than April 24.

Whether it will be possible to hold hearings or not, I do not know, but I personally pledge that we will study in great detail any informaton that either of our distinguished colleagues brings to our attention.

The only matter of significant concern to me about the direct popular vote plan embodied in Senate Joint Resolution 1, of which I am the principal author, and which has some 46 cosponsors, is what happens in the case of a runoff. History has shown us that only once in almost 200 years has a President of the United States been elected when he had less than 40 percent of the votes, the figure which would require a runoff in our system. This was in 1860, when Abraham Lincoln was elected. At that time he had 39.76 percent of the votes, so he was just below the 40 percent figure, and he was not on the ballot in 10 States. Nevertheless, I think we have to examine this possibility.

Whether the shortcomings, as described by my two distinguished colleagues, of a runoff in the direct popular election in which no candidate gets 40 percent of the votes are greater than the shortcomings of any of the other

plans. I am not yet willing to concede. But I am certainly willingly to study it, because I recognize it as one of the principal difficulties.

I have said from the beginning that I have not held out the direct popular vote plan as a panacea, without any problems at all, because as long as man devises a plan a few unscrupulous souls are going to try to take advantage of it, no matter what it is. What appeals to me about the Senate Joint Resolution 1 approach, which won a 339 to 70 vote in the House, is that it guarantees that the winner is going to have the most votes, and it will protect us at all stages of the process.

I want to thank both of my colleagues for their interest and for presenting these new ideas. We are willing to study them. I know they are both legislative craftsmen and recognize the need to search for the art of the possible. So in working together here in this body and trying to consult our colleagues in the other body, and the experts to which the Senator from Kansas alluded, I hope we can get the best possible plan, and that we will be able to make real progress. But we all know, from having gone through the constitutional amendment process before, that when we are looking for and need 67 colleagues to vote with us and ratification by three-fourths of the State legislatures, it is going to be impossible to get a plan that absolutely pleases everyone.

I know, from the record of our two distinguished colleagues, that they are going to do their very best to help us try to perfect the system and try to reconcile the system as best we can.

I salute them for adding to the debate on this matter.

Mr. EAGLETON. Mr. President, I thank the Senator from Indiana for his kind remarks, and wish to say at this time that were it not for the efforts of the Senator from Indiana, we would not have the opportunity of considering this problem at all. It has been through his diligence and unswerving efforts over the past 5 years or more that at long last it appears that we will have a chance to have this issue before us. He is to be commended most highly for his efforts in this regard. I take his comments most seriously because he is truly an expert on this subject matter.

One brief comment on the Senator's remarks. He points out that in only one election, the first Lincoln election, did the winner receive less than 40 percent of the votes. Historically, that is true. But the winner has come precariously close to that 40-percent mark in other elections. It was true in the first Wilson election of 1912. The 1968 election of President Nixon was rather close to the 40-percent margin.

What concerns me very much about the direct election plan is that it will further encourage the proliferation of third, fourth, fifth, sixth, and seventh parties. Past history on elections which came close to 40 percent may, therefore, not be a perfect guide insofar as the future conduct of national elections is concerned. If my worries are realized, and if we do see an endless number of political parties involved in elections under the direct system plan in 1976 or 1980, or 1984, it may well be that it would be uncommon in the future for any of the national candidates to achieve as much as 40 percent of the vote.

This may be a needless worry. In any event, it is what has caused me, among other things, serious concern about the direct election plan, of which I am one of the cosponsors, as I pointed out in my earlier remarks.

Mr. DOLE. Mr. President, will the Senator yield?

Mr. EAGLETON. I yield.

Mr. DOLE. Let me endorse the statement just made by the junior Senator from Missouri as to the great effort made by the Senator from Indiana. We all recognize the temper of the people and the need for some change; and hopefully the proposal offered this morning will shed some light—perhaps not—after it is carefully explored. I share the hope of the Senator from Indiana that it can be reviewed carefully, perhaps, with the Senator from Indiana, other committee and staff members.

We recognize that the time frame is narrow. We recognize the importance of moving as rapidly as possible with electoral reform. Hopefully, we can discuss the matter with the Senator from Indiana to determine if there may be a possibility of having brief hearings. But it is my hope and the hope of the junior Senator from Missouri to at least come forth with some principle embodying the efforts of the Senator from Indiana, that will alleviate some of the fears those in small and middle-sized States have, because the federal system plan, as we see it, without, of course, exploring all the possible pitfalls, does provide in principle for direct elections, and does also insure that the candidate elected would have broad-based support.

As far as I am concerned, this is its main strength. If it falls in some other area, we should know that, and will know it if we have hearings.

Mr. BAYH. Mr. President, will the Senator from Missouri yield?

Mr. EAGLETON. I yield.

Mr. BAYH. I appreciate the comments of my friend from Kansas. The reason I think it is imperative that we look into this plan is that it is very easy to examine ideas that look good on the surface, and find out that they really do not work quite as well in practice. I say this without being at all critical of the plan submitted here today by our two distinguished colleagues, because I have not had a chance to study its implications fully. All I know is that in my 4- or 5-year study of this problem, I started out convinced that the direct popular vote would not work, and my main concern was the destruction by proliferation of parties of the two-party system.

By incorporating the 40-percent runoff provision, I felt we had sufficiently dealt with some of the nuisance splinter parties who get in just to achieve a bargaining position, and yet left the door open for a bona fide, valid third party. We have to recognize, for example, that the party of which our distinguished colleague from Kansas is a member started out as a minority party. Now they have the Presidency.

I do not think we want to say that from today on, for the next thousand years, we are going to preclude any splinter party from being able openly to capture the imagination of the American people.

But even when I became convinced that direct election was the best solution, as I just pointed out to my friend from Missouri——

The PRESIDING OFFICER. The time of the Senator from Missouri has expired.

Mr. EAGLETON. Mr. President, I ask unanimous consent that I be allowed an additional 5 minutes, to continue and complete this exchange.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BAYH. I shall hurry on. I just wanted to point out, as a sign of good faith, in talking to our distinguished friend from North Carolina, I thought perhaps he might be prevailed upon to join in the popular vote effort if we had the runoff provision with a joint session of the House and the Senate. I felt that perhaps we could thus maintain the system that our distinguished colleague from North Carolina is sincerely concerned about. But finally I came to the conclusion that the three criteria I mentioned before; namely, that the winner have the most votes, that everybody's vote count the same, and that everyobdy vote directly, were of overwhelming importance. That is why I came out in favor of Senate Joint Resolution 1.

Mr. ALLEN. Mr. President, will the Senator yield?

Mr. EAGLETON. I yield.

Mr. ALLEN. I congratulate the Senator from Missouri (Mr. EAGLETON) and the Senator from Kansas (Mr. DOLE) for the work and the thinking that has gone into this plan that they are suggesting. I must say, however, that I am not yet persuaded that any plan for modifying or abolishing the electoral college is in the public interest; and I have yet to be convinced of that.

The comment of the Senator from Missouri that his plan might well stop the proliferation of parties was interesting. But I wonder if that is correct. I see in the plan of the Senator from Missouri and the Senator from Kansas the possibility of more proliferation of parties, possibly, than under any other plan; and it would seem to me that if one candidate should literally sweep from 15 to 20 States of the Union, he would comply with the provisions of this proposal; namely, that he receive a plurality of the votes in the entire country and a plurality in States having 50 percent of the vote in the election, without getting votes in other States.

So it would seem to me that there is serious danger of a real minority President being chosen—not one who failed to receive a plurality of the vote, but one who failed to get a majority of the overall vote—and having a plurality far below the 40 percent provided in the direct plan.

I would suggest, however, that the Senators who proposed this plan stick

by the plan, and if it is not agreed upon by the Senate and the House of Representatives, that they cast their votes against any modification of the electoral college. I believe that would be in the public interest.

I thank the Senator for yielding.

Mr. EAGLETON. I thank my distinguished friend and colleague from Alabama. I think his remarks underscore all the more the necessity that this plan, as well as the other plans that have previously been submitted by other Senators, be given thorough and detailed examination by the Committee on the Judiciary.

As was pointed out by the Senator from Kansas (Mr. DOLE) and in my remarks, we do not know at this time whether this is utopian, whether this is the answer, whether this is the panacea. We think it has much to commend it, and we want the experts who compromise the Committee on the Judiciary—and I note in the Chamber, among the members of that committee, the Senator from North Carolina (Mr. ERVIN)—to consider this plan among others.

Mr. President, I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from South Carolina is recognized for a period not to exceed 1 hour.

File
Re Direct election

GUEST PRIVILEGE



THEODORE H. WHITE

Direct elections: an invitation to national chaos

Last September, in a triumph of noble purpose over common sense, the House passed and has sent to the Senate a proposal to abolish the Federal System.

It is not called that, of course. Put forth as an amendment to the Constitution, the new scheme offers a supposedly better way of electing Presidents. Advanced with the delusive rhetoric of *vox populi, vox Dei*, it not only wipes out the obsolete Electoral College but abolishes the sovereign states as voting units. In the name of The People, it proposes that a giant plebiscite pour all 70,000,000 American votes into a single pool whose winner—whether by 5,000 or 5,000,000—is hailed as National Chief.

American elections are a naked transaction in power—a cruel, brawling yearlong adventure swept by profound passion and prejudice. Quite naturally, therefore, Constitution and tradition have tried to limit the sweep of passions, packaging the raw votes within each state, weighting each state's electoral vote proportionately to population, letting each make its own rules and police its own polls.

The new theory holds that an instantaneous direct cascade of votes offers citizens a more responsible choice of leadership—and it is only when one tests high-minded theory against reality that it becomes nightmare.

Since the essence of the proposal is a change in the way votes are counted, the first test must be a hard look at vote-counting as it actually operates. Over most of the United States votes are cast and counted honestly. No one anymore can steal an election that is not close to begin with, and in the past generation vote fraud has diminished dramatically.

Still, anyone who trusts the precise count in Gary, Ind.; Cook County, Ill.; Duval County, Texas; Suffolk County, Mass.; or in half a dozen border and Southern states is out of touch with political reality. Under the present electoral system, however, crooks in such areas are limited to toying with the electoral vote of one state only; and then only when margins are exceptionally tight. Even then, when the dial riggers, ballot stuffers, late counters and recounters are stimulated to play election-night poker with the results, their art is balanced by crooks of the other party playing the same game.

John F. Kennedy won in 1960 by the tissue-thin margin of 118,550—less than 1/5 of one percent of the national total—in an election stained with outright fraud in at least three states. No one challenged his victory, however, because the big national decision had been made by electoral votes of honest-count states, sealed off from contamination by fraud elsewhere—and because scandal could as well be charged to Republicans as to Democrats. But if, henceforth, all the raw votes from Hawaii to Maine are funneled into one vast pool, and popular results are as close as 1960 and 1968, the pressure to cheat or call recounts must penetrate everywhere—for any vote stolen anywhere in the Union pressures politicians thousands of miles away to balance or protest it. Twice in the past decade, the new proposal would have brought America to chaos.

▸ To enforce honest vote-counting in all the nation's 170,000 precincts, national policing becomes necessary. So, too, do uniform federal laws on voter qualifications. New laws, for example, will have to forbid any state from increasing its share of the total by enfranchising youngsters of 18 (as Kentucky and Georgia do now) while most others limit voting to those over 21. Residence requirements, too, must be made uniform in all states. The centralization required breaches all American tradition.

▸ Reality forces candidates today to plan campaigns on many levels, choosing groups and regions to which they must appeal, importantly educating themselves on local issues in states they seek to carry.

But if states are abolished as voting units, TV becomes absolutely dominant. Campaign strategy changes from delicately assembling a winning coalition of states and becomes a media effort to capture the largest share of the national "vote market." Instead of courting regional party leaders by compromise, candidates will rely on media masters. Issues will be shaped in national TV studios, and the heaviest swat will go to the candidate who raises the most money to buy the best time and most "creative" TV talent.

▸ The most ominous domestic reality today is race confrontation. Black votes count today because blacks vote chiefly in big-city states where they make the margin of difference. No candidate seeking New York's 43 electoral votes, Pennsylvania's 29, Illinois' 26 can avoid courting the black vote that may swing those states. If states are abolished as voting units, the chief political leverage of Negroes is also abolished. Whenever a race issue has been settled by plebiscite—from California's Proposition 14 (on Open Housing) in 1964 to New York's Police Review Board in 1966—the plebiscite vote has put the blacks down. Yet a paradox of the new rhetoric is that Southern conservatives, who have most to gain by the new proposal, oppose it, while Northern liberals, who have most to lose, support it because it is hallowed in the name of The People.

What is wrong in the old system is not state-by-state voting. What is wrong is the anachronistic Electoral College and the mischief anonymous "electors" can perpetrate in the wake of a close election. Even more dangerous is the provision that lets the House, if no candidate has an electoral majority, choose the President by the undemocratic unit rule—one state, one vote. These dangers can be eliminated simply by an amendment which abolishes the Electoral College but retains the electoral vote by each state and which, next, provides that in an election where there is no electoral majority, senators and congressmen, individually voting in joint session and hearing the voices of the people in their districts, will elect a President.

What is right about the old system is the sense of identity it gives Americans. As they march to the polls, Bay Staters should feel Massachusetts is speaking, Hoosiers should feel Indiana is speaking; blacks and other minorities should feel their votes count; so, too, should Southerners from Tidewater to the Gulf. The Federal System has worked superbly for almost two centuries. It can and should be speedily improved. But to reduce Americans to faceless digits on an enormous tote board, in a plebiscite swept by demagoguery, manipulated by TV, at the mercy of crooked counters—this is an absurdity for which goodwill and noble theory are no justification.

Mr. White has closely followed the campaigns of the last four Presidents. His most recent book is *The Making of the President, 1968.*

HB 9

REPORT TO JUDICIARY COMMITTE ON HOUSE BILL #9

The only change in present statute is that persons convicted of first degree murder are not eligible for bail.

A real problem has developed in Anchorage where recently convicted murderers have been released on bail. The press has made much to do about it. In at least one instance a convicted murderer out on bail was reconfined at the complaint of his wife for threats on her life.

Representative Miller states that the present Alaska Statute is identical to the federal statute. It can be claimed that the present bill may be unconstitutional or declared so in the future. That is, if an appeal is taken or if sentence has not been pronounced, the decision is not final.

Therefore confinement without bail of someone who still may be adjudged innocent or of someone who has yet not been sentenced to confinement may be unconstitutional even though he has been convicted of a crime.

Representative Miller has informed me that because of a federal statute requiring the death penalty for first degree murder convictions, this bill if enacted into law would not be unconstitutional.

Because of this looming constitutional question it is my recommendation that the committe have Art research the constitutional aspects.

Certainly we have a duty to protect the public from the presence of a convicted murderer and absent a constitutional prohibition, I recommend a "do pass."

HB12

JUDICIARY COMMITTEE REPORT

HOUSE BILL NO. 12

This bill is designed to permit Alaskans to purchase firearms to the full extent permitted by P.L. 90-618. Specifically, the bill enables Alaskans to take advantage of the exception contained in Sec. 922(b) (3) (A) and purchase a rifle or shotgun in a "contiguous" state.

Are there any states "contiguous" to Alaska? An opinion of the Legislative Affairs Agency, dated January 9, 1969, indicates that "contiguous" may mean "near, though not in contact". Construed this way, the bill has meaning and may be useful to some Alaskans.

Barry Jackson, Chairman

HB 12

HB 12

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

January 9, 1969

Representative Jess Harris
1016 - 11th Avenue
Anchorage, Alaska 99501

Dear Representative Harris:

In preparing your bill for pre-file permitting Alaskans to buy guns in other states within the framework of the new Gun Control Bill of 1968 (draft copy attached), I have checked Public Law 90-618 closely and find that the exceptions for nonresidents under sec. 922(b)(B) and (C) do not prohibit an Alaskan from securing a firearm for the purposes set out. In sec. 922(B) a resident Alaskan in another state may "borrow or rent a firearm for temporary use for lawful sporting purposes," and sec. 922(C) does not preclude a resident Alaskan in another state from

> "purchasing a rifle or shotgun when he is participating in any organized rifle or shotgun match or contest, or is engaged in hunting in a state other than his state of residence and whose rifle or shotgun has been lost or stolen or has become inoperative in such other state ... if such person presents to such dealer a sworn statement (i) that his rifle or shotgun was lost or stolen or became inoperative while participating in such a match or contest or while engaged in hunting, in such other state, and (ii) identifying the chief law enforcement officer of the locality in which such person resides, to whom such licensed dealer shall forward such statement by registered mail."

However, in (A) of sec. 922(b)(3) it states the exception that a resident of a "contiguous state" may purchase a rifle or shotgun in another state only where the purchaser's state of residence permits such sale or delivery by law.

The enclosed draft would take care of (A), leaving only the problem that there are no other states strictly "contiguous" to Alaska. Excluding the people of Alaska from coverage under sec. 922(b)(3)(A) would be subject to challenge on constitutional grounds as discriminatory. The courts, as a matter of construction, will always attempt to construe provisions as not

conflicting if possible and in this case "contiguous" would probably be construed as including those states nearest to Alaska, i.e., Oregon, Washington, and possibly California. The generally accepted legal definition is as follows:

> CONTIGUOUS. In close proximity; near, though not in contact; neighboring; adjoining; near in succession; in actual close contact; touching; bounded or traversed by. Black, Law Dictionary (4th ed. 1951)

If contiguous were not construed in this manner, then the exception provided by sec. 922(b)(3)(A) would not apply, regardless of any law of this state authorizing it. In any case, the fact that a resident Alaskan is not prohibited from purchasing a rifle or shotgun under (B) and (C) may take care of the specific situation posed in your request.

If I have in any way misunderstood your request or the enclosed draft does not reflect your wishes, please let me know and advise whether or not this one is to be formally prefiled. I have enclosed a copy of the pertinent sections of Public Law 90-618 for your inspection.

Sincerely,

John M. Elliott
Executive Director

Joel F. Bennett

Joel F. Bennett
Legislative Counsel

JFB/mh

Encl.

which the transferor resides (or other than that in which its place of business is located if the transferor is a corporation or other business entity); except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes; and

"(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

§ 922

"(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

"(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age.

"(2) any firearm or ammunition to any person in any State where the purchase or possession by such person of such firearm or ammunition would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

"(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of a rifle or shotgun to a resident of a State contiguous to the State in which the licensee's place of business is located if the purchaser's State of residence permits such sale or delivery by law, the sale fully complies with the legal conditions of sale in both such contiguous States, and the purchaser and the licensee have, prior to the sale, or delivery for sale, of the rifle or shotgun, complied with all of the requirements of section 922(c) applicable to intrastate transactions other than at the licensee's business premises, (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes, and (C) shall not preclude any person who is participating in any organized rifle or shotgun match or contest, or is engaged in hunting, in a State other than his State of residence and whose rifle or shotgun has been lost or stolen or has become inoperative in such other State, from purchasing a rifle or shotgun in such other State from a licensed dealer if such person presents to such dealer a sworn statement (i) that his rifle or shotgun was lost or stolen or became inoperative while participating in such a match or contest, or while engaged in hunting, in such other State, and (ii) identifying the chief law enforcement officer of the locality in which such person resides, to whom such licensed dealer shall forward such statement by registered mail;

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"(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity; and

Post, p. 1231.

Recordkeeping.

"(5) any firearm or ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Secretary.

"(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

"(1) the transferee submits to the transferor a sworn statement in the following form:

"'Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are _____

_____

Signature _____ Date _____'

Ante, p. 1214.

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

"(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

"(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

Recordkeeping.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

HB 14

JUDICIARY COMMITTEE

REPORT ON HOUSE BILL NO. 14

This bill seeks to protect the public from being sent and billed for merchandise which was not ordered. It is intended to discourage certain promotional schemes by which an individual would receive some merchandise, usually through the mail, and find that although he never asked for it he is faced with the inconvenience and expense of returning the merchandise or being billed for it. The bill covers only those situations in which the unsolicited sending constitutes an offer of sale and does not cover either contractual arrangements for the periodic sending of merchandise or cases of mistaken delivery where there was no actual "offer".

The committee substitute differs from the original bill in that it removes some redundant language and relocates the section so that it is covered by the definition of "merchandise" in AS 45.45.110. That definition is broadened to cover this new section, and the circularity of the definitions in sec. 110 is removed.

Barry Jackson, Chairman

HB 18

JUDICIARY COMMITTEE REPORT ON

HOUSE BILL NO. 18

This bill is one product of the legislatively directed project to revise the Alaska Administrative Code and the Administrative Procedure Act. It clarifies the functions of the Department of Law with respect to administrative regulations, and established the concept of "regulations attorney." This person would work with the various administrative agencies, bringing to them a greater understanding of the nature of administrative regulations, preventing the Code from deteriorating after the revision project is completed, assisting in preparing regulations and relevant legislation, advising of the need for new regulations and amendment of old ones, and assuring constitutionality, legality and compliance with the Administrative Procedure Act and the drafting manual for administrative regulations. It is intended that this person be taken from these duties only when his work load permits or when the interests of the state definitely require it.

Some of the very serious problems relating to the present treatment of regulations are discussed at pp. 5 - 6 of the January 1968 study entitled, "Revision of the Alaska Administrative Code", prepared by the Legislative Affairs Agency. The primary cause of the problems is the fact that under the present system laymen, who may be excellent administrators or specialists in another field, are being required to analyze, interpret and apply complex legal matter without the requisite legal training. This is an illogical and inefficient system, leading to general frustration for administrators and users of the Code and to wasted money for the state.

To preserve uniformity of style, numbering, form, citation of authority, etc., the bill also requires adherence to the drafting manual for administrative regulations which Sec. 2(a), Ch. 70 SLA 1966 required the Legislative Affairs Agency to prepare.

Henry Logan, Chairman

SB-45
HB 31

STANLEY H. REITMAN
ATTORNEY AT LAW
708 FOURTH AVENUE
ANCHORAGE, ALASKA 99501
PHONE 272-2409

February 13, 1969

The Honorable Barry Jackson
Chairman, House Judiciary Committee
House Chambers
Juneau, Alaska

Dear Barry:

The Legislative Council, as a result of my letter of January 6, 1969 (copy of which was forwarded to you on the 3rd of this month) pertaining to existing deficiencies in the Alaska Professional Corporation Act, drafted Senate Bill No. 45. This new bill faithfully follows the suggestions set forth in my January 6 letter, and in my opinion should be adopted as drafted.

One minor troublesome item is the introduction of House Bill No. 31 at the request of the Legislative Council. This bill addresses itself to A.S. 10.45.080. However, Senate Bill No. 45, in a more comprehensive amendment of the Alaska Professional Corporation Act, contains an amendment to the very same section. In my opinion, House Bill No. 31 should not be adopted, as Senate Bill No. 45 adequately and properly handles the situation.

Again, thank you for any courtesies extended to me and to all Alaskan professionals who are vitally interested in the effectiveness of the Alaska Professional Corporation Act.

Very truly yours,

Stanley H. Reitman

SHR/mm

Decision
send it to Senate

Chairman Jackson file Jud HB51

NORTHERN LIFE INSURANCE COMPANY

NORTHERN LIFE TOWER • SEATTLE

February 20, 1969

Executive Offices

Mr. William K. Boardman, Speaker
Alaska State Legislature
State Capitol Building
Pouch V
Juneau, Alaska 99801

Dear Bill:

It has come to our attention that you have a House Bill #51 by Tom Fink which is substantially similar to the Bill he introduced during the Fifth Legislature (H.B. #361).

Joe Peel of the Health Insurance Association of America asked me if I would advise you that the HIAA is opposed to this Bill. Also, I am enclosing a copy of some information that Robert Scott sent to the sponsor, Tom Fink, which states some of the objections to the Bill.

We will certainly appreciate any help you can give the industry.

Best regards,

A. L. Whetstone
Vice President

ALW:rrm
Encl.

ALASKA HOUSE BILL NO. 51

Sponsor: Tom Fink

Referred: House Commerce, Labor and Management, and Judiciary Committees

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Purpose of Bill

This bill would require payment by the insurer of interest at the rate of 8% per annum on sums "determinable at the time of filing" and owed under life and health insurance policies starting from the day of filing of a "claimant's statement and death certificate" in the case of a life insurance death claim, and from the day of filing of a "claimant's statement and physician's statement" in the case of a disability claim; and on additional sums, on the day they become determinable. It further provides that a bona fide settlement offer equal to final settlement or judgment would stop the running of the interest penalty.

Objections

This bill is similar to House Bill No. 361 introduced by Mr. Fink during the Fifth Legislature. The bill is punitive in nature in that while it is apparently designed to penalize an insurer which vexatiously delays payment of its claims, it would penalize even reputable insurance companies if, through no fault of their own, a claim were not paid pursuant to the terms of the proposal.

Delays in claim settlements when they occur in the case of life and

health insurance are due to a variety of bona fide reasons caused chiefly by the need to await information from sources over which the life insurance company has no control.

This bill would impose an excessive interest penalty which would commence upon receipt of specific items, i.e., a "claimant's statement" and a death certificate or physician's statement. There is no indication in this bill of what the expression "claimant's statement" means. It could be construed to be anything from a telephone call, letter, telegram, or postcard notifying the insurer of a claim, to filing the proof of loss forms and other documents necessary for perfecting the claim, all as required under the contract. Interest should not begin to run until the completed claim proofs and other required documents are received at the insurer's home office.

Even assuming that due proof of loss forms and a death certificate were filed under a death claim, the insurer might need a certificate of appointment delayed because of a controversy among the heirs or next of kin, or a tax waiver the issuance of which would not be within the insurer's control. There may be a discrepancy with regard to the insured's age, requiring additional proof from the claimant. Frequently, the contract also calls for the surrender of the policy, receipt of which may be delayed by the beneficiary. However, under the bill, if these additional documents are not received upon the filing of "claimant's statement" and "death certificate", the insurer would be unjustly penalized.

In the case of a life insurance policy with accidental death benefits, there may be suspicious circumstances involved, or a question as to whether the death was accidental. In such situations, the insurer should be permitted a reasonable amount of time to conduct a proper investigation without the threat of an interest penalty.

"Disability" insurance is defined in the insurance code (AS 21.12.050) as including all forms of health insurance. It would appear that where hospitalization coverage is provided, the insurer will need more than just a "claimant's statement and a physician's statement" to settle such a claim. The same is true with respect to medical coverage involving reimbursement for cost of drugs, etc.

Disability claims are generally of small amounts, and computing interest on a daily basis from the day of filing such statements would only amount to pennies. On the other hand, the computation of interest on such small amounts would create an administrative nightmare.

It should be noted that the bill would not apply to claims payable by fraternal benefit societies, nor to hospital and medical service corporations when reimbursement is required to be made to a subscriber. This is so because the bill does not specifically amend the chapters of the insurance code dealing with these organizations.

The life insurance business believes that the proper remedy in the case of any insurer which delays payment of claims without good cause is that its certificate of authority to do business in Alaska should be revoked. A provision requiring the Director of Insurance to take such action is already contained in the Insurance Code. See AS 21.09.150.

We urge that House Bill No. 51 not receive favorable consideration.

Respectfully submitted,

Robert M. Scott, Juneau
Legislative Agent
Life Insurance Association of America

HB 75

JUDICIARY COMMITTEE REPORT

ON

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 75

The Judiciary Committee is unable to obtain an opinion from the Attorney General's office as to the constitutionality of House Bill No. 75.

In order to permit action on this bill in this session the Committee puts the bill out with the recommendation on the merits of the bill, but without complete review of the legal aspects of the bill.

The Committee Substitute deletes the local government sharing provisions, which the sponsor intends to submit by a separate bill, and inserts a percentage alternative in order to offset any effects of inflation.

_____

Barry Jackson, Chairman

March 5, 1969

To: G. Kent Edwards
Attorney General

From: Barry Jackson
Chairman
House Judiciary Committee

Subject: House Bill No. 75

We hereby request an opinion from your office regarding any constitutional problems on the above bill.

We specifically direct your attention to the various rate structures and to the method of allocating the one half of the proceeds to local government.

File

STATEMENT BEFORE THE HOUSE
JUDICIARY COMMITTEE

March 14, 1969

Mr. Chairman, Gentlemen:

I am H. M. Cole, Counsel for Atlantic Richfield Company.

On 3-3-69 T. F. Carlisle, Manager of the Tax Division of Atlantic Richfield's North American Producing Department stated, in testimony before the House Resources Committee that certain portions of HB 75 may raise the question of constitutionality. I have been asked to elaborate on that thesis and, therefore, shall confine my remarks to that issue.

There are a number of arguments which might be mentioned to indicate the possible unconstitutionality of the bill. These include:

(1) undue burden on interstate commerce;

(2) unreasonable classification and thus violating the due process principles in that the tax is based on an occurrence after the tax is imposed;

(3) the unconstitutional levying of a state export tax, and

(4) discriminatory taxation.

It is axiomatic that a tax must be equal and uniform, but the tax here is neither. The incidence of the tax is on severance, but the rate is on the location of use.

Article I, Section 8, Clause 3 of the United States Constitution provides, among other things, that

> The Congress shall have power -- to regulate commerce with foreign nations and among the several states. . .

In 1940 the U.S. Supreme Court, in Best & Company, Inc. v. Maxwell[1] stated that "The Commerce Clause forbids discrimination whether forthright or ingenious" in holding a State statute unconstitutional which required out-of-state merchants to pay larger privilege taxes than local merchants.

Both Texas and Louisiana have passed gas gathering taxes, which are taxes on the occupation of gathering gas from a producer. In the Michigan-Wisconsin Pipe Line Co. v. Calvert[2] Case, a tax was imposed on the Pipeline for the exit of gas from Texas. The U.S. Supreme Court held that the gathering of natural gas, as defined in the Statute, was an inseparable part of interstate commerce and characterized the tax as a tax "on the exit of the gas from the state." The Court said that "the receiving of a commodity for transportation cannot be carved out of the transportation process itself." "It is now well settled," the Court continued, "that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." "The economic process is inherently unsusceptible of division into distinct local activity capable of forming the basis for the tax here imposed, on the one hand, and a separate movement in commerce, on the other." the Court continued. "If Texas may impose this. . .tax. . .then Michigan and other recipient states have at least equal rights to tax the. . .unloading. . .when it arrives for distribution. . .The net effect would be substantially to resurrect the Custom barriers which the Commerce Clause was designed to eliminate."

It seems to me that HB 75, if enacted, would undertake the same thing which the Supreme Court has said is unconstitutional.

Calvert v. Transcontinental Pipe Line Corporation[3], a 1960 Texas Supreme Court Case, citing the Michigan-Wisconsin Pipe Line Co. Case, stated that the tax was on the downstream purchaser of gas (an out-of-state entity) and, therefore, was not valid because it was a burden on interstate commerce.

The Texas Legislature tried again with their gas gathering tax and Calvert v. Panhandle Eastern Pipe Line Co.[4] was the involved case. The Texas Supreme Court voided the act and said that, "Irrespective of what the Act labels the tax and of what other declarations are found in the Act that seeks to attach the tax to the production and processing of natural gas, it is apparent, as the U.S. Supreme Court found in the Michigan-Wisconsin example, that the tax attaches to the gas after it has been produced and processed and has begun its journey in interstate commerce."

It seems to me that this language is singularly appropriate to the provisions of HB 75. "Where a tax is a burden on interstate commerce, it is not made valid by isolating and denominating some incident or element as 'local activity' and designating such incident as the focal point of the tax."

The Louisiana case to which reference has been made is Louisiana-Nevada Transit Co. v. Fontenat[5]. Twenty percent (20%) of the gas involved was for local use and eighty percent (80%) for interstate use. The Louisiana Court, citing the Michigan-Wisconsin Pipe Line Co. case, held that a tax imposed on a local activity is valid only if the local activity can realistically be separated from the interstate process, the flow of commerce.

A producer who chose to ship his oil in interstate commerce (either on his own motion or because the market in Alaska could not support more processing) prior to processing would incur

a greater tax than the producer who does process his crude in Alaska. The incidence of the added tax would tend to encourage processing in Alaska to the exclusion of other states. Such would impede interstate commerce and it is this type of impediment upon the commerce of the nation that was struck down in Best v. Maxwell. An independent producer, without refining capabilities would under HB 75 pay a tax which would be determined by what the purchaser of his production chose to do with it. It is doubtful that a classification such as here proposed would meet the due process requirements of the 14th Amendment of the Constitution.

One other case which might be of interest to the Committee on this matter is Pennsylvania v. West Virginia[6]. This case is cited in the Michigan-Wisconsin case and involved an attempt by one state to prevent the export of gas into another state. By way of dictum the U.S. Supreme Court stated, "Even the States power to lay and collect taxes, extensive though it may be, cannot extend in such a way as to impede interstate commerce."

Mr. Walker's brief contains several other cases which are additional examples of legislatures favoring local business by discriminating v. interstate business, so I shall not longer belabor the point. It seems clear to me that the extra tax proposed upon oil and gas exported from Alaska is an added burden on interstate commerce; that it is in fact discriminatory against oil and gas not processed within Alaska and therefore is subject to constitutional attack.

I have pointed out a number of reasons why I am of the opinion that HB 75 as written is unconstitutional. I would like to make it clear, however, that Atlantic Richfield is interested in the

amount of the tax and not the technical aspects of the statute, but I would assume that the legislature would not want to enact legislation which appears on its face to be subject to attack.

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[1] Best & Company v. Maxwell, 311 U.S. 4 54 (1940)

[2] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)

[3] Calvert v. Transcontinental Gas Pipe Line Corp., 341 SW_2 679 (1960)

[4] Calvert v. Panhandle Eastern Pipe Line Co., 371 SW_2 601 (1963)

[5] Louisiana-Nevada Transit Co. v. Fontenat, 97 SO_2 409 (1957)

[6] Pennsylvania v. West Virginia, 262 U.S. 553

File

STATEMENT PRESENTED TO HOUSE JUDICIARY COMMITTEE
ALASKA SIXTH LEGISLATURE
BY HUMBLE OIL & REFINING COMPANY

CONSTITUTIONALITY OF HOUSE BILL NO. 75
AN ACT RELATING TO REVENUES FROM OIL AND GAS PROPERTIES

Facts

House Bill No. 75, an Act relating to revenues from oil and gas properties is now before you for your consideration. Last Wednesday you invited the oil industries' comments on the constitutionality of House Bill No. 75. Among other provisions House Bill No. 75 proposes that there would be one rate for those engaged in primary manufacturing and processing in the State of Alaska, and another rate for those shipping raw materials outside the State. Alaska presently imposes an oil and gas conservation tax at the rate of five mills per barrel of oil produced and for each 50,000 cubic feet of gas produced. Alaska also imposes an oil and gas production tax at the rate of three percent (3%) of value and the disaster severance tax of one percent (1%) of value.

Issue

The question in issue is whether the enactment of a split severance tax as proposed by House Bill No. 75 would be valid under both the Alaska Constitution and the United States Constitution.

Answer

It is concluded that the enactment of an occupation tax as proposed by House Bill No. 75 would patently violate the Commerce Clause,

Article I, Section 8, Clause 3, of the United States Constitution. This being the case no effort was made to justify such an enactment under the Alaska Constitution.

Discussion

Article I, Section 8, Clause 3 of the United States Constitution provides:

> The Congress shall have power. . .To regulate commerce with foreign nations, and among the several states. . .

The primary considerations for determining the limits of a state's power to tax activities connected with interstate commerce have been aptly stated by the Supreme Court of Washington in Washington-Oregon Shippers Cooperative Association, Inc. v. Schumacher, et al., 367 P.2d 112 (1961). They are:

> . . .(1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage; the discrimination test. (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; the multiple burden test.

Because the occupation taxed in a typical state production or severance tax is strictly a local activity and occurs but once, we need not concern ourselves with the second or multiple burden test. It appears obvious that the type of split severance tax proposed for Alaska fails to satisfy the first test, that of nondiscrimination against interstate commerce.

The United States Supreme Court has upon many occasions struck down state license and occupation taxes where they favored

instate business by discriminating against interstate business. Welton v. Missouri, 91 U.S. 275 (1876), relating to discriminatory licensing of out-of-state producers or manufacturers of goods; Walling v. Michigan, 116 U.S. 446 (1886), involving discriminatory taxation of out-of-state liquor sales; Darnell v. Memphis, 208 U.S. 113 (1908), discrimination against out-of-state agricultural products; Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939), involving discrimination against cement transported into the state from out of state; Mullaney v. Anderson, 342 U.S. 415 (1952), striking down an Alaska licensing tax on the grounds of discrimination against interstate commerce since the tax was levied at a higher rate upon nonresident fishermen than upon resident fishermen; Memphis Steam Laundry Cleaners Inc. v. Stone, 342 U.S. 389 (1952), involving a discriminatory license tax imposed at a higher rate on out-of-state peddlers than on instate peddlers.

In Best v. Maxwell, 311 U.S. 454 (1940) the Supreme Court held a state statute unconstitutional in violation of the Commerce Clause since the statute required out-of-state merchants to pay larger privilege taxes than instate merchants. In so holding, the court said:

> The Commerce Clause forbids discrimination whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack will in its practical operation work discrimination against interstate commerce. The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.

Seeing that the key to constitutionality is nondiscrimination, the proposed split severance tax should be examined to determine if it

would discriminate against interstate commerce. The extra burden of tax proposed upon oil and gas exported and not processed in Alaska clearly is an added burden on interstate commerce. A producer who chooses to ship his oil or gas in interstate commerce prior to refining or processing would incur a greater tax than would the producer who chose to refine or process his oil or gas in Alaska. Clearly the State of Alaska would benefit from such a tax as integrated producers would be encouraged to locate refineries and processing plants in Alaska at the exclusion of other states. This would clearly impede interstate commerce. This type of impediment upon the commerce of the nation was struck down in Best & Company, Inc. v. Maxwell, 311 U.S. 454 (1940), where the Supreme Court said:

> . . .Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this $250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. A $250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina retail market. Extra-state merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail merchants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.

As to a nonintegrated producer who must sell all of his oil and gas prior to refining or processing, such a tax would appear to violate the Due Process Clause of the 14th Amendment to the United States Constitution. The amount of his tax would be determined by what the purchaser of his production chose to do with it. It is doubtful that a classification such as proposed in the split severance tax would meet the tests of the Due Process Clause of the 14th Amendment.

H684

File HB 84

February 7, 1969

Honorable Wendell P. Kay
Alaska House of Representatives
Juneau, Alaska 99801

Dear Mr. Kay:

The undersigned are students of the Alaska Barber College, Anchorage, and other persons interested in your House Bill 84. We understand that this bill would require, in addition to the presently prescribed course of training at a barber college, eighteen months of apprenticeship.

We do not know whether you are aware that similiar legislation has been introduced in the Alaska Legislature over the past six years. On each occasion, such legislation has failed to be enacted. We believe that the rejection of similiar bills by past legislatures was based on good reason.

We are not maintaining that the apprenticeship requirements of your bill are totally without merit. We believe that someday they may be appropriate for Alaska. However, the statistics released by the National Association of Barber Schools, Inc., in its research report No. 6A, dated July 1, 1967, make it evident that the sophisticated plan proposed by your bill may be suitable for an Alaska of the future but would only bring hardship to the Alaska of the present. The average barber-population ratio for the United States is 1 barber per 632 persons. The highest population-barber ratio next to that of Alaska is West Virginia with 931 persons per barber. In Alaska we have an astonishing ratio of 2,663 persons for each barber, or approximately 4 times the national average. Under those facts alone, we believe that House Bill 84 would do a disservice to the people of Alaska by merely copying the code of other states without considering the needs and conditions of Alaska at the present time.

Please consider that there are only 80 barber-shops in all of Alaska. Of these at least 50 or 60 are one-chair shops. Such shops could not use, and do not want the services of an apprentice. An apprentice under your bill could not even relieve the owner by serving as a manager

while the owner takes his vacation. We ask that you consider that this lack of a sufficient number of multi-chair barbershops will make it extremely difficult for an apprentice to find employment. Such difficulty will discourage the number of persons entering into the barbering field from the Alaska population.

HB 84 would lessen the number of barbers trained in Alaska and would strengthen a monopoly of those already in the field. Because of the present shortage of barbers, the curtailment of Alaskans entering barbering, which would result from HB 84, would lead to an influx into the State of barbers trained and practicing in other states. HB 84, in effect, would bring about discrimination against local hire.

It is submitted that Alaska has not only not reached the stage where HB 84 could serve any useful purpose but in fact such legislation is not needed. At present Alaska trained barbers are graduated from a barber college and proceed to take an examination for journeyman barber. They do not graduate from the college until they have complete 1500 hours of instruction which includes a minimum of 300 hours of theory including physiology of the scalp, hygene problems, etc. The balance is practical experience under the direct personal supervision of a journeyman barber. To complete this course on a full time basis requires 9 months, or 18 months on a part-time basis. There appears no good reason why this training should not be considered as an adequate program to prepare Alaskans for employment as journeymen in the field of barbering.

We request that you reconsider the advisability of HB 84 at this time and request that you withdraw your bill until further study can be given to the matter.

We appreciate your attention on our behalf. Because of the wide spread significance of HB 84 we are circulating this letter-petition to the other members of the House and Senate. If you or any other member of the Legislature have questions concerning our purpose, please contact us: "Committee Against Barber's Apprenticeship", 330 "L" Street, Anchorage, Alaska 99501.

4586

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 86

The purpose of this bill is to eliminate a current problem in the law relating to the seizure of items by fish and game enforcement officers. Under the present statute, a commercial fishing vessel and gear can be tied up at the time of arrest, to be held until the case is finally disposed of by a determination of guilt. The effect is to put the fisherman who insists upon his innocence out of business for days or weeks, often for the balance of the season. The only alternative would be to plead guilty, to "get it over with" and get back to fishing.

This bill requires the prompt release of the boat and gear upon the posting of a reasonable bond. The bond would require the boat to be available for process at the time of trial. The amount of bond would be set by the court.

Barry Jackson
Chairman
House Judiciary Committee

HB 101

The Legislature of the State of Alaska
FISCAL NOTE
First Session - Sixth State Legislature

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST, POUCH V
___THE LEGISLATIVE FINANCE COMMITTEES' STAFF, POUCH Y
___THE DIVISION OF BUDGET & MANAGEMENT, POUCH C
___RETAIN A COPY FOR YOUR FILES

subject HB 101 SB
requested by Chairman Barry W. Jackson, House Judiciary Committee
referred to date of request
completion date requested date received

EXPENDITURE DETAIL	FY 1969-70	FY 1970-71	FY1971-72
100 PERSONAL SERVICES	$18,600	$18,600	$18,600
200 TRAVEL	1,500	1,500	1,500
300 CONTRACTUAL SERVICES	1,700	1,700	1,700
400 COMMODITIES	200	200	200
500 EQUIPMENT	1,100	-0-	-0-
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
TOTAL	$23,100	$22,000	$22,000
FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	23,100	22,000	22,000
Man Months	24	24	24
Permanent Positions	2	2	2
Temporary Positions	0	0	0

FISCAL ANALYSIS

Please see attached.

DATE 3/4/69 SIGNATURE George Sharrock

NAME & TITLE George Sharrock, Commissioner of Commerce

SA-13A
State of Alaska
Dept. of Admin.
Budget & Mgt. Div.
(Rev. 7/68)

REQUEST FOR NEW POSITION
For the Fiscal Year Ending June 30, 1970

Department
Division
Program

Position Title Investigator Range 16 Location Juneau

Type of Position Permanent - Full Time Reference: SA-13, line

Code (1)	EXPENDITURE BY OBJECT (2)	EXPENDITURES (3)	DETAIL OF RELATED EXPENSES (4)
100	Personal Services	11,900	Annual Salary - $10,400; Employee Benefits 14% - $1,496
200	Travel	1,500	Inside Travel - Travel - $1,000; Perdiem - $500
300	Contractual Services	1,710	Office Space - 10 x 20 = $960; Car Rental - $720
			Insurance & Bonding - $30.
400	Commodities	200	Routine Office Supplies
500	Equipment	270	Desk - $110. Chair - $50. File Cabinet - $110.
	TOTAL	15,580	

NARRATIVE JUSTIFICATION: (5)

SA-13A
State of Alaska
Dept. of Admin.
Budget & Mgt. Div.
(Rev. 7/68)

REQUEST FOR NEW POSITION
For the Fiscal Year Ending June 30, 1970

Department
Division
Program

Position Title Clerk Typist III Range 8 Location Juneau

Type of Position Permenent - Full Time Reference: SA-13, line

Code (1)	EXPENDITURE BY OBJECT (2)	EXPENDITURES (3)	DETAIL OF RELATED EXPENSES (4)
100	Personal Services	6,700	Annual Salary - $5,880. Employee Benefits 14% - $820.
	Travel		
	Contractual Services		
	Commodities		
500	Equipment	735	Desk - 210. Chair - 50. Typewriter - 475.
	TOTAL	7,435	

NARRATIVE JUSTIFICATION: (5)

HB 105

MEMORANDUM State of Alaska

TO: Representative Barry Jackson
House Judiciary Committee
Alaska State Legislature

DATE: April 13, 1970

FROM: Thelma Cutler
Director of Elections

SUBJECT: House Bill No. 105

As a result of the registration forms in the polling places during the 1968 general and primary elections as a voter convenience, we received more than 65,000 completed forms. Many of these were duplicates and had to be eliminated. The totals by districts plus registrations received by the end of 1969 before any concerted drives had been made:

District	1	3394	District	10	4035
"	2	1464	"	11	1853
"	3	2011	"	12	864
"	4	4044	"	13	1245
"	5	1131	"	14	2146
"	6	1720	"	15	2059
"	7	1751	"	16	9830
"	8	23,250	"	17	1358
"	9	954	"	18	1568
			"	19	792

Since that time, we have accumulated approximately 12,000 new registrations as a result of our February registration drive and the continued efforts of our registrars. We have, of course, deleted those persons who have had a change of name and invited them to reregister. We have deleted those individuals who have indicated they are no longer residents of Alaska and we are deleting from the 1969 death certificates. We therefore estimate that over 75,000 registrations will be on the new list which will be duplicated and available for sale after May 1st. These lists will be alphabetized within precinct, show full mailing address and party preference if indicated. We will also have a machine count by precinct, district and state.

Additional registration drives in the nature of supermarket booths, special local promotions and additional area activities will be made. Registrars using a district list could secure registrations for all those yet unregistered and would be paid the 50¢ per new registration.

If the 18 year old referendum is approved at the primary election, registration may be made by those eligible and they will be allowed to vote in the general election.

Speediset ® Moore Business Forms, Inc.-s

The remote or bush areas of the state are close to 100% registered. We estimate now that the larger communities of the state are 90% registered. These communities, of course, have newspapers, radio and television and would benefit especially from another concentrated drive.

The provisions of HB 105 which would allow voter registration up to and including election day and subsequent voting by these late registrants via the "questioned ballot" method would result in a flood of envelopes for the absentee board to canvass.

The 14 day deadline for registration will require tremendous last minute efforts on our part to get registrations through the data processing centers and get printouts for election day. We will have to count, to some extent, on the registrar's records of these late registrations.

Almost 7,000 persons voted during the 1968 general election by absentee ballot. The absentee canvass boards checked the affidavit envelopes on the second day following the election; on the third day following the election, the counting board and the absentee board, began the task of tallying the vote. In the Anchorage area, the canvass board plus 14 four man counting boards spent approximately 12 hours on this count. Now, if you add to their chores questioned ballots, the counting could not possibly be completed during the 2nd and 3rd day. The absentee board then meets on the 8th day following the election to complete the count. Thus, you could well have 15 to 20% of the total vote of the state tied up in absentee and questioned ballots and a determination of winners would be delayed until after the 8th day following the election.

I think you will agree that many people tend to procrastinate and if you allow for registration on election day, it will be very easy to imagine the numbers of people who will delay registering until this day.

I do not think that you would be doing the qualified voters of this state a service by permitting such late registrations. The additional time consumed in the polling places in using the question ballot will result in long lines of voters at the polling place. The delay in making election figures available to the public and to the candidates will certainly create confusion and disatisfaction.

The efforts of the registrars, the political parties, the League of Women Voters, the labor groups and candidates' supporters should assure that every otherwise qualified voter is registered for the 1970 elections.

7-6
AB-115

KENAI PENINSULA BAR ASSOCIATION
P. O. Box 397
Kenai, Alaska 99611

17 April, 1969

Representative Barry Jackson
Pouch V
Juneau, Alaska 99801

Dear Representative Jackson:

Thank you very much for listening to the representatives of the Kenai Peninsula Bar Association who have approached you regarding the urgent need of the Kenai Peninsula for a resident Superior Court Judge. Remember a judge shared with Kodiak would be a reasonable solution to problems of Kodiak and Peninsula litigants.

Any consideration you can give to this most important governmental service would be greatly appreciated.

Yours truly,

James E. Fisher

JAMES E. FISHER, President
Kenai Peninsula Bar Association

HB-115 AB115

FISHER & HORNADAY
ATTORNEYS AT LAW

JAMES E. FISHER
JAMES C. HORNADAY

KENAI PROFESSIONAL BUILDING - P. O. BOX 397
KENAI, ALASKA 99611

TELEPHONE
283-7865

22 December, 1969

Representative Peter M. Deveau
Bpx 1577
Kodiak, Alaska 99615

Dear Representative Deveau:

Re: Authorization - Funding - Superior Court Judge Position to be resident Kenai-Kodiak Communities

We urgently request your full consideration and support of the establishment of judicial positions which will provide resident superior court judicial services in the Kenai-Kodiak communities.

As we understand the authorization and funding process for judicial positions, there has customarily been:

A request from the Alaska Bar Association.

A request from the Alaska Judicial Council.

It is our understanding that both of these pre-conditions have now been achieved to permit assignment of a Superior Court judge to be resident in the Kenai Peninsula Borough -- Kodiak Island Borough communities.

Earlier you should have received a resolution of the Alaska Bar Association passed at the May, 1969, convention at Nome, Alaska, requesting the establishment of new judicial positions. In November the Alaska Judicial Council met and recommended establishment of such positions.

To provide a summary of the social and economic reasons for such a program, I enclose a paper entitled "Plea for Equal Treatment." This is a general summary of the facts and reasoning in support of such legislative action as is required.

Please read "Plea for Equal Treatment" that you might be more familar with this subject.

Thank you for any consideration and support.

Yours truly,

James E. Fisher

JAMES E. FISHER, President
Kenai Peninsula Bar Association

JAMES E. FISHER
ATTORNEY
TRADE BUILDING - P.O. BOX 397
KENAI, ALASKA

TELEPHONE 283-7565

20 January 1970

Representative Barry W. Jackson
Box 348
Fairbanks, Alaska

Dear Representative Jackson:

Enclosed is an article entitled "Plea for Equal Treatment." While you should have received a copy of the enclosed article as an item of general information to the entire Alaska Legislature, it should be especially of interest to you in your capacity as a member of the Judiciary Committee.

Therefore, in the event that you might have overlooked this request, an additional copy is sent to you.

If I may be able to furnish any additional information, please call upon me to do so.

Thank you for any consideration you may be able to give to the authorization of a resident Superior Court Judge in the Kenai-Kodiak Borough communities.

Yours truly,

James E. Fisher

JAMES E. FISHER, President
Kenai Peninsula Bar Association

Barry: This letter sent to entire committee

J. E. F.

PLEA FOR EQUAL TREATMENT

BY: JAMES E. FISHER, President
Kenai Peninsula Bar Association

This is addressed to all interested Alaskans. It is a request for your help and knowledge in a matter of equal treatment.

This is a plea for equal treatment. Please do whatever possible to insure that your fellow Alaskans on the Kenai Peninsula and Kodiak Island have the same access to a resident Superior Court Judge as your neighbors in comparable hometowns.

A request for the assignment of a Superior Court Judge to be resident in the Kenai-Kodiak communities can only be justified on the service to residents. Such a request rings hollow if based on convenience to the legal profession. Alaskans should not rest until legal services are dispensed as equitably as possible. One of the watchwords of the law is that 'justice delayed is justice denied.". That situation is frequently faced by residents of the Kenai Peninsula and Kodiak Island communities because the Superior Court's services can be remote and therefore costly.

Roy Madsen, President of the Kodiak Bar Association has outlined the problem in a letter to State Representative Peter M. Deveau:

> "Further, Alaska statutes afford individuals certain provisional remedies such as attachment, civil arrest, injunction, temporary restraining order, executions after judgment and the like which when applied for from an outlying area such as Kodiak require approximately two weeks as they have to be prepared here, mailed to Anchorage, signed by the Judge, turned over to the Alaska State Troopers for service and then be returned for service. If we had a full time Superior Court here the two week period could be reduced and all of this could be accomplished in one day ; therefore it is my contention as it has been all along, that people that live as far away as we do from a full time Superior Court Judge are being deprived of these remedies."

In spite of the best intentions of a visiting judge it is not possible to have wide community knowledge. A resident Superior Court judge can provide more precise and comprehensive service resulting from knowledge of the community.

Until a resident Superior Court judge is stationed in the Kenai-Kodiak communities, it can be argued this important area does not receive equal protection of the law. In the same letter quoted above, Madsen outlined this example:

"The Alaska Statutes provide that trials for the foreclosu of a mechanic's lien are given priority over all other types of cases except criminal cases. Article I of the Constitution of the State of Alaska states that: "all persons are equal and entitled to equal rights and opportunities and protection under the law". A classical example of the inequality of the residents of this area (Kodiak) resulting from lack of a Superior Court being here, was a lawsuit for a foreclosure of a mechanic's lien in Kodiak. The case dragged on for months and years and fianlly in order to get it set down for trial at all the local attorney had to agree to a trial in Anchorage in order to accomodate the Court's calendar and the opposing attorney's schedule. The Court in Anchorage had to hear evidence on a matter which involved questions concerning materials, and worksmanship on a building situated in Kodiak without having the opportunity of viewing the building in question, and after some five days of trial, the case was recessed for a period of two months requiring the local attorney to return to Anchorage at a later date for continued hearing as well as the witnesses involved."

One critical inefficiency resulting from lack of resident Superior Court judicial service is the effect on other government agencies. On the Kenai Peninsula Borough as many as five of a detachment of seven Peninsula based Alaska State Troopers have been absent at one time in Anchorage attending grand jury proceedings. Under such conditions, for practical purposes, there was no police protection for the Central Peninsula.

When economic justifications are considered the number of Alaskans in the Kenai and Kodiak Boroughs should be remembered. The Kenai Peninsula Borough and Kodiak Island Borough comprise an estimated population of 25-35,000 persons who are served as an additional responsibility of the Superior Court judges at Anchorage. The residents in those communities live in an area which was providing in excess of 50 per cent of the State's resource derived revenue (until the oil lease sale on the North Slope). Such activity should have available equal governmental service.

For housing courts in both Kenai and Kodiak, courtrooms are in existance and could be utilized without excessive additional capital type expenditures.

Another practical consideration is the fact that a Superior Court Judge could handle District Court matters. At present there are no district judges assigned on the Kenai peninsula. An assigned Superior Court judge could achieve economy in operations by handling District Court matters -- and provide an interesting opportunity for experiment by the Alaska Court System.

Almost everybody would agree, eventually there should be resident Superior Court Judicial service in both the Kenai and Kodiak communities. However, such service should not be delayed so a newly assigned Superior Court judge would have an overwhelming or impossible burden commencing from the first day of service.

The need for a Superior Court judge for Kenai-Kodiak communites has been recognized in pending legislation before the Sixth Alaska State Legislature and such legislation could be acted upon with dispatch during the Second Session commencing in January, 1970.

The Alaska Bar Association urged efforts to securing new judges for both Kenai-Kodiak and Sitka. The Alaska Judicial Council has recommended staffing of judges which would provide resident judicial service to Kenai-Kodiak.

Please remember this request for help as stated in the title of this article "A Plea for Equal Treatment."

File

PRESENTATION TO ALASKA STATE LEGISLATURE
OF
REASONS FOR SUPERIOR COURT JUDGE ON KENAI PENINSULA

I. Partial list of economic and social reasons:

A. The Kenai Peninsula Borough presently has a population of 18,000 to 22,000 people (from school and other sources).

B. Over one-third (1/3) of the State's derived revenues for Alaska come from the Kenai Peninsula Borough.

C. It is the third largest borough in the State in population.

D. Enrollment in the Kenai Peninsula Community College is third in the State.

E. It is the site of the largest industrial development in the State -- development that focuses on extraction and on primary and secondary processing of resources before their shipment.

F. A Court facility is available for immediate use by the Judge (if a new municipal building-civic center is authorized in Kenai an additional Court room facility would be available).

G. In the immediate Kenai-Soldotna-North Kenai area an Alaska Trooper source has been quoted as saying that only one-third of the Troopers are available for the activity, criminal, etc, within their area of primary responsibility. A resident Superior Court Judge would more effectively utilize such forces.

H. The Kenai Peninsula Borough is second in assessed valuation in the State (Kenai Peninsula $308,604,543 as compared to $822,564,271 for the Greater Anchorage Area Borough).

II. Present situation:

A. In the area of heaviest pressure, Kenai-Soldotna-North Kenai area a magistrate has performed with a case load which at times has exceeded that, for purposes of comparison, the caseload of the Fairbanks based District Court. In spite of outstanding performance it is not fair to the Magistrate nor to the surrounding communities to depend entirely upon him for future services in the quantity required in the past.

B. Approximately once per month a Superior Court travels on circuit to Kenai. Recently the activities have required more and more time of a judge at Kenai. Such demands disrupt the on going program in the Greater Anchorage area (i.e. when the judge is gone criminal and trial calendars are apt to be chaotically disrupted by the judges absence which could ramify throughout the Third Judicial District).

III. An approximate statistical comparison of Superior Court judges available for areas of the state are as follows:

A. In the Anchorage area there is approximately one Superior Court Judge per 20,000 people.

B. In the Fairbanks area there is approximately one Superior Court Judge per 15,000 people.

C. In Southeast Alaska there is approximately one Superior Court Judge per 10,000 people.

Would cooperate
w/ Kodiak for a unit

D. In Nome, there is one Superior Court Judge for approximately 5,000 to 10,000 people.

E. The Kenai Peninsula is an area of 18,000-22,000 people which is presently unserved by a resident Superior Court Judge.

F. The above comparison is not intended as a request that judicial services should be diverted from any other area of the State. One can be sure that the communities where resident Superior Court Judges are stationed can easily and extensively justify why such service should be continued in their local areas -- or augmented.

G. Judges must rely on their experience and knowledge in order to most effectively serve. A judge should be immediately familiar with the area. In other words to insist on transient or circuit judges to decide measures relating entirely to the Kenai Peninsula is unfair both to the judge and to the parties coming before him because he is not completely familiar with the area in which he is on circuit at that time.

H. When any activities involving criminal hearings or proof required of Alaska State Troopers are called for, frequently fifty (50) percent or more of the entire staff of the local Trooper detachment can be in Anchorage leaving the Kenai Peninsula substantially unpoliced (such a time is when cases are being presented to the Grand Jury, when testimony is required in a particular case, etc.).

IV. Anticipated responses to questions:

A. Funding is a matter that would have to be accomplished from general state revenues. It should be accomplished to at least establish a parity of governmental service for the Kenai Peninsula with other areas of the state.

B. If it is necessary to justify your actions authorizing stationing of a Superior Court Judge on the Kenai Peninsula to your own local areas, this can be done on the basis that such services are essential if the entire state is to develope in an orderly fashion -- which benefits us all anywhere in the state.

JAMES E. FISHER, President
Kenai Peninsula Bar Association
Box 397, Kenai, Alaska 99611
Telephone: 283-7564
(3/11/69)

file
bill re
7 judge
15

FISHER & HORNADAY
ATTORNEYS AT LAW

JAMES E. FISHER
JAMES C. HORNADAY

KENAI PROFESSIONAL BUILDING – P. O. BOX 397
KENAI, ALASKA 99611

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283-7565

26 February, 1969

The Honorable Terry Miller
Chairman, Senate Judiciary Committee
State Legislature
Juneau, Alaska

Again I would express my appreciation to you and your committee for permitting me to testify in regards to a Superior Court Judge when I was in Juneau on 17 February, 1969. Pursuant to the request of the committee, I am submitting a written summary of my testimony. I had hoped to contact the House Judiciary Committee and the Finance Committees of both houses. However, as delegation coordinator of the joint Kenai-Soldotna Legislative trip I found that time evaporated. Enclosed is a copy of the joint Kenai-Soldotna Legislative Program.

COPY

By copy of this letter, I am informing the House Judiciary Committee and the Finance Committee of both The House and The Senate of my testimony before your committee.

The joint Kenai-Soldotna Legislative Delegation was a landmark experience. It is the first time the two areas have worked together in such a project. We had a weather problem in that we had to overnite in Seattle which caused further delay in our schedule. There were twelve in our delegation and a copy of the joint program is attached.

The Kenai Peninsula is experiencing rapid growth. It is one of the most rapidly developing areas in the United States. We are experiencing similar problems that other frontier areas in the American development experienced. Rather than sit at home and complain, we have decided to come before the Legislature with our requests.

As you know, with rapid growth also come problems as well as opportunities. There are now somewhere between eighteen and twenty-two thousand people on the Peninsula. Over one-third of the State Revenues now come from the Kenai Peninsula area.

The Kenai Peninsula badly needs a resident Superior Court Judge. We appreciate what the Superior Court Personnel and the Court System have done with existing funds. However, it is just not adequate.

We are not asking for a District Judge. We ave a most competent Magistrate in Jess H. Nicholas, Jr. Further, the District Judge does not have sufficient jurisdiction to handle the cases on the Kenai Peninsula.

The case load from the Peninsula is very difficult to estimate. For example, it is my understanding that the probate matters still must be filed in Anchorage. Further, the felonies are still filed in Anchorage that arise in this area and all of the individuals who qualify for legal aid are generally taken care of through Anchorage filings. However, with a population of approximately 20,000 people, there is no problem in keeping a resident Superior Court Judge busy. For example, Ketchikan has about 10,000 people; Juneau has 12,000. I am sure that the Attorneys in Ketchikan and Juneau would be emphatic in insisting that their respective communities can keep a resident Judge busy. Nome does not have the population but in that vast area, a resident Judge is probably needed.

I would emphasize that we are not suggesting that Judicial Personnel be reduced anywhere in the State. On the contary, we believe that judicial facilities and personnel should be increased.

At the present time the Kenai Peninsula is the third largest population center center in Alaska. We are the only major population center without a resident Superior Court Judge.

The Court does come down once a month. However, this is just not adequate. When a Judge leaves Anchorage, the Anchorage Calendar is interrupted. Sometimes the Court schedules change or there is a weather problem. This generally means that our people and our witnesses sometimes wait an entire day and still do not receive the needed judicial services. The people from the Peninsula are often jerked up to Anchorage for hearings that could just as well have been heard locally. The last two times the Court has come to Kenai he has spent the better part of week in Kenai. The last time the Judge came, the criminal jury case had to be continued and the Judge had to return to Anchorage. This meant that the divorce matters, estate matters and other situations were not taken care of. Many of these problems involve marital disputes in which it would be imposing to ask a Judge to leave the busy Anchorage Calendar to come down to hear a restraining order, etc. However, these people need to be taken care of.

It would not be an expensive proposition to put a resident Judge on the Kenai Peninsula. The new Court Facility has chambers for a resident Judge. We would hope that the resident Judge would serve the entire Peninsula.

The question was asked whether or not the Peninsula would be willing to cooperate with Kodiak on a Superior Court Judge. As I explained, we have a very good relationship with Kodiak. If the only politically feasible mannner in which to obtain a resident Peninsula Judge is to provide that the Judge reside on the Peninsula and serve Kodiak on a weekly basis, we would have no objections. I would imagine that the day is rapidly approaching when there will have to be a resident Judge both on the Peninsula and in Kodiak. Likewise, I would repeat that we do not disapprove of increasing judicial personnel in other areas that need additional Judges. However, I want to impress again that these other areas are asking for additional Judges while the Kenai Peninsula does not even have one Judge at the present time.

In view of the population on the Kenai Peninsula and the amount of revenues pumped into the State (probably in excess of thirty million dollars), we would respectfully request a resident Superior Court Judge on the Peninsula.

The Kenai Peninsula Bar Association feels that the Superior Court Judge is the top priorty item. We are also supporting the increase in judicial compensation and the Public Defender bill.

I believe that there will be additional people to testify later on in the session from the Kenai Peninsula in regards to the needs for a resident Superior Court Judge.

Thank you.again for your courtesy.

Very truly yours,

James C. Hornaday

cc: House Finance Committee

Senate Finance Committee

Alaska Judicial Council

Governor Miller

File
Bill re
# of judges
Copy to reading
members
11-5

Alaska Court System

State of Alaska

ROBERT H. REYNOLDS
ADMINISTRATIVE DIRECTOR
RAYMOND W. GREGORY
ASSISTANT ADMINISTRATIVE DIRECTOR
ERNEST Z. REHBOCK
LEGAL ASSISTANT

OFFICE OF ADMINISTRATIVE DIRECTOR
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

March 4, 1969

Hon. Barry W. Jackson, Chairman
House Judiciary Committee
House of Representatives
State Capitol Building
Juneau, Alaska 99801

Dear Representative Jackson:

In accordance with your request we are sending you herewith the 1968 caseload statistics of the various superior court locations in the State of Alaska. We are also enclosing herewith the number of cases filed in superior court wherein the causes of action arose in the Kenai peninsula and on Kodiak island.

In 1968 there were 4,485 superior court cases filed in Anchorage. Of these, 591 were children's cases, being handled by the family court judge, and 442 were probate cases, being handled by the probate master. The remaining 3,452 cases were assigned to the five superior court judges who exercise general trial jurisdiction, making a total caseload per judge of 690 cases.

In Fairbanks the number of cases filed in 1968 was 1,176. Of these 197 cases were probate matters, being handled by the probate master. 147 cases were children's proceedings. The balance of 962 cases are divided between the two superior court judges, making a total caseload per judge of 481.

In Juneau 719 cases were filed in the superior court, of which 72 were children's proceedings, which are processed by the juvenile master. 110 cases were filed in probate. The balance of the caseload to be handled by the one judge of the superior court was 537 cases.

In Ketchikan 485 cases were filed in the superior court, of which 50 were probate, being handled by the probate master, and 119 children's proceedings which are currently being handled by a master. The balance to be handled by the superior court judge was 316 cases.

In Nome the superior court judge handles all of the civil, criminal, probate and children's proceedings. In 1968 the total cases filed in Nome was 324.

Of the superior court cases filed in Anchorage during 1968 we have conducted a case by case study to determine how many of those originated in Kenai and the Kenai peninsula and how many originated in Kodiak. The results are as follows:

Kenai peninsula civil and criminal	157
Probate	57
Total	214

Of the 214 civil, criminal and probate cases listed above, 126 originated in the City of Kenai area and 88 originated elsewhere on the Kenai peninsula.

Kodiak civil and criminal	133
Probate	44
Total	177

Presiding Superior Court Judge Ralph E. Moody confirms what Chief Justice Nesbett told your committee in Juneau, that superior court judges from Anchorage do service both the Kenai and Kodiak locations at least once each month and all litigants from those areas have an opportunity to be heard.

It should also be pointed out that many of the causes of action arising in the Kenai peninsula area involve attorneys of both sides who reside in Anchorage and for the purposes of motions and pleadings it is more convenient for them to be heard at Anchorage. In this respect the records indicate only 70 of the 214 Kenai cases were filed by Kenai attorneys. In Kodiak all but 58 cases were filed by Kodiak lawyers.

We trust that this statistical information complies with your request. If you need any further information please do not hesitate in requesting it.

Sincerely,

Robert H. Reynolds

Robert H. Reynolds
Administrative Director

RHR:np

FISHER & HORNADAY
ATTORNEYS AT LAW
JAMES E. FISHER
JAMES C. HORNADAY
KENAI PROFESSIONAL BUILDING - P. O. BOX 397
KENAI, ALASKA 99611
TELEPHONE
283-7565

3 March, 1969

Representatives Barry Jackson, Tom Fink, Eugene V. Miller
Earl Hillstrand, Wendell P. Kay, Stanley Cornelius,
Mildred Stanfield, Jess Harris

House Judiciary Committee:
House of Representatives
Pouch V, Juneau, Alaska

Dear Judiciary Committee:

As President of the Kenai Peninsula Bar Association I have been directed by the membership to travel to Juneau to work for legislation which would result in the stationing of a Superior Court Judge on the Kenai Peninsula.

If possible I would like to appear before your committee, or sub-committees to make a formal presentation of the request for a Superior Court Judge to be stationed on the Kenai Peninsula.

In the event a formal meeting is not possible, then I would hope to meet informally with individual members of the committee or with groups of members of your committees.

I hope to be in Juneau Tuesday and Wednesday, March 11th and 12th. Would such a date be reasonable? If it is possible to answer my inquiry regarding the date of appearance, for your convenience I would accept a collect telephone call or wire.

Yours truly,

James E. Fisher

James E. Fisher
President
Kenai Peninsula Bar Association
P.O. Box 397, Kenai - Telephone 283-7564

Have Pres. [illegible] Senate Committee meeting Wednesday

Susan - Fisher collect
Wire
that Wed is OK
Set on calendar

Kay
~~SB~~ 18
HB 115

12 February 1969

Hon. Barry Jackson, Thomas Fink, Terry Miller
Earl Hillstrand, Irvin Metcalf, Wendell Kay
Stanley Corneilus, Mildred Banfield and Jess Harris
House Judiciary Committee
State Legislature
Juneau, Alaska

Dear Committee Members:

The Kenai Peninsula badly needs a resident Superior Court Judge. Existing personnel of the Superior Court and the Alaska Court System have been cooperative to the extent of the personnel and funds available.

However, the development has now reached a point where a resident Superior Court judge is a necessity. You might think we would request a District Judge. However, this would not help the situation as a District Judge does not have sufficient jurisdiction either in civil or criminal cases. Likewise, we feel that Magistrate Nicholas should continue to handle Magistrate matters.

As you know, over 1/3 of the operating revenues of the State of Alaska come from the Kenai Peninsula area. Likewise approximately 18,000 to 22,000 people now reside on the peninsula. It is the third largest population center in Alaska. Several areas that do not have the population nor the activity of the peninsula have resident Superior Court judges. I wish to emphasize that we do not desire a reduction of judicial services in any location in Alaska. Further, there are other areas that need additional judges. However, the peninsula is the only population center that does not have a resident judge.

The Superior Court does come down from Anchorage once each month. However, this is just not adequate for the present population density. Sometimes the court schedule is changed and our witnesses will sit all day waiting. Likewise, sometimes the weather prevents the arrival of the judge. This situation also complicates the court calendar in Anchorage. For example, the last two months, the court has spent the better part of a week in Kenai, which indicates that Anchorage is short a judge almost 25% of the time.

On numerous occasions a judge has been needed for restraining orders, criminal matters, etc. We do now have a deputy clerk for the Superior Court. However, I believe the probate matters from this area are still filed in Anchorage as well as many criminal cases arising out of peninsula activities.

I would advise that the recently completed court facility in Kenai has chambers for a Superior Court judge. It would be our hope that the court would serve the entire peninsula.

Your cooperation would be very much appreciated.

Thank you.

Sincerely,

James C. Hornaday

James C. Hornaday
Committee Chairman
Kenai Peninsula Bar Association

ROY H. MADSEN
ATTORNEY AT LAW
BRECHAN BUILDING
KODIAK, ALASKA 99615

TELEPHONE
486-5769

MAILING ADDRESS
P.O. BOX 920

Jud Mary
HB 115

February 12, 1969

The Honorable Peter M. Deveau
State Representative
State Capitol Building
Pouch V
Juneau, Alaska 99801

Dear Pete:

I am writing to commend you on H.B. 115 requesting a full-time Superior Court Judge to sit in Kodiak.

I want you to know that I fully support a full-time Superior Court Judge for the Kodiak-Aleutian-Bristol Bay Area and that the Kodiak Bar Association supports this legislation also because we strongly feel that the people of this and other areas such as the Alaska Peninsula and Bristol Bay are being effectively denied the equality guaranteed them by our Constitution under the present arrangement.

I have requested the Superior Court to schedule all preliminary motions and pre-trial conferences concerning Kodiak cases for hearing at Kodiak and that all cases originating in Kodiak be designated as Kodiak cases. However, none of this has been accomplished so it is necessary for the attorney for a litigant from Kodiak to travel to Anchorage for the purpose of appearing for preliminary motions and pre-trial conferences. In many civil actions this may require three or four trips to Anchorage before trial, each of which uses one whole day of the attorney's time and a portion only of this time is recoverable as costs (if the party is successful in securing a judgment and collecting on it) whereas if there were a Superior Court sitting in Kodiak, a matter such as this would take only a few minutes or at most an hour.

Further, the Alaska Statutes afford individuals certain provisional remedies such as attachment, civil arrest, injunction, temporary restraining orders, executions after judgment and the like which when applied for from an outlying area such as Kodiak require approximately two weeks as they have to be prepared here, mailed to Anchorage, signed by the Judge, turned over to the Alaska State Police for service and then be returned here for service. If we had a full time Superior Court here this two week period could be reduced and all of this could be accomplished in one day; therefore, it is my contention and has been all along that people who live as far away as we do from a full-time Superior Court Judge are being deprived of these remedies.

I feel that a Superior Court Judge here could handle all probate matters, estates, adoptions, uniform reciprocal enforcement of support act proceedings and any such matters now going through the Probate Master in Anchorage and in addition I feel that if we had a full-time Superior Court Judge here in Kodiak we could abolish the District Court position and merely have a Magistrate Court to handle small claims and the City cases and the Magistrate could act in the dual capacity of Magistrate and Clerk of the Superior Court. The attendant costs of the new Superior Court could be set off in part by the present salary of the District Court and in part by eliminating the travel expense now used by the present Superior Court Judges when traveling to and from Kodiak and their per diem during Court sessions; however, I do feel that provisions should be made for travel to Bristol Bay and the Alaska Peninsula.

The Alaska Statutes provide that trials for the foreclosure of a mechanic's lien are to be given priority over all other types of cases except criminal cases. Article One, Section One of the Constitution of the State of Alaska states that:

> "All persons are equal and entitled to equal rights, opportunities and protection under the law."

A classic example of the inequality of residents in this area due to the lack of a Superior Court sitting here involves a lawsuit for a foreclosure of a mechanic's lien here in Kodiak. This case dragged on for months and years and finally in order to get it set down for trial at all the local attorney had to agree to a trial in Anchorage in order to accomodate the Court's calendar and the opposing attorney's schedule. The Court sitting in Anchorage had

to hear evidence on a matter which involved questions concerning materials and workmanship on a building situated in Kodiak without having the opportunity to view the building in question and after some five (5) days of trial the case was recessed for a period of two months requiring the local attorney to return to Anchorage at a later date for continued hearing as well as the witnesses involved.

Under the present circumstances with no Superior Court situated here in Kodiak the people residing in this area and the Bristol Bay and Aleutian Chain area only have equal rights if they can afford to pay to pursue them; only have equal opportunities under the law if they can afford to pay to pursue them; and only have equal protection under the law if they can afford to pay for it.

In addition to the matters above mentioned we have the matter of inconvenience in attempting to prosecute for criminal offenses. If a felony is committed in Kodiak under the present arrangement and when an arrest is made the person is brought before the District Judge. If he is held to answer to the Superior Court he is transported to Anchorage until his matter goes before the grand jury. This requires a State Trooper to transport the prisoner to and from Kodiak and at the time the case is presented to the grand jury any witnesses from Kodiak must travel to Anchorage to testify. If the person desires to retain a Kodiak attorney, his attorney has to travel to Anchorage to consult with him. When it is set for trial in Kodiak the attorney has no opportunity to consult with the client prior to trial and therefore the Defendant is denied actually the usual conferences with his attorney prior to the trial of his case. The Judge and prosecuting attorney have to travel to Kodiak all at the expense of the State.

The case load of the present Superior Court Judges sitting in Anchorage is the heaviest in the State and when they are required to travel and sit in other areas this naturally puts them further behind.

Kodiak and the Aleutian Chain have always been politically, economically and ethnically separated from Anchorage and as such a separate community it is entitled to the stability and dignity that the creation of a full-time Superior Court sitting in Kodiak would bring.

If you should need any witnesses to testify on behalf of this Bill when it comes up for hearing I would be more than happy to travel to Juneau at my own expense and I am sure I could get some local businessmen who have had to pay the cost of having cases litigated in Anchorage to appear and testify in support of this Bill also.

With best personal regards, I am

Very truly yours,

ROY H. MADSEN
Attorney at Law

RHM:jm

COPY COPY COPY

ALASKA BAR ASSOCIATION

RESOLUTION NO. 3

(Passed in Convention-May, 1969)

RESOLUTION

URGING THE LEGISLATURE TO ASSIGN SUPERIOR COURT JUDGES TO THE KENAI PENINSULA AND KODIAK COMMUNITIES AND TO SITKA, ALASKA

BE IT RESOLVED by the ALASKA BAR ASSOCIATION that the Association's officers, administrators and legislative counsel or representative do all that is necessary to accomplish executive or legislative or judicial authorization for assignment of a Superior Court Judge to be shared by, and resident in, the Kenai Peninsula and Kodiak communities and also a Superior Court Judge to be resident in Sitka;

BE IT FURTHER RESOLVED that such judge be assigned as soon as appropriately funded by the Alaska State Legislature, but in any event not later than the 1st day of July, 1970.

DONE at Nome, Alaska this 16th day of May, 1969.

CERTIFICATION: I hereby certify that the above resolution is true and correct.

s/ Stanley Howitt
Stanley Howitt
Executive Director

COPY COPY COPY

NO.2

HB

February 17, 1969

HB 127

Honorable Terry Miller, Chairman
Senate Judiciary Committee
and
Honorable Barry Jackson, Chairman
House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Gentlemen:

Your committees, meeting jointly, are considering legislation that would establish a public defender system in Alaska.

Please be advised that the Juneau Camp of the Alaska Native Brotherhood (ANB) and the Alaska Native Sisterhood (ANS) strongly endorses this and urges favorable action by the joint committees. We elect not to enter into the specifics of such legislation as we feel confident that other proponents will discuss the technical and legal aspects of the bill with the joint committees.

While you may be assured that the Juneau Camp expresses its' own desires, you may be equally assured that we feel we speak in the best interests of the natives of Alaska.

Not only would this be desirable for all natives, but the impact of implementing such a system would be tremendous for all persons, irregardless of ethnicity. We therefore urge that this be enacted and due consideration be given to establishing an office in each judicial district of our state.

Respectfully yours,

James J. Austin, Jr.
James J. Austin, Jr.,
President - Juneau ANB

Stella Martin
S.O.
(Mrs.) Stella Martin
President - Juneau ANS

Joint Senate-House Judiciary Committee Hearings

Senate Bill 7
Senate Bill 43 The Public Defender Act
House Bill 127

February 17, 1969

1. Les Miller — President, Alaska Bar Association
2. Representative of the Fairbanks Bar Association
3. Fred Miller — Ketchikan Bar Association
4. Jim Bradley — Juneau Bar Association
5. Bob Erwin — Anchorage Bar Association
6. Jim Hornaday — Kenai Bar Association
7. Stan Howitt — Ex. Secretary, Alaska Bar Association
8. Kenneth Wells — Public Defender, City of Sacramento, California
9. Dick Reagan — Legal Services Corp.
10. Representative of the Alaska Native Brotherhood
11. Lou Dischner — Teamsters Union
12. Don Dickey — Alaska Chamber of Commerce
13. Duane Carlson — AFL/CIO
14. Henry S. Pratt — Alaska Bar Association

SUGGESTED AMENDMENTS TO SENATE BILL 43

BY THE ALASKA BAR ASSOCIATION

Page 1, Line 27

After the word "council" insert the following new language: "The decision of the judge concerned shall be made within 60 days after receipt of the council's recommendation."

Page 2, Line 10

After the word "remove" delete "as many".

Page 4, Line 4

After the word "other" delete the word "may", and insert the word "shall".

Page 4, Line 24

After the word "defendant" delete "or other indigent person".

Page 4, Line 26

After the word "representative" delete the word "him" and insert the words "the defendant person".

Page 5, Line 1

Delete the word "other" and insert "agencies, as ordered by the court."

Page 5, Line 4

Between the words "may" and"contractor" insert the following: ", on approval of the presiding judge of the judicial district where the private attorney resides,"

Page 5,

Add new sub-section (c)

"A person receiving assistance under this Chapter shall be advised of his responsibility under this section, and shall at the conclusion of his representation hereunder, be advised of his exact financial obligation."

Add new sub-section (d)

"The extent of a person's financial obligation under sub-section (c) above, shall be determined by the Public Defender."

Renumber remaining sections to remaining sub-section.

Page 6

Insert new sub-section (l) to read:

"Agencies" means the public defender agencies created hereunder.

Renumber succeeding sub sections.

ESTIMATED NUMBER OF CRIMINAL APPOINTMENTS AND TIME SPENT THEREON BY MEMBERS OF THE ANCHORAGE BAR ASSOCIATION

1. Supreme Court - 1968

   A. Written opinions - 24 indigent criminal appeals

   B. Original applications - unknown

   C. Estimated time spent in preparation and argument to Supreme Court 75 - 100 hours each

   D. Estimated number of lawyers involved in appeals:

      40 on appeals alone
      20 on original applications

   E. Compensation awarded by court:

      $10.00 per hour on research
      $15.00 per hour on court appearances
      100 hours - approximate fee: $1,050.00

   F. Minimum Bar Fee Schedule:

      $1500.00 minimum
      $35.00 per hour rate for all
      100 hours approximate fee - $3,500.00

2. Probate Courts

   A. Sanity cases 1968 - 27

   B. Estimated time spent per each case: 3 - 5 hours

   C. Estimated number lawyers involved: 27

   D. Compensation awarded by court: $25.00 for each court appearance

   E. Minimum Bar Fee Schedule - $35.00 per hour.

3. United States Commissioner and United States District Courts

A. Total 1968: unknown
Average: 1-2 per each member of bar based on examination of appointment book in United States Clerk's Office.

B. Probation revocation and minor crimes not compensable by United States, so requests for representation made by Judge to serve without compensation and no statistics kept.

C. Estimated time spent on each:

10 - 15 hours to enter guilty plea where no contest entered.

20 - 50 hours for ultimate change of plea in contested cases

50 - 100 hours for trial case.

D. Court compensation

$10.00 for out of court time
$15.00 for in court time

E. Minimum Bar Fee Schedule: $35.00 per hour.

F. Estimated number of lawyers involved: all private practitioners in Anchorage Bar.

4. State District Courts and State Superior Courts.

A. Total 1968: unknown; average 3 - 4 for each member of bar, based on examination of criminal appointment book in District Court Clerk's Office.

B. Question whether juvenile cases are also noted in book and if not, estimated additional 1 case per each member of Anchorage Bar in private practice.

C. Estimated length of time spent on each criminal case:

8 - 12 hours on each uncontested plea of guilty (arraignment District Court through plea in Superior Court)

4. State District and State Superior Court Continued:

12 - 40 hours on each contested plea of guilty.

40 - 150 hours on each case where trial takes place.

Estimated length of time on each juvenile case: 6 hours.

D. Court compensation:

$10.00 per hour out of court time
$15.00 per hour in court time

E. Minimum Bar Fee Schedule:

Depends on crime and $35.00 per hour.

5. Estimate of normal time spent yearly for each member of Anchorage Bar in privatepractice on court appointments where matter uncontested:

Supreme Court	1 case	45 hours
Probate Court	1 case	4 hours
United States Courts	1 case	20 hours
State Superior and District Court	3 cases	30 hours
Juvenile Court	1 case	6 hours
	Total	105 hours

(American Bar Association recommends that each lawyer attempt to obtain 6 chargeable hours per day. On such a basis, this amounts to 17½ days a year or approximately 3/4 of a month.)

6. Estimated time where a contested matter is handled. (It is a consensus of opinion that each member would have at least one contested guilty plea each year):

	45 hours
	4 hours
	20 hours
	50 hours
	6 hours
	125 hours

Total time approximately 21 days a year.

7. Estimate of time where there is one trial matter (this would be true for a majority of the members of the bar):

	45 hours
	4 hours
	20 hours
	120 hours
	6 hours
	195 hours

Total time approximately 33½ days a year.

BOARD OF GOVERNORS

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ALASKA BAR ASSOCIATION

P. O. BOX 279
ANCHORAGE, ALASKA 99501
OFFICE
ROOM 137, 941 FOURTH AVENUE
ANCHORAGE, ALASKA 99501
STANLEY HOWITT, EXECUTIVE DIRECTOR AND BAR COUNSEL

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February 11, 1969

Representative Barry W. Jackson, Chairman
Alaska State Legislature
House Judiciary Committee
State Capitol
Juneau, Alaska

Re: Public Defender Bill

Dear Representative Jackson:

Mr. Kenneth Wells has agreed to testify on behalf of the Public Defender Bill and will be representing the National Legal Aid and Defender Association. Mr. Wells is the public defender for Sacramento, California.

We hope that his appearance will aid the judiciary committees in their evaluation of a public defender system for Alaska.

I will also be at the hearing.

Very truly yours,

Stanley Howitt

Stanley Howitt,
Executive Director and
State Bar Counsel

SH:sb

WILFRED C. STUMP
ERNEST E. BAILEY

STUMP & BAILEY
ATTORNEYS-AT-LAW
BOX 2693
314-317 COMMERCIAL BUILDING
KETCHIKAN, ALASKA

PHONE CANAL 5-4131

Feb. 11, 1969

Mr. Terry Miller
Chairman, Senate Judiciary Committee
State Legislature
Juneau, Alaska 99801

Barry Jackson
Chairman, House Judiciary Committee
State Legislature
Juneau, Alaska 99801

Gentlemen:

The Ketchikan Bar Association will have representation before your Joint Committee hearing on the proposed "Public Defender" bill which will be held at 7 p.m. in the Superior Court room, State Building, February 17th, 1969. It will be Mr. A. Fred Miller.

If there is any change in this hearing, would you please notify us at once as he will depart from Ketchikan on the 16th.

Sincerely yours,

STUMP & STUMP

BY: W. C. Stump

WCS:pm

cc: Senator R. H. Ziegler, Sr.
C. L. Cloudy
A. Fred Miller

H B136

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

BOX 1149 — JUNEAU 99801

March 17, 1969

The Honorable Irwin L. Metcalf
House of Representatives
Pouch V
Juneau, Alaska

Dear Representative Metcalf:

Re: H.B. 136

The Department of Labor supports H.B. 136.

This legislation would allow the Alaska Department of Labor to furnish information obtained in administering the unemployment insurance law to the Alaska Department of Revenue in order for the Department of Revenue to administer the Alaska Revenue Act. At present this information is furnished to the U.S. Internal Revenue Service. The Department of Labor and the Department of Revenue are charged with the responsibility of collecting taxes. In fulfilling this obligation, information is obtained by both departments. A free interchange of information between the departments for legitimate purposes would increase the efficiency and effectiveness of required tax collections within the State.

It is my understanding that the House Labor Management Committee changed the language of H.B. 136 to limit the Department of Revenue's use of information to tax purposes only. The Department is in accord with that change. The purpose of this interchange of information is only to more effectively administer the collection of taxes as required by law.

Very truly yours,

Bill Jermain

William K. Jermain
Deputy Commissioner

WKJ:eb

IN REPLY REFER TO 5.03 13.1

U.S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYMENT SECURITY

UNITED STATES EMPLOYMENT SERVICE

Regional Office
1911 Smith Tower Building
Seattle, Washington 98104

UNEMPLOYMENT INSURANCE SERVICE

OK

December 18, 1968

Alaska Dept. of Labor
RECEIVED
DEC 19 1968
Employment Security Division
JUNEAU
EXECUTIVE DI:

Mr. Stuart H. Bowdoin
Director
Employment Security Division
P. O. Box 3-7000
Juneau, Alaska 99801

Dear Mr. Bowdoin:

This letter will confirm the information given to Assistant Attorney General Vernon Snow during Mr. Johnson's recent visit to your agency concerning a proposed amendment to the Alaska Employment Security Act to permit the release of information to the State Department of Revenue to assist in the collection of other State taxes.

Although section 303(a)(1) of the Social Security Act prohibits public disclosure of information obtained from claimants and employers on an unrestricted basis, disclosure to another agency of the government is permitted provided that further disclosure by that agency will be made only to the extent necessary in the discharge of its official responsibility under the State law. If the proposed amendment to section 23.20.110 is adopted, your agency should have an agreement with the Department of Revenue that it would limit its disclosure to the discharge of its responsibility under the Alaska law.

The Department of Revenue should also be advised that since the furnishing of information to that Department is a use of unemployment compensation records for a purpose other than administration of the State unemployment compensation law, the administrative costs of furnishing such information must be paid out of general funds rather than funds granted under Title III of the Social Security Act.

Sincerely yours,

Clinton A. Johnson
Regional Administrator

By _____
Richard C. Buschman

File

Bob Rowther
ESC

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 136

House Bill No. 136, introduced at the request of the Governor, and supported by the Department of Labor and the Department of Revenue, will enable the Department of Labor to disclose information held by the Employment Security Division to the Department of Revenue to assist it in collection of state taxes. The bill would not conflict with Federal restrictions on the use of this information, which is already being furnished to the Internal Revenue Service for a limited tax purpose.

The Judiciary Committee amendment would limit the use of the information to tax purposes. The Department of Labor supports this change as in keeping with the intended puspose of H.B. 136.

Barry Jackson, Chairman

File
HB 150



District Court
State of Alaska
POUCH U, STATE CAPITOL BUILDING
JUNEAU, ALASKA 99801

March 3, 1969

Honorable Barry W. Jackson
Chairman, Judiciary Committee
House of Representatives
Juneau, Alaska 99801

Re: Civil Statistics Juneau District Court

Dear Mr. Chairman:

Attached please find the statistical information requested during your deliberations on H.B. 150 during your February 24, 1969 committee hearings. These statistics are the results of extracting 200 of the 391 cases filed in 1968 in the District Court at Juneau.

If further information is necessary please advise me.

Very truly yours,

Bruce Monroe

Bruce Monroe
Presiding District Judge

Memorandum

Alaska Court System

TO: Honorable Bruce Monroe
Presiding District Judge
Pouch U, Capitol Bldg.
Juneau, Alaska 99801

DATE : February 27, 1969

SUBJECT: Civil Filing Breakdown

FROM: Mary Jo Jeans
Deputy Clerk
Pouch U, Capitol Bldg.
Juneau, Alaska 99801

AMOUNT:	$100.00	$100.00 to $500.00	$500.00 to $1000.00	$1000.00 and Over
FILING	55	116	19	10
PERCENT	27.5%	58%	9.5%	5%

The above is a breakdown of 200 civil cases from 1968.

HB-150



District Court
State of Alaska
POUCH U, STATE CAPITOL BUILDING
JUNEAU, ALASKA 99801

February 24, 1969

Representative Peter M. Deveau
House of Representatives
Pouch V, Capitol Building
Juneau, Alaska 99801

Re: Small Claims Court
Appeal Statistics

Dear Representative Deveau:

Thank you for your telephone call and inquiry of this date concerning the number of appeals taken from this Court in small claims matters. A search of the records of both District Court and Superior Court at Juneau reveals there have been no appeals since January 1, 1967 until this date. Records prior to January 1, 1967 were not examined.

I hope this information satisfies your needs. If I may be of further assistance, please contact me.

Yours very truly,

Bruce Monroe

Bruce Monroe
Presiding District Judge

cc: The Honorable
Thomas B. Stewart
Presiding District Judge

HB 164

CALL & HAYCRAFT
ATTORNEYS AT LAW
ROOM 210, NERLAND BUILDING
FAIRBANKS, ALASKA 99701

DAVID H. CALL
KENNETH C. HAYCRAFT, COL. (RET.)

TELEPHONE
452-2211
452-2296

February 25, 1969

Representative Barry Jackson
State Legislature
Juneau, Alaska

IN RE: House Bill 164

Dear Barry:

This is to ask you as a representative of Interior Alaska to oppose passage of House Bill 164. We have had Daylight Savings Time for one year only, but I think most people found it desirable. I should like to add my voice to those who think it is important to all forms of youth activity, particularly baseball, that we have the extra hours of sunlight in early June and August that are provided by Daylight Savings Time. Scheduling youth baseball is indeed difficult without it.

I am sure you will hear from many people as to other advantages of Daylight Savings Time such as in the field of transportation, and I will agree with them that it is desirable from many viewpoints. I urge a continuance of Daylight Savings Time to facilitate youth athletics in the Fairbanks area.

Sincerely yours,

CALL & HAYCRAFT

Kenneth C. Haycraft

KCH:gb

cc: William Cartwright,
Alaska National Bank

HB179

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 179

This bill would establish qualifications and training for police officers in Alaska through the creation of a Police Standards Council. The bill follows the provisions of the Model Police Standards Council Act very closely.

When a person calls the police he has the right to hope that a well-trained, skilled and reliable man will answer the call. In some areas of Alaska today that hope may not be justified. Standards of police employment, and the actual practices of hiring, vary widely, and there is no uniform requirement of training.

The law enforcement officer is responsible for the protection of life and property and for the enforcement of laws and ordinances. He must know the law of arrest and of searches and seizures. He must be skilled in first aid and life-saving techniques. He should possess investigative ability, including good powers of observation, and the sense to interpret his findings and make an effective factual presentation, in order to command respect for law and order, he has to have general intelligence, emotional stability, good judgment, and the ability to handle complex situations under emergency conditions. We certainly expect him to possess good moral character and a high degree of physical fitness. In brief, he is expected to be a living example of all that is good within our society.

We require training and set standards for our physicians, attorneys, teachers, embalmers, beauticians, and barbers. It is time we did the same for our police.

Specifically, this bill creates a council containing representatives of the federal, state and local governments. The council will adopt regulations governing police training and certification, and will provide training programs. Presently employed officers may continue in employment. Some federal funds are available for the functions contemplated by this bill on a matching basis, and the bill provides for a sharing of funds by local governments to reimburse expenses invoked in police training programs.

There are 23 states having statewide police standards legislation, of which 7 are modeled on the prototype of the present bill.

Berry Jackson
Chairman
House Judiciary Committee

FORM SA-18

MEMORANDUM State of Alaska

TO: Honorable Barry Jackson
Chairman House Judiciary Committee
Sixth State Legislature

DATE : March 20, 1969

FROM: Lieutenant G. O. Williams

SUBJECT: My Testimony Relative to SB 179

This memorandum is submitted to the committee pursuant to your request.

I will not address myself to the question of the funds which will be available for police officer training under the Omnibus Crime Bill. Mr. Rick Lauber of the Governor's Crime Commission will discuss this subject.

In my testimony, I stated that there were numerous federal grants which were becoming available for the training of law enforcement officers. Funds for police training under the Omnibus Crime Bill of 1967 may be wholly conditional to the passage of a Police Standards and Training Act.

Legislation of this type is essential to the coordination of grant applications for federal funding under a variety of programs. During 1968, the Department of Public Safety applied for and received federal funding for the following projects which had an important training component.

NEW CAREERS - $125,000 program funded by the U. S. Department of Labor which provided for a 14-week training program for police and correctional aides in the Division of Corrections and the Department of Public Safety. Invitations to participate in the program were extended to all municipalities.

VOCATIONAL EDUCATION - $10,000 program funded by the State Department of Education which provided books, training materials and training equipment for the State Trooper Academy.

We are currently awaiting final approval of the following projects which have been funded under the Highway Safety Act.

BREATHALYZER TRAINING - A program which will provide the transportation, maintenance and training expenses for municipal and state police officers to qualify them in the supervision of breathalyzer testing programs.

M E M O R A N D U M

POLICE TRAFFIC SUPERVISION - A program which will provide the transportation, maintenance and training expenses for municipal police traffic supervisors to train them in the advanced techniques of traffic accident investigation and traffic enforcement.

EMERGENCY MEDICAL CARE - A program which will provide the transportation, maintenance and training expenses for 100 volunteer and professional firemen, policemen and other personnel engaged in the transportation of sick or injured persons. The training will encompass advanced first aid and emergency rescue procedures.



CITY OF JUNEAU | ALASKA'S CAPITAL CITY
155 SOUTH SEWARD STREET | JUNEAU, ALASKA 99801

March 19, 1969

The Honorable Barry Jackson, Chairman
House Judiciary Committee
Alaska State Legislature
Pouch V - State Capitol
Juneau, Alaska 99801

Dear Representative Jackson:

I have received your letter of March 17, 1969, concerning House Bill 179, which is presently before your Committee. The purpose of the Bill, establishing an Alaska Police Standards Council, was discussed with Chief Wellington and he has informed me that as a police administrator, he feels the Bill is necessary in order to upgrade the qualifications for individuals desiring to be employed as police officers within the State of Alaska.

At the present time, there are no minimum qualifications for the individual, or standards set for the training he should receive. As a result of this, some cities have no standards or training for their officers. Of course, as an elected official, I can see the danger in this. The citizens of that particular community are going to suffer as a direct result of unqualified, untrained officers handling the police functions in their area.

Here in Juneau, I think we are fortunate that our Police Department has set standards for recruitment and also has taken the initiative to provide training, which is acceptable, but far from being the ultimate answer.

I definitely feel that the cities should not relinquish any power to a State board, but after reviewing the proposed Bill, five of the nine member committee will be representatives of local government, and this should be the safeguard that the cities will need in order to insure that programs are not pressed upon them which they are financially unable to meet.

For years, different professions throughout the State have been regulated by State boards' rules and regulations, and I think it is important that some minimum

standards be set for the recruitment and training of our police officers. Therefore, I am generally in favor of passage of House Bill 179.

Thank you very much for giving me the opportunity of making these comments to you.

Sincerely,

Joseph L. George
Mayor

JLG/kh

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

OFFICE OF THE GOVERNOR

CRIMINAL JUSTICE COMMISSION

GOLDSTEIN BUILDING
POUCH AJ — JUNEAU 99801

March 24, 1969

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Alaska State House of Representatives
Pouch V
Juneau, Alaska 99801

Subject: HB179

Dear Mr. Chairman:

The Omnibus Crime Control and Safe Streets Act of 1968 makes provision for federal assistance to states and units of local government for academic educational assistance. By grants and loans to law enforcement personnel, an effort is being made to upgrade the educational level of those presently engaged in law enforcement.

While the Governor's Planning Council on the Administration of Criminal Justice has not as yet submitted its Comprehensive Law Enforcement Plan, it appears that training in all areas of law enforcement will be a priority item. If the Council determines that funds should be allocated from the federal grant to units of local government to assist them in training police officers, up to 75 percent of the cost of the program may be paid under the federal grant. Either the unit of local government or the state could match the additional 25 percent.

While not specifically mentioned in the Act, I feel that the Justice Department would require that the state establish minimum curriculum requirements for the training of police officers. These standards could be arbitrarily fixed by the Governor's Planning Council on the Administration of Criminal Justice, but it would appear far better to have the curriculum established by representatives of units of local government with the assistance of state and federal agencies involved and concerned.

Sincerely yours,

Richard B. Lauber
Executive Director

RBL:gt

FORM SA-1B

MEMORANDUM State of Alaska

TO: Barry Jackson, Chairman
House Judiciary Committee
Sixth State Legislature

DATE : March 13, 1969

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: Fiscal Note - HB 179
Our File 151 - 1969

In regard to your request for a fiscal note on HB 179, I find it almost impossible to submit a meaningful valid fiscal note on what is a voluntary program. This statement is of course in conflict with the statements of the "Anchorage Police Department Employees Association" in their correspondence with Rep. Harris. If nothing else, that correspondence verifies the need for minimum educational requirements for police officers. (See 18.65.180(b) regarding voluntary and incentive.)

The first year, however, would no doubt consist of planning meetings for formulation of the standards.

Travel and per diem would be the largest item, if not the only one. Estimate, $5,000.00.

Second, third and subsequent years would have too many variables (decisions of the council, number of persons trained, facilities and training methods used, etc.) for me personally to arrive at any meaningful figure.

Since this is not a Department of Public Safety Bill, and the administration or direction would be mainly in the hands of local government, I do not feel qualified to present the fiscal note requested.

Copy to member
regarding
File copy in HB 179

Anchorage Police Department Employees Assoc.

625 "C" Street Anchorage, Alaska 99501

February 28, 1969

Representative Jess Harris
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

RE: HB 179 & Act already passed regarding submission of reports by local police departments to a central State file

Dear Sir:

In regard to HB 179, the Anchorage Police Department Employee's Association (APDEA) is in accord with the professionalization of law enforcement in Alaska by setting uniform and acceptable standards of recruitment and training. However, we do not endorse or recommend HB 179.

The Governor of the State has the sole power to appoint the members of this council. There are no written safeguards to confirm the qualifications of the people on this council. There are also no provisions for allowing the proposed council members to be chosen from representative, evenly distributed geographic areas. Appointment to this council could be politically influenced. This political influence could be directed, through this council, to law enforcement agencies. Influence on law enforcement agencies should only be imposed by legitimate legislative action in the form of laws enacted by elected representatives of the people.

Other hazards of this bill are: Section 18.65.160(1) - For what reason or purpose would a Police Standards Council need police reports and information? Once this information has been released from confidential files it could be made public, thus increasing the right to discovery of defense attorneys and suspected criminals. The names of confidential sources who provide information on criminal activities could be made public. We strongly object and oppose this breach of confidence.

Section 18.65.170(b) - The wording of the second line of sentence one; shall fix other qualifications for the employment of police officers. We feel that this wording leaves too general a discretion to the council.

Section 18.65.170(c) - Pertaining to promotional examinations. Is it to be understood that the council will administer the examination and make the promotion without the voice of the agency in which the vacancy has occurred. This area also comes close to and possibly does give power to horizontal mobility. This would allow a Sergeant in Nome to transfer in rank to the Juneau Police Department. This, of course, would not be realistic.

Section 18.65.200 - We feel that the members of the council should elect their own chairman.

Section 18.65.240(b) - We are greatly concerned that there is a conflict of interests with this section in utilizing existing facilities and programs to avoid duplication. There are two facilities in the State that are well-qualified to meet the standards of police training; one being in Sitka maintained by State personnel, and the other administered by highly qualified instructors of the Anchorage City Police Department. Also, in Anchorage the University of Alaska offers a Police Science curriculum for police officers.

Now, if the political appointed members of this State Police Standards Council are enacted with the power to approve these training facilities and programs with the intent to avoid duplication in the interest of economy and efficiency, we wonder which of the two facilities would be allowed to remain in operation, the State sponsored program or the local municipal program? If the local municipal training program is abolished in favor of the State program in Sitka, would the council also move the Police Science program from the University of Alaska to Sheldon Jackson College? Under Section 18.65.160, paragraphs 2, 3, 4 and 5, the council is empowered to make this move.

We do not feel that this council should be endowed with absolute power as set forth in this bill. Nor do we believe that the members should be appointed without qualifications and exposed to influence of political dominations. California has a similar but more practical and non-political bill in which compliance thereto is be choice, with a monetary incentive to comply.

We do feel that a Police Standards Council would be beneficial to both State and Municipal law enforcement agencies, and that their function should be in an advisory manner to the State and Municipal agencies. We sincerely believe that more research should be made in this matter before presenting it to the Legislature.

Regarding the other records submission bill, we understand a hearing is to be held by S. Cornelius to establish regulations for this act. We were opposed to this originally and request consideration of the following: lack of State ability to finance an adequate system, the geographic unavailability of the file, the amount of unnecessary reports involved, and of utmost importance, the availability of the file to process servers who are in actuality private investigators.

The only method of operation of such a file that would produce timely, accurate feedback of information is an up-to-date teletype operated data process system designed after the Federal Bureau of Investigation's National Crime Information Center (N.C.I.C) on a seven day a week, 24-hour a day basis. This, I am sure, would not be forthcoming from the State.

Sincerely,

Brian Porter

Brian S. Porter, President
Anchorage Police Department
Employee's Association

BSP/ams

cc: Robert Sharp, Anchorage City Manager
John C. Flanigan, Anchorage Chief of Police
All Representative & Senators, Anchorage Area
Members of Judiciary Committee

CITY OF FAIRBANKS



OFFICE OF THE MAYOR

March 31, 1969

The Golden Heart City

P.O. BOX 790
FAIRBANKS, ALASKA 99701

The Honorable Barry Jackson
Chairman, House Judiciary Committee
Pouch Y
Juneau, Alaska 99801

Dear Barry:

Concerning House Bill No. 179. This was supported by the League of Alaska Cities as a part of our blanket program implemented at the annual meeting of the League of Alaska Cities this past October. I have not followed the bill closely and will have to rely on your judgment regarding your statement that "This bill suggests that it would effectively limit the powers of cities to determine matters related to their own police force." If you feel strongly about this, I would suggest that you take whatever action you feel would be in the best interests of the Fairbanks community. Since the firm of Senator Merdes also acts as our City Attorney, and you have previous experience in this area, I will trust your good judgment in this matter.

Kindest personal regards and on behalf of the Fairbanks community, my sincere thanks for the outstanding job that you are doing in the current session of the State Legislature.

Most sincerely,

CITY OF FAIRBANKS

H. A. "Red" Boucher
MAYOR

HAB/ss

VISIT ALASKALAND

All-America City
of
ANCHORAGE ALASKA

International
Polar air cross roads of the world

Office of The Mayor

March 25, 1969

Honorable Barry Jackson, Chairman
House Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Dear Barry:

This is in response to your inquiry on HB NO. 179 which would establish the Alaska Police Standards Council. As I wired you on March 24, 1969, the City of Anchorage opposes this bill. It would effectively invade the home rule powers of cities.

Section 18.65.160 would empower the Alaska Police Standards Council to promulgate regulations including the authority to require the submission of reports and information by police departments in the state. We have found from past experience that such agencies are unmindful of the costs involved in complying with such report requirements. The City is currently taking issue with the Department of Public Safety on regulations which require numerous reports.

This Council would also be empowered to establish minimum educational and training standards for police officers including those employed by cities. So-called "class specifications" which normally include educational training and experience are a part of a comprehensive pay plan. The City of Anchorage, and I am sure other cities, are not prepared to delegate this authority to an appointive state council. It could logically be asked, "if the state should establish standards for police officers, why not have the state establish standards for engineers, firemen, electricians, and any other class of employees of cities and boroughs?" We know that minimum standards also establish the level of pay that is justified. The agency with responsibility for the budget should have the ultimate responsibility for standards. The appropriate agency is the City Council and not the Police Standards Council as proposed in this bill.

I could comment on each of the powers that Section 18.65.160 confers upon this Council but I believe the above remarks make the point I wish to make-- that this is a local matter insofar as it relates to City police officers. The powers proposed for this Council also invades the duties of the State Director of Personnel and will erode the Merit System. You can be assured that if the Council as proposed in this bill is established, there will be demands for similar councils to be established to control engineers and other professions and to eventually remove these positions from local and state civil service or merit systems.

There is such a variance in the needs of the cities of the state that I think it would be next to impossible for the Council to establish meaningful standards on a state-wide basis since the standards in Klawock and Craig would not very well meet the standards in Anchorage or Fairbanks. We feel the City of Anchorage is capable of determining the standards for City police officers, needed training facilities, curriculum, and other matters relating to law enforcement for which it is capable of financing. We find it totally inconsistent for a state agency to establish standards when it does not have the responsibility for funding these standards.

We find it unacceptable to have administration officers or executive officers of cities sitting in a position to prescribe standards that their city councils may not be willing to establish or may be unable to finance.

We appreciate your bringing this matter to our attention and if we can be of further assistance please advise me.

Sincerely yours,

George

George M. Sullivan,
Mayor

A M E N D M E N T

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: HOUSE BILL NO. 179

Page 3, line 22:

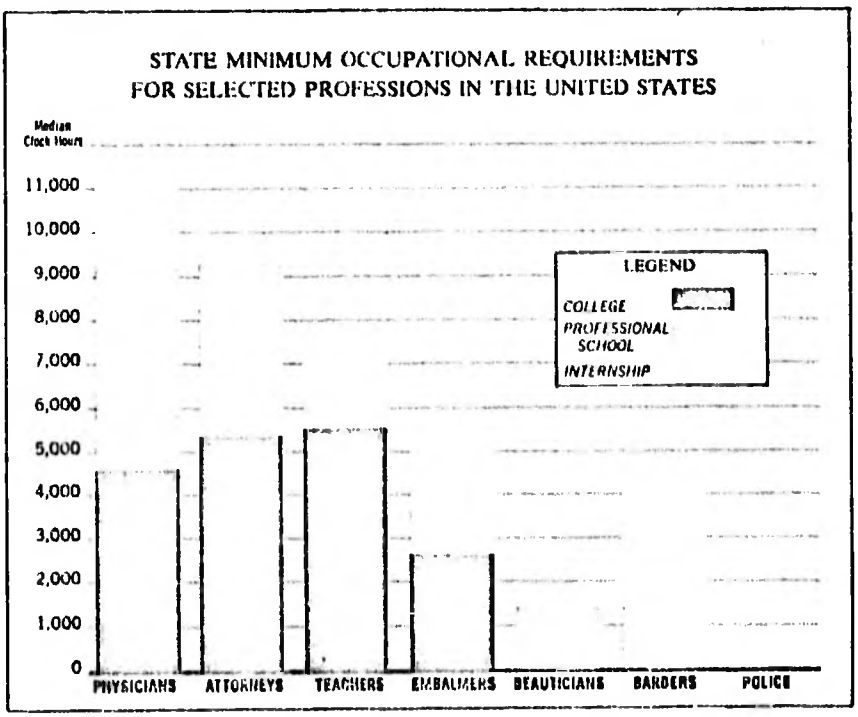
Before "reimbursement" insert "partial or complete" and after "reimbursement" insert a comma.

Page 3, line 23:

After the word "state" insert a comma, and delete "of 50 per cent".

A MODEL POLICE STANDARDS COUNCIL ACT

By NORMAN C. KASSOFF
IACP Professional Standards
Division, Washington, D. C. 20036



◆ The technological advances of the twentieth century in the United States have been accompanied by a corresponding advancement in the living standards of its citizens that is unique in the community of nations. This industrial and economic growth has been paralleled by a universal desire to increase the educational level of our population. School building programs, whether for a new construction or the expansion of present facilities, are bringing the opportunity to learn to a very large segment of our population. This emphasis on education is reflected by the prediction that within the next five years some forty percent of the adult population will have obtained the equivalent of a junior college education.

It follows then that the citizen of an enlightened society is not only more aware of the dignity of man, but of the guarantees given to him under the constitution. This awakening has in turn brought about great changes in the attitudes and physical operations of law enforcement agencies all across this country. Never before in our history have the police been so closely observed, criticized, (whether rightly or wrongly), nor have they encountered court decisions that questioned certain police practices. As a result, the law enforcement officer has in some instances found himself incapable of readjustment because of the very nature of this social and legal upheaval.

His ability and the methods used to cope with these new challenges are directly related to the type and quality of training that the police officer has received. Often as not, as our courts have indicated, the American police officer is inadequately prepared to cope with the rapidly changing problems in the society, and it appears that his ability to function in this contemporary society is weakened.

What are the answers to this situation?

If the individual police agencies cannot or will not prepare the officer to meet this pressing challenge, then the individual states must be prepared to provide the leadership and to assist in any means possible to help law enforcement achieve a professional status. Every state is charged with the protection of the health and welfare of its citizens, and all states have, through their legitimate licensing authority, established standards of selection and training for services and professions that affect this important phase of our lives.

LICENSING AND ITS DEVELOPMENT

Licensing as a means to select the more qualified and assure their proper training and education is not a new concept. It can be traced back to the ancient Hebrews, who required their healers and physicians to be of a certain age and practice for a certain period of time under the supervision of an experienced physician before they could use their "art upon the people." The move to professionalize through licensing

has been extended to many fields, but strangely enough, it has not been made applicable to a group which must make certain life or death decisions, decisions where a citizen's life, liberty and property may be arrested . . . *the law enforcement officers (police) in the United States.*

The development of professions in the United States, and indeed in the rest of the world, has been based upon (1) a careful selection of individuals to make certain they have the basic qualifications needed to perform, and (2) an established and tested body of knowledge that the practitioners must master and use in performing their tasks.

It was felt that certain requirements had to be established beforehand to guarantee satisfactory performance, not only during the training period but long after the individual became a member of the profession. The states had a vital interest in this area, for it was found they were the only ones who had the authority to enforce compliance with regard to any criteria laid down by the professional groups. Further, the citizens demanded and expected that the professional be an expert in his field, and so they assented by giving to their state representatives the authority through legislation to determine and regulate, on a statewide basis, whether individuals holding themselves out as members of a profession, were indeed qualified. As professions developed, the selection process readjusted to place a greater emphasis on basic educational qualifications in order to insure a greater degree of success in the training and learning phase by individuals. This, as we shall see, has varied greatly between occupations and professions, but the trend has been in one direction: toward higher basic educational qualifications.

The training of a professional person has, over a period of time, improved in quality and quantity. The factors affecting this were demands by the society for more improved services from the professions, the information explosion, and the great strides made in the areas of science and technology.

These facts have led to a generally accepted standard of what is a profession; and have set in

MODEL POLICE STANDARDS COUNCIL ACT

(Title should conform to state requirements. The following is a suggestion: "An Act establishing a Police Standards Council; providing certain educational and training requirements for members of police forces; and for related purposes.")

(Be it enacted, etc.)

Section 1. Findings and Policy

The legislature finds that the administration of criminal justice is of statewide concern, and that police work is important to the health, safety and welfare of the people of this State and is of such a nature as to require education and training of a professional character. It is in the public interest that such education and training be made available to persons who seek to become police officers, persons who are serving as such officers in a temporary or probationary capacity, and persons already in regular service.

Section 2. Police Officer Defined

As used in this Act:

"Police officer" means any full-time employee of a police department which is a part of or administered by the state or any political subdivision thereof and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this State.

Section 3. Police Standards Council

(a) There is hereby established a Police Standards Council, hereinafter called "the Council," in the Executive Office of the Governor. The Council shall be composed of fifteen members, as follows: five chief administrative officers of local government police forces, at least three of whom shall be from forces maintained by incorporated municipalities; five officials or employees of local government who have general executive or legislative responsibilities with respect thereto so chosen as to represent county government and municipal government; [the head of the state police], one representative of higher education, two public members and the Attorney General.

(b) Except for the Attorney General and the [head of the state police] who shall serve during their continuance in those offices, members of the Council shall be appointed by the Governor for terms of four years; provided that no member shall serve beyond the time he holds the office or employment by reason of which he was initially eligible for appointment. Notwithstanding anything in this Section to the contrary, the terms of members initially appointed to the Council by the Governor upon its establishment shall be: three for one year, three for two years, three for three years, and three for four years. The Governor, at the time of appointment, shall designate which of the terms are respectively for one, two, three and four years. Any vacancy on the Council shall be filled in the same manner as the original appointment, but for the unexpired term.

(c) The Governor annually shall designate the chairman of the Council, and the Council annually shall select its vice-chairman. The chairman and vice-chairman shall be designated and selected from among the members of the Council.

(d) Notwithstanding any provision of any statute, ordinance, local law, or charter provision to the contrary, membership on the Council shall not disqualify any member from holding any other public office or employment, or cause the forfeiture thereof.

(e) Members of the Council shall serve without compensation, but shall be entitled to receive reimbursement for any actual expenses incurred as a necessary incident to such service.

(f) The Council shall hold no less than four regular meetings a year. Subject to the requirements of this subsection, the chairman shall fix the times and places of meetings, either on his own motion or upon written request of any [five] members of the Council.

(g) The Council shall report annually to the Governor and legislature on its activities, and may make such other reports as it deems desirable.

Section 4. Powers

In addition to powers conferred upon the Council elsewhere in this Act, the Council shall have power to:

1. Promulgate rules and regulations for the administration of this Act including the authority to require the submission of reports and information by police departments within this State.

2. Establish minimum educational and training standards for admission to employment as a police officer: (a) in permanent positions, and (b) in temporary or probationary status.

3. Certify persons as being qualified under the provisions of this Act to be police officers.

(Continued on next page)

4. Establish minimum curriculum requirements for preparatory, in-service and advanced courses and programs for schools operated by or for the state or any political subdivisions thereof for the specific purpose of training police recruits or police officers.

5. Consult and cooperate with counties, municipalities, agencies of this State, other governmental agencies, and with universities, colleges, junior colleges, and other institutions concerning the development of police training schools and programs or courses of instruction.

6. Approve institutions and facilities for school operation by or for the state or any political subdivision thereof for the specific purpose of training police officers and police recruits.

7. Make or encourage studies of any aspect of police administration.

8. Conduct and stimulate research by public and private agencies which shall be designed to improve police administration and law enforcement.

9. Make recommendations concerning any matter within its purview pursuant to this Act.

10. Employ a Director and such other personnel as may be necessary in the performance of its functions.

11. Make such evaluations as may be necessary to determine if governmental units are complying with the provisions of this Act.

12. Adopt and amend bylaws, consistent with law, for its internal management and control.

13. Enter into contracts or do such things as may be necessary and incidental to the administration of its authority pursuant to this Act.

Section 5. Required Standards

(a) Police officers already serving under permanent appointment on the effective date of this Act shall not be required to meet any requirement of subsections (b) and (c) of this Section as a condition of tenure or continued employment; nor shall failure of any such police officer to fulfill such requirements make him ineligible for any promotional examination for which he is otherwise eligible. The legislature finds, and it is hereby declared to be the policy of this Act, that such police officers have satisfied such requirements by their experience.

(b) At the earliest practicable time, the Council shall provide, by regulation, that no person shall be appointed as a police officer, except on a temporary or promotionary basis, unless such person has satisfactorily completed a preparatory program of police training at a school approved by the Council, and is the holder of a Bachelor's degree from an accredited institution. No police officer who lacks the education and training qualifications required by the Council may have his temporary or probationary employment extended beyond one year by renewal of appointment or otherwise.

(c) In addition to the requirements of subsections (b), (e) and (f) of this Section, the Council, by rules and regulations, shall fix other qualifications for the employment and promotion of police officers, including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of police officers, and the Council shall prescribe the means for presenting evidence of fulfillment of these requirements.

(d) The Council shall issue a certificate evidencing satisfaction of the requirements of subsections (b) and (c) of this Section to any applicant who presents such evidence as may be required by its rules and regulations of satisfactory completion of a program or course of instruction in another jurisdiction equivalent in content and quality to that required by the Council for approved police education and training programs in this State.

Section 6 Police Training Schools and Programs: Grants Under the Supervision of Council and the State

(a) The Council shall establish and maintain police training programs through such agencies and institutions as the Council may deem appropriate.

(b) The Council shall authorize the reimbursement to each political subdivision and to the State 50 percent of the salary and of the allowable tuition, living and travel expenses incurred by the officers in attendance at approved training programs, providing said political subdivisions or state agencies do in fact adhere to the selection and training standards established by the Council.

Section 7. Appropriations

(a) Except as otherwise specifically provided in this Section, the Council shall be supported only by appropriations made by the legislature.

(b) The Council may accept for any of its purposes and functions under this Act any and all donations, both real and personal, and grants of money

(Continued on page 15)

motion the machinery of the states to guarantee that the high standards of selection and training developed by the professions would be safeguarded from incompetence and frauds.

This has been done through the process of licensing by the several states and is related to a method of control for the benefit of society. In our country this control is based upon the fact, as we have seen, that the several states owe an obligation to their citizens to protect their health, safety and morals from those who might adversely affect it. The states, through their various legislatures, therefore, have enacted laws to safeguard these inherent rights, and indeed have the responsibility to see to it that they are continually protected.

This is not new or unique; it is a sociological phenomena—as any population expands, living becomes more complex. Safeguards are needed not only to protect the society from outright criminal activity of individuals, but also from the less apparent unskilled and untrained individual, whose services can affect the people. This latter area permits the several states to regulate a large variety of activities and occupations. The legislative function, thus, is to secure to all persons the safeguarding of their rights, including the enjoyment of their personal property as well as the equal use and enjoyment of public property. Whatever affects the health, safety and morals of the people is subject to legislative action, and so licensing by legislative edict evolved as a means for this type of protection.

This is not an unreasonable restraint on individual liberty or the society, it is a process that, by building the safeguards, actually protects the individual and the society.

The states have acted, in many areas through the licensing of many enterprises and occupations, with one thought in mind: *to improve the end result, whether it be a product or service, either personal or impersonal.*

A license or certificate for an occupation is a means of providing the legal guidelines and requirements for those who wish to enter an occupation that affects the health and welfare of the entire

from any governmental unit or public agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. Any arrangements pursuant to this subsection shall be detailed in the annual report of the Council. Such report shall include the identity of the donor, the nature of the transaction, and the conditions, if any. Any monies received by the Council pursuant to this subsection shall be deposited in the [state treasury] to the account of the Council.

(c) The Council, by rules and regulations, shall provide for the administration of the grant program authorized by this Section. In promulgating such rules, the Council shall promote the most efficient and economical program for police training, including the maximum utilization of existing facilities and programs for the purpose of avoiding duplication.

(d) The Council may provide grants as a reimbursement for actual expenses incurred by the State or political subdivisions thereof for the provisions of training programs to officers from other jurisdictions within the state.

Section 8. Severability

The provisions of this Act shall be severable and if any phrase, clause, sentence or provision of this Act is declared to be contrary to the Constitution or laws of this State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Act and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby.

Section 9. Repealing Clause

All acts or parts of acts not consistent with this Act are hereby repealed.

Section 10. Effective Date

(Insert effective date.)

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society. It establishes a high uniform standard for the licensee and enforces adherence to the prescribed standards; it further provides the public with the information that the state, within its legal prerogatives, has made certain the practitioner is what he says he is, a professional.

The result: public confidence.

But it was not always so, for we learn from our mistakes.

A license is a permit granted by the sovereign to a person, firm or corporation to pursue some occupation or to carry on some business, subject to regulation under police power. This has been due in part to the efforts of state or national professional organizations raising their own technical standards. This upgrading seems to center about educational qualifications; for example, there is a trend among the states for barbering to require a high school education.

As our population continues to expand, our knowledge should also continue to grow. The result of this complex growth will be a more complex economy and we will begin to see the development of specialization in many more fields of occupations and professions. As a result of this, the trend toward licensure will be subjected to more and more pressure from the public in order to improve the services offered.

The trend for licensing or control has gone far beyond those occupations normally associated with professional status, as evidenced by a recent survey conducted by the International Association of Chiefs of Police. This survey included barbers, beauticians, embalmers, as well as doctors, lawyers and teachers, and was most enlightening. First, all of these occupations had set standards of selection commensurate with their needs; and second, they all had established a body of knowledge which was needed by the practitioner to adequately perform this task. The trend is there, the need has become obvious, and in the interest of the public, the states have seen fit to regulate the several occupations that can and do affect our society.

At the cost of human life and suffering, it took the medical profession many years to have the state legislatures prohibit country store pharmacists and others from practicing medicine and calling themselves doctors without having graduated from accredited medical schools.

At the expense of many innocents going to jail, or heirs being involved in long drawn out litigation over the probating of a will, the public and the state realized the defense of a criminal case or a man's estate after his death were complex legal matters that required the special services of an individual who had received legal training and could demonstrate his learning.

It took several incidents of death to make the states realize that the handling and the preparation of a dead human body posed problems to health, sanitation and hygiene; that to deal effectively with these problems required an understanding of mortuary science, pathology, microbiology, chemistry and other related sciences. The result was the adoption by the states of a selection and training process for those seeking to become embalmers.

Besides some humorous results in haircutting, it took many serious scalp infections in heavily populated areas, for both the states and the barbers to realize that there was more to barbering than just cutting hair; there were questions of hygiene, sanitation, nerve functions in the hand and face, chemistry of the hair and chemical composition of various lotions put on the scalp, all of which affected the type of service given in a barber shop. Together they drew a code of licensing for those practicing barbering to protect the general public and to provide a more efficient service to it.

PRESENT STATUS OF LICENSING: SURVEY RESULTS

The occupational survey conducted by the IACP included such considerations as age, residency, training, and reciprocity. Three of these occupations, the physician, the teacher, and the attorney, were chosen because the police officer of today performs each of these skills to some degree at some time during the course of his employment.

As a "physician" he must know the fundamentals of first aid for the sick and the injured, and practice this skill under the most trying conditions. In many instances he must know the law as thoroughly as a practicing attorney, and without the benefit of a large law library close at hand. The remaining three occupations—barber, beautician and embalmer—listed in the appendices are not less important,

and are generally not thought of as professions, but they do indicate the high degree of training needed to function and protect the society. It will be noted that they far exceed the requirements of law enforcement.

Physicians

The survey showed that in order to enter the medical profession the states generally require a maximum of a four-year Bachelor's degree or a minimum of three years of college; four years of training in a medical school recognized and approved by the American Medical Association; and an internship of from one to two years. He must also pass a written and/or oral examination administered to him by the state's medical association in accordance with state law. The median number of hours needed to complete these qualifications is 11,450.

Attorneys

In reference to the attorney, the survey shows that the majority of states require a maximum of a four-year Bachelor's degree(minimum number of states require two years of college), three years at an accredited law school recognized by the American Bar Association, and the passing of a Bar examination. A minority of states require an internship of from one to two years before being permitted to take the Bar examination in lieu of some years of law school. The median number of hours required to complete these qualifications is 9,540.

Teachers

In the majority of states, the teaching profession requires a Bachelor's degree as a minimum, depending upon the grade level and the type of job the teacher seeks. (As an example, some states require a Master's degree for their administrators or principals.) There is now a trend toward a requirement of a fifth year of preparation for teachers in the elementary and secondary schools. In any case, they must serve an internship that may vary from twelve to twenty-four months, depending upon the state. Some states even require the passing of the National Teachers Examination as a requirement for certification. The median time involved to complete these qualifications is 7,400 hours.

Embalmers

The embalming profession in a majority of the states requires a maximum of two years and a minimum of one year of college. The courses required during this period include mortuary science, anatomy and physiology; chemistry—organic and inorganic; pathology; microbiology; sanitation and hygiene; public health laws and regulations; and mortuary law and administration. The professional schooling also requires an internship, varying from twelve to twenty-four months. During this internship, the student must embalm a prescribed number of bodies under the supervision of a licensed practitioner. The median number of hours required to complete these qualifications is 5,580.

Barbers

The licensing of barbers in most jurisdictions, requires a professional schooling of from six to twelve months. Required courses include physiology, hygiene, elementary chemistry, sterilization, and anatomy, including facial bone structures and cranial nerve systems. There is a trend now among the states to require a high school diploma for barbers. An apprenticeship of from six to eighteen months is also required once the training course has been completed. The median number of hours required to meet these qualifications is 4,330.

Beauticians

Such courses as theoretical studies in sanitation and hygiene, anatomy of the head and face, safety measures, use of antiseptics, chemical composition of cosmetics, and the use of electrical appliances consistent with the practical and theoretical requirements as are applicable to cosmetology, are required. The beauticians' general training requirements are similar to those of the barbers; however, the median number of hours required to complete these qualifications is 1,800.

Other Requirements

In each of the previously mentioned occupations, the aspirant must be of good moral character, free from any physical or mental defects which might affect the performance of his work, and only after satisfactorily meeting all these requirements is he or she then permitted to receive a license to practice.

Reciprocity

The survey further showed that licensing is not a means of excluding persons from entering these occupations. With very few exceptions, reciprocity is usually granted to an applicant who has obtained training in another state when requirements are similar to those of the state where he seeks to practice. It is this factor that has also added to the professional status of these occupations. Their training is uniform throughout the United States and lends itself to a national discipline applicable to each state. Licensing does not seek to exclude the qualified and the talented. It does, however, discourage the lazy and incompetent.

Probation

The question of probation does not enter into these described occupations. The practitioners are not permitted to practice their arts or skills until they have fully complied with all of the statutory requirements which may include an oral, practical demonstration, and a written exam. Their internships are strictly controlled and observed to insure compliance. Internship is as much a part of their selection process as is their formalized education and training. The point is quite clear, aspirants to these occupations are not permitted to practice until their licensing boards are satisfied the individuals are qualified.

In law enforcement this is almost unknown. In over 31 per cent of the police agencies, the officer is on the street with *little or no training* of any type. The concept of probation permits an individual officer to practice his "skills" under a system that in effect is still testing him to determine if his training has been successful—his "guinea

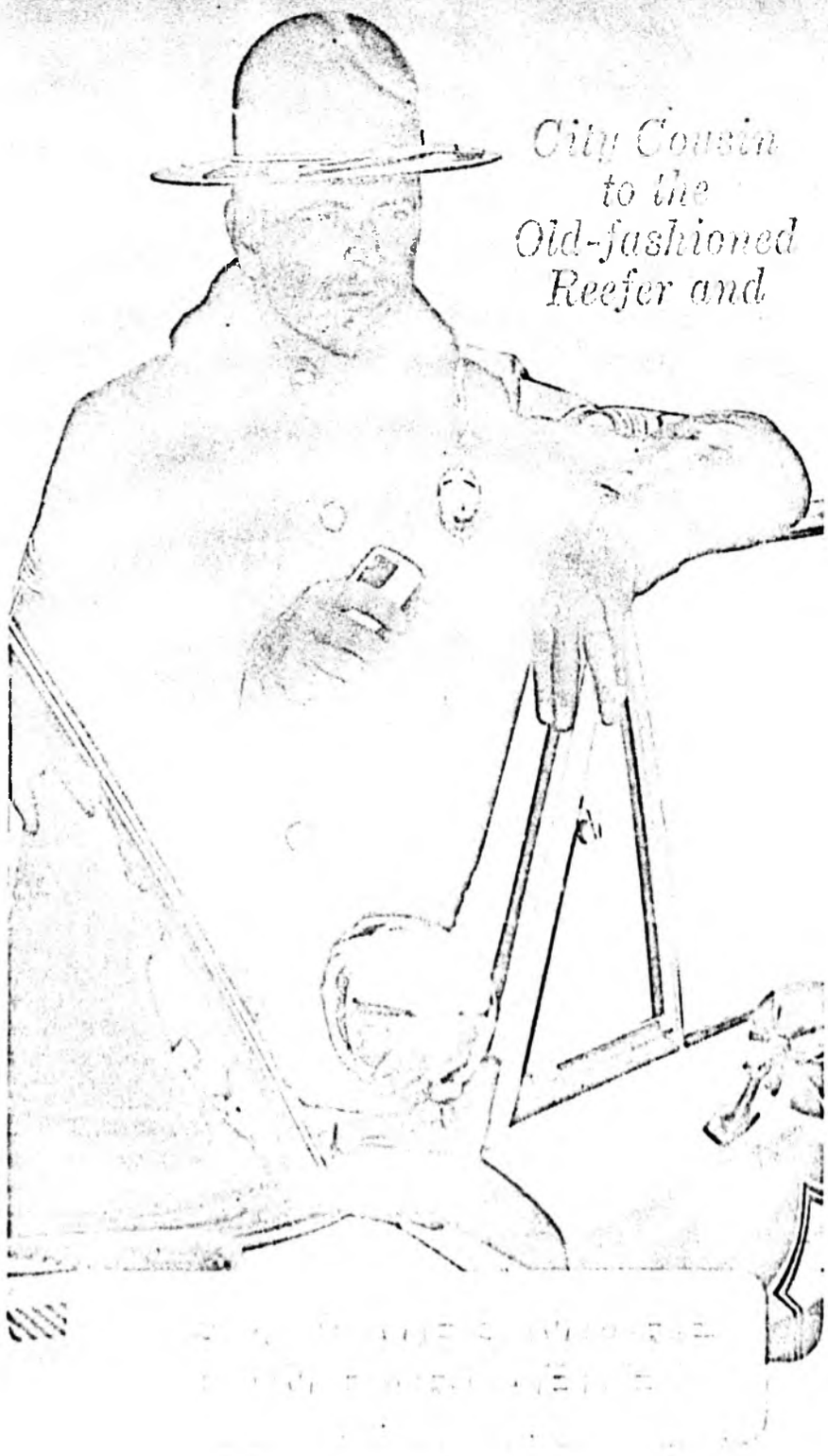
pigs" are the public he is supposed to serve. Obviously, it follows that some of America's law enforcement problems are created by the police themselves.

No other profession has "probation." Individuals practicing the occupations surveyed are "on probation" all through their careers. The citizen doesn't look in the phone book for a doctor or an attorney or sit in a barber's chair and hope the individual he is dealing with is qualified; he expects it. When he calls for police assistance he has the right to expect that the officer is as qualified as any other specialist.

To insure the citizen's expectation and to elevate the stature of law enforcement, the myth that an individual hired as a police officer who serves his "probationary period" without incident is qualified, must be examined in the light of what a police officer does today in our society.

LAW ENFORCEMENT OFFICERS

Certainly we cannot say that law enforcement is less important than the previously discussed occupations. In fact, it might be said to be even more important considering the drastic social changes that are occurring in the United States. The law enforcement officer is responsible for the protection of life and property and for the enforcement of laws and ordinances. Society expects, and in the future should demand, that he command respect for law and order; integral parts of such qualities are general intelligence and emotional stability, coupled with good judgement. He must maintain order in crowds under extremely difficult circumstances, often unnecessarily complicated by hysterically emotional climaxes. He must be firm, courteous, and still be able, technically, to resolve situations with respect to the rights of others. He must have the ability to analyze situations quickly and objectively, to determine the necessary and proper action to take within the legal structures surrounding his position, and to guarantee the rights of all individuals. He must possess investigative ability, including good powers of observation, coupled



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with the ability to interpret his findings, to make a factual presentation, to protect the rights of the accused or convicted. He is expected to be a fact-finder for the court. His attributes must, of course, include good moral character, together with a high degree of physical fitness and mental stability. In brief, he is expected to be a living example of all that is good within our society.

Law enforcement agencies, since early in this century, have been talking and are aware of the need to move toward a professional status. So far, this has been a largely uncoordinated, unsupported effort, insofar as the individual officer is concerned. It is true, of course, that there have been some steps taken toward professionalization in law enforcement, albeit slow and unsteady steps in light of the needs. Up to this point, there has been no concentrated effort toward uniform standards for the police either from a personnel, physical or training and operational standpoint. Too often the exigencies of filling a police position result in a waiver of many factors recognized as necessary. The police officer's qualifications place him in a dual status since he must have not only some qualifications of a technician but also some qualifications of a professional.

As a technician, a police officer must have precise knowledge concerning the collection and preservation of evidence, a highly developed ability encompassing scientific methods of processing a crime scene, including the ability to properly lift and preserve latent forms of evidence. He must be skilled in the operation of a motor vehicle, diving gear, and other modern instruments of law enforcement.

As a professional police officer, he must know the criminal codes and be able to readily apply them to situations without the benefit of time for legal research and reflection. He must have a knowledge of rules of evidence, what is admissible and non-admissible. He must have an unreasoning ability to make the right decisions under any given circumstance. He must, under the most extreme conditions, determine when a citizen's property can be searched. Law enforcement today is concerned not only with the prevention of crime and apprehension of criminals, but also with the sociological aspects of crime.

In the field of law enforcement, which has a direct relationship to the important police power doctrine of the states, our research has revealed a complete lack of standards for selection and training. First, licensing required for some occupations is almost unknown in American law enforcement. When we consider the expected capabilities of the American police officer of today, we suddenly realize that the minimum entrance requirements and selection standards in all too many cases are sub-standard. If one were to examine and reflect on the major internal problems of law enforcement across this country today and seek a solution to prevent them from recurring he would, of necessity, have to start with selection and training criteria.

The theory is false that establishing selection criteria has the philosophical approach of a "textbook." Would we consider hiring a person with a felony record or a person with a long history of mental illness? The answer would have to be negative, and yet are these not selective criteria? Would we hire a person who could not read or who had difficulty in learning or adjusting to new situations and place him out on the street to control society? Again, the only possible answer must be in the negative, but shockingly, it is in some instances being done. We are, then, in effect putting a uniform on a man, handing him a gun and a badge, and proclaiming to the community that he is a police officer.

Only four states have gone so far as to include in their minimum statewide standards for law enforcement the number of hours needed to become a police officer. These provide for only about 200 hours. However, required qualifications and training of law enforcement officers have not been up-graded to keep pace with the changing aspects of our society and law enforcement. The graph on page 12 illustrates this point.

By state law the hours of training needed to become a barber or beautician are almost ten times greater than hours of training needed to be a police officer, and yet the police officer's performance must be so exacting and correct that without it society could not function.

There are police officers across this country today with little or no training of any type, whose mental or physical capabilities have not been fully determined, whose mental stability has not been looked into, and who lack the ability to learn and absorb all of the new techniques that are applicable in our changing society. There must be some uniformity of standards. The "village" officer should not be any less important or less able to perform than the "large city" police officer.

In the area of law enforcement, the proposition that "the sovereign can do no wrong," has artificially protected to some degree the untrained and incompetent. Now, even this long established rule of law is undergoing change. There have been court decisions which state that the sovereign is not only responsible for whom it hires but how it trains them.

Statutory Status of Police Training

The survey was effectuated by contacting the Secretary of State for each of the various states and obtaining full copies of their police training laws, if any.

Types of Laws

Two categories of training legislation exist: voluntary and mandatory.

The *voluntary* type legislation gives to police agencies within the state an option of whether they have their personnel trained under the statewide standards prescribed by law, or whether they have them trained at all. Arkansas, Colorado, Illinois, Iowa, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas and Washington have this type of legislation.

The *mandatory* type of law requires that all police officers within the given state must successfully conclude the prescribed training

program before they can receive a permanent appointment with other departments. Connecticut, Massachusetts, Maryland, New Jersey, New York, and Ohio have this type of legislation.

Alabama, Alaska, Arizona, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming *have no laws at all.*

Types of Commissions

A great majority of the existing laws call for the creation of a training commission, in most cases, to "establish the standards needed" for officers entering training and to "prescribe the course content" of the programs and the length of time to be devoted to the program. The function of these important commissions varies greatly. While the great majority of the states have commissions, their makeup differs.

In California, the commission is chosen from a cross-section of educators, police and administrative heads of local government, as well as the attorney general of the state. They function in all matters pertaining to the state training program and are free to carry out all aspects of the law which include, among other things, the inspection of the various programs on a statewide basis.

In Rhode Island, there is no commission and the Superintendent of the State Police sets the requirements for their statewide training program. In Michigan, the eleven-man training council is composed of ten police representatives and "one member nominated by the Metropolitan Club."

In Mississippi, the Commissioner of the Public Safety Department is authorized to establish and maintain a law enforcement officer's training academy. He alone establishes the curricula and determines who will attend.

The effect of this wide diversity in the type and makeup for the various commissions does not permit the establishment of uniform standards in the important matter of selection. There should be absolutely no reason why selection standards should not be uniform throughout the United States. While it is argued that a small community cannot compete in the salary level that high selection standards would cause, there is no escape from the validity of equal salary for equal work; and no community today, large or small, can avoid the inevitable changes that are forecast for the future. The small city or community has the same, if not a greater, obligation to provide its citizens with good law enforcement as has the large community. If we wish to attract and keep capable and qualified people, we must be able to show to all concerned that law enforcement is interested, first, in raising the quality of its officers and then it must inevitably follow that salary increases for work performed will be forthcoming.

The Advisory Council on Education and Training of the IACP, which is made up of members from state, municipal and county police organizations, as well as educational and governmental institutions, has been at work for the last two and one-half years developing a Model Police Standards Council Act. The deliberations of this group have led to the development of a model, which breaks the chains that bind it to the obsolete philosophies that have plagued law enforcement. First, the proposed state council is made up of a cross-section of police officials representing the various levels of government, officials of local government who have had, prior to their present position, general executive or legislative responsibility, together with representatives of higher education, the attorney general and the head of the state police, plus three public members, to compose a well-balanced commission. The designation of the appointments of the commission is totally and specifically spelled out to encourage the commission to administer the law in a progressive manner.

Nationwide adoption of this Model Act is being recommended.

Standards of Selection

Only one state (California) has had its standards of selection built into its statewide training law. By minimum standards of selection, we are referring to the basic qualifications that an individual must have before he will be hired by the police agency. The California law provides for U.S. citizenship, a minimum age of twenty-one, a criminal record check of the applicant to determine if he has been convicted of a crime, fingerprinting, a good moral background determined by a thorough background investigation, education through the twelfth grade, physical fitness as shown by a medical examination, and an oral interview conducted by the hiring agency. While California has such minimum standards, they operate solely within a *voluntary* law; that is, the various police agencies within California do not have to conform to these requirements if they do not participate in the training programs. It is purely voluntary. If, however, the agency does participate in the program, the local government must pass an ordinance wherein it agrees that it will conform to the minimum standards. While these minimum standards are a step in the right direction, the shortcoming is quite obvious in that there is no total compliance with the law; and while it may be argued that there is a near total compliance in California, it should be pointed out that this is due only to (1) the unique educational system within the state, (2) the large tax base that supports the educational system in the state, and (3) the funds provided from the criminal courts. These three unique realities have enabled the California law to be such a success. It is doubtful whether this type of law would have succeeded as well had it been tried in some state other than California. Further, there is an implication, no matter how slight, that the financial success of the training operation rests upon the number of citizens arrested in California and convicted in its criminal court system. It is questionable to say the least, whether a state should use its police authority to finance any type of training program related directly to the state's welfare and use a source of income for which it was not intended.

However, a major point is still to be considered, and that is one of keeping within the guidelines of

other professions, which do not give to doctors, lawyers, teachers, embalmers, barbers, or beauticians an option of participating in the required educational and training programs. The results of such an option would immediately become obvious and disastrous to the health and welfare of the public. It is apparent that one of the strong factors involving professional standards is that compliance on a statewide basis is mandatory.

The voluntary type of police training law appears to be political in nature because a voluntary, as opposed to a mandatory, law stands a better chance of passing through a state legislature. This compromise is a foolhardy one in that the complex requirements of law enforcement today are being subrogated to political compromise and arguments. A comparable situation existed in the United States in 1847, when a bitter argument arose between physicians and pharmacists as to what constituted the practice of medicine and who could practice it. Compromise obviously was not an answer where the public's health and safety were involved. The co. llary is the same when discussing minimum standards for law enforcement. The issue here is that political compromise should not be permitted to enter this very vital question. There is only one question to be answered here: Is the individual who is to become a protector of and guardian for our society, qualified to perform within the society?

The states having mandatory law, such as New Jersey and New York have not provided for minimum standards of selection, apparently for political reasons. The determination of standards is left to the training commissions and it is obvious that with no statutory guidelines to govern them, they may make their own standards of selection. Although this is not to import outright political manipulation, such manner and determination does not always provide for the uniformity requisite in a professional group and permits human elements to enter into the consideration. Unless the statutes already contain minimum standards o. selection, it must follow that there will be cases of poor selection. Poor selection eventually results in the admission of sub-standard individuals who are incapable of learning and absorbing not only the basics, but the complex changes of technology and the society. There is every reason to believe that many problems in the field of law enforcement today were brought about by poor selection; inevitably this created problems not only for the agency, but for the individual involved, as time went on. Today even a twelfth grade education will not suffice. Higher educational requirements are essential not only for today, but for the future. Without careful testing and selection beforehand, we can never be sure of the future progress of the individual law enforcement officer. Certainly education is one of these key factors. Section V of the IACP Model Police Standards Council Act has included the necessary requirements of a police officer as well as higher ranks included in it. A copy of that model accompanies this article. The model act further provides that personnel who are already members of a department who further their education beyond the high school level, be awarded certain benefits for any future promotional examinations that they might participate in. The act in no way prohibits police personnel who do not further their education from taking future promotional examinations. The act further provides that at a certain future date, this date to be left to the states, no person shall be employed as a police officer, except on a temporary or probationary basis, unless he has satisfactorily completed two years of higher education beyond the high school level. At another future date, no person shall be employed except on a temporary or probationary basis unless he has satisfactorily completed courses and holds a Bachelor's degree from an accredited institution. In both instances, the individuals must still satisfactorily complete a police training program approved by the council. This law is mandatory in nature in that it prohibits permanent employment beyond one year unless he has met these educational and training qualifications. Further, the act provides for the council to establish standards involving promotion of police personnel at *all* ranks, and the best method available to accomplish this objective is to prescribe by law and for a commission to carry it out. This portion of the model law was arrived at after great deliberation and careful study. As has been pointed out, the American public is receiving education above the high school level at a rate previously unknown in our history. The law enforcement officer in order to function in this society must equal if not exceed the general level of education and training. The various states have an obligation to their citizens to provide the best available. This model law supplies the basis from which great strides can be made toward establishing the professional status that is so greatly needed in American law enforcement. The educational requirements will not in and of themselves guarantee good law enforcement but they will eliminate many of the factors that have created bad law enforcement. The police officer of today, and most certainly of tomorrow, must be prepared to act professionally; and what is more important, the American public must look upon him as a professional. To achieve this, the educational requirements must be on a *mandatory* basis rather than on a *voluntary* basis, for the reasons already stated.

A review of the survey data indicates a new and guiding force is needed. A recent nationwide police training survey conducted by the International Association of Chiefs of Police has shown that some ninety per cent of over four thousand agencies responding were in favor of some type of statewide minimum standard law dealing with selection and training.

Course Content

The course content of the various police training programs varies greatly from state to state. In some instances the statutes limit the number of classes to be held in any given year or the length of time to be devoted to a program. Iowa has this type of statutory provision. In Illinois, the program is limited to a maximum amount of money that can be appropriated for each man attending the training program. The course content of many

STATE	Legal Citation	Effective Date	TYPE OF LAW: MANDATORY Requires Basic Training of All Police Officers	TYPE OF LAW: VOLUNTARY Encourages Basic Training of All Police Officers	Provide Financial Reimbursement To Local Agencies	Provide Programs and Facilities at No Cost to Local Agencies	Provide Programs and Facilities—Cost Paid by Local Agencies	Council – Commission Selection Procedure	Head State Police	Attorney General of State	Police Chief	Sheriff	FBI	Mayor	City-Manager	Educator	Police Association	Private Citizen	POWERS OF COUNCIL: Promulgate Rules and Regulations Establish Minimum Standards for Admission to Employment as a Police Officer: In Permanent Position	In Probationary Status	Certification	Establish Minimum Curriculum Requirements: Preparatory	In-Service	Advanced	Supervisory – Management	CONSULT with Other Agencies	Approve Facilities and Institutions	Make Studies and Surveys	Research	Make Recommendations	Employ a Director and Personnel	Evaluate for Compliance
Ala.																															
Alaska																															
Ariz.	Chap 209	May 68		√	YES			By Appt	1	1	2	2				1		2			YES	Y[1]				Y				Y	Y	Y
Ark.	Chap 526	Mar 63		√		YES		By Appt			1	1					1				YES	Y	Y								Y	
Calif.	Sec 13500 PC	59		√	YES	YES		By Appt		1	53				4						YES	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y
Colo.	Chap 263	May 65		√			YES	By Appt		1	3	3	1					1					Y	Y	Y	Y							
Conn.	Sec 7-294	Feb 65	√					By Appt	1				1	1			1	85			YES	Y	Y	Y			Y	Y			Y	Y	Y
Del.																																	
Fla.	Chap 67	June 67	√		YES			By Appt	1	1	3	3	1			1	26				YES	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	
Ga.																																	
Haw.																																	
Idaho																																	
Ill.	Chap 85	Aug 65		√	YES			By Appt[7]	1	1	1	2	1	2	2		1	1				Y	Y				Y				Y		
Ind.	Chap 209	Mar 67	√			YES[8]		By Appt[9]	1		3	2				1		4			YES	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y
Iowa	Chap 112	July 68	√		YES[11]			By Appt[14]		1											YES	Y	Y	Y	Y		Y	Y		Y	Y	Y	Y
Kan.	H.B 1137	July 68		√[16]				By Appt[16]	1		3	2	1				2	1			YES	Y	Y					Y				Y	
Ken.	SB 385	June 68		√			YES	By Appt[17]	1	1	5	1	1		1	2	2	1				Y	Y					Y	Y		Y	Y	Y
La.																																	
Me.																																	
Md.	MCA Sec 70A	June 66	√					By Appt	1	1	1[19]		1			1	2				YES	Y	Y	Y			Y	Y	Y	Y		Y	Y
Mass.	Chap 561	June 64	√[21]					By Appt[20]			3						1				YES			Y							Y	
Mich.	Act 203	Jan 66		√	YES			By Appt	1	1	3	3					2	1			YES	Y	Y	Y	Y		Y	Y			Y	Y	Y
Minn.	ML Chap 676	July 67	√[23]				YES	By Appt	1	1	2[24]	2	1				2	2				Y					Y	Y	Y		Y[25]	Y[26]	
Miss.																																	
Mo.																																	
Mont.	Chap 52	June 59		√			YES	By Appt[28]		1	1	1	1				1					Y	Y					Y					
Neb.																																	
Nev.	Title 16	35	√					By Appt[31]			3			2													Y	Y					Y
N.H.																																	
N.J.	52: 17B-68	65	√[32]				YES	By Appt	1	1			1	1[33]		1	2	2			YES	Y	Y				Y	Y	Y		Y	Y	Y
N.M.																																	
N.Y.	Sec 484	July 68	√				YES	By Appt[34]			3	2						3			YES	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y
N.C.																																	
N.D.	Chap 12-61	July 67	√				YES	By Appt[36]	1	1	1	1				1						Y	Y			Y				Y	Y	
Ohio	Sec 109.71	June 65	√					By Appt[38]	2		2	2	1			2					YES	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
Okla.	Title 70	Feb 67	√		YES			By Appt[39]				1				1	1				YES	Y	Y	Y	Y			Y	Y	Y	Y		Y
Ore.	STAT 81620	Jan 69	√					By Appt[40]			2										YES	Y						Y	Y		Y		Y
Penn.																																	
R.I.	42-26 26	67		√		YES		By Appt[43]														Y	Y										
S.C.																																	
S.D.	SB 128 Supp. '61 Sec	Feb 66		√				By Appt[44]	2		1	1	1					2				Y	Y					Y					
Tenn.	38-801 Code	Mar 63		√			YES	By Appt[45]																			Y						
Tex.	ART 4413	May 67		√				By Appt[46]														Y					Y			Y	Y		
Utah	SB 60 Chap 103	July 67	√					By Appt[48]		1	1	1	1	2				3			YES	Y	Y				Y	Y	Y		Y	Y	
Vt.	Bill #189	April 67	√					By Appt[49]			2	2	1					2			YES	Y	Y	Y	Y		Y	Y	Y			Y	
Va.	Chap 740	July 68	√					By Appt[47]	1	1		1	1			1	3			YES	YES		Y	Y	Y		Y	Y	Y	Y	Y	Y	Y
Wash.	SB 60	March 65		√	YES			By Appt[50]	1	1	2	2	1	2							YES	Y	Y				Y						Y
W. Va.																																	
Wis.																																	
Wyo.																																	

KEY: BL = By Law

Explanatory notes are on page 78.

			Reimbursement to Each Political Sub-Division and to the State			FINANCING						PROGRAMS										STANDARDS											
								Funds Administered by																									
Contract	Promulgate Rules and Regulations	Establish and Maintain Training Programs	Salary	Tuition	Living and Travel	State Appropriated	Levy on Fines	Council	State Police	Attorney General o' State	Accept Grants and Gifts	Basic Recruit Training	Required Hours	Established by Law	Established by Rule	Supervisory – Management Training	Required Hours	Established by Law	Established by Rule	IN-SERVICE	Established by Law	Established by Rule	EDUCATION	Physical	Mental	Psychological	Moral	Character	Age	Citizenship	Experience	Grandfather Clause	Reciprocity
Y	Y		Y 50%		Y 50%		Y[2]		Y		Y	Y												Y	Y		Y				Y	
		Y				Y		Y			Y	Y	BR 150		Y																	
Y	Y	Y	Y 50%		Y 50%		Y [illegible]	Y			Y	Y	BR 200		Y	Y	180	Y					Y	Y	Y		Y	Y	Y	Y			
Y	Y					Y			Y		Y	Y	BR 222		Y	Y		Y		Y	Y		Y BR				Y BR						
	Y											Y	BR 160	Y						Y	Y												
Y	Y	Y	Y 50%		Y 50%	Y		Y			Y	Y	BR 200		Y							Y	Y	Y			Y	Y	Y	Y		Y	Y
	Y	Y	Y 50%	Y 50%	Y 50%	Y		Y			Y		BR 160																			
	Y[30]					Y [illegible]	Y [illegible]	Y			Y	Y	BR 160		Y					Y		Y	Y BR	Y BR	Y BR		Y BR				Y	
	Y					Y		Y			Y	Y	BR 160		Y					Y		Y	Y BR	Y BR	Y BR		Y BR					
	Y					Y						Y	BL 120										Y				Y	Y		Y		Y	
Y	Y	Y				Y		Y			Y																					
	Y											Y	BR 160		Y					Y		Y										
	Y		Y 21		Y							Y	BR 210																			
			Y 50%		Y 50%		Y [illegible]	Y				Y	BR 120		Y					Y		Y	Y	Y	Y		Y					
	Y					Y			Y	Y	Y	Y	BL 160 200										Y	Y	Y		Y					
	Y		Y 29		Y							Y	BR [illegible]		Y																	
	Y												BL 72											Y BR		Y BR	Y BR					
	Y					Y		Y			Y	Y	BR 240		Y																	Y
	Y					Y		Y				Y	BR 240		Y	Y	70	Y		Y		Y	Y	Y BR			Y	Y	Y				
Y	Y					Y				Y	Y	Y	BR 160		Y															Y BR		
	Y											Y	BR 120							Y		Y									Y	
	Y			Y	Y	Y		Y				Y	BR 120	Y																	Y	
Y	Y			Y	Y	Y		Y			Y	Y	BR 120		Y									Y	Y	Y	Y				Y	
						Y			Y			Y													Y				Y	Y			
											Y	Y	BR 106		Y																	
Y						Y					Y																					
	Y					Y					Y		BR 140																			
	Y	Y				Y					Y	Y	BL 200	Y									Y	Y	Y	Y	Y	Y	Y	Y			
	Y	Y				Y				Y	Y	Y				Y				Y												
Y	Y	Y									Y	Y		Y						Y	Y			Y	Y		Y	Y			Y	
							Y																									

FOOTNOTES TO PRECEDING TABLE

[1] "The Training and Education Division shall: (1) certify law enforcement training and education programs as having attained the minimum required standards established by the council. (2) Certify instructors as having qualified as law enforcement officer instructors under conditions established by the council."

[2] "A penalty assessment in the amount of $2.00 for every $20.00 collected by the courts for criminal matters."

[3] "Five sheriffs or chiefs of police or peace officers nominated by their respective Sheriffs or Chiefs of Police."

[4] "A penalty assessment in an amount equal to $5.00 for every $20.00 or fraction thereof, collected by the courts for criminal offenses."

[5] "Eight members of the Educational Committee of the Connecticut Chiefs of Police Association who are holding office or employed as chiefs . . . or the highest ranking professional police officer of a regularly organized police department."

[6] ". . . and two police officers who are neither sheriffs nor chiefs of police . . ."

[7] ". . . Board composed of 16 members: 5 appointed by statute and 11 appointed by the governor . . . The 5 by statute are: one attorney general, the Superintendent of the Highway Patrol, the Superintendent of the Chicago Police Department, the Director of the Illinois Police Training Institute, and the F.B.I. agent in charge of the Springfield Division. The 11 by the governor are 2 mayors, 2 county sheriffs, 2 city-managers, 3 chiefs of police, and 2 citizens . . ."

[8] ". . . The facilities shall be available . . . without cost to . . . law enforcement agencies, subject to rules and regulations of the Board . . . agencies conducting training at other facilities . . . shall be entitled to a per capita allowance from the . . . fund to defray portions of the cost of such training . . . approved by the Board . . ."

[9] ". . . also included are one prosecuting attorney, one judge, and one member of the Municipal League . . ."

[10] ". . . Minimum basic training requirements which law enforcement officers appointed on a permanent basis shall complete in order to be eligible for continued employment."

[11] ". . . created a continuing fund to be used by the Board to conduct a law enforcement academy until 1973."

[12] ". . . in each and every criminal action . . . one dollar of said fee . . . deposited in the General Fund . . . shall be earmarked and deposited in the Law Enforcement Training Fund . . ."

[13] "Any governmental agency subject to the requirements of this Act which desires to receive aid pursuant to this Act shall make application to the council and director for such aid . . . The Administration of the Academy and the Council Act shall be vested in the Commissioner of Public Safety."

[14] "Also included is one member appointed from the Senate . . . One member from the House . . . and four members knowledgeable and experienced in the field of law enforcement . . ."

[15] "The law becomes mandatory as of July 1, 1969."

[16] ". . . Commission consists of ten members . . . Full-time law enforcement officers . . . One of the ten members is the President of the Kansas County Attorneys' Association . . ."

[17] ". . . The F.B.I. member serves in advisory status only, and the Commission also has one member from the Kentucky Bar Association."

[18] ". . . and three police officials of the state . . ."

[19] "mandatory training for cities of 5,000 or more."

[20] ". . . Also consists of the Director of Civil Service . . . Commissioner of Public Safety . . . Commissioner of Police of Boston . . . and administrator of a city or town . . ."

[21] ". . . officer attending school shall be paid his wages . . . also receive such reasonable expenses as may be determined by appointed authority . . ."

[22] ". . . on assessment as additional cost . . . equal to 10 percent of every fine . . . collected by the courts for criminal offenses . . . other than violation of the vehicle code . . ."

[23] ". . . Mandatory to cities of 1,000 population or more; voluntary to cities of 1,000 population or less . . ."

[24] ". . . as well as "the chiefs of police of each city of the first class."

[25] ". . . The board may recommend to the attorney general rules and regulations only with respect to . . . certain clauses . . . but not as to minimum standards of physical, mental, educational, etc. . . ."

[26] ". . . The Executive Director . . . shall have the following duties . . . to be exercised with the approval of the Board . . . and to be executed only in full accordance with the rules and regulations promulgated by the attorney general . . ."

[27] ". . . 160 hours of training for cities in rural areas and 200 hours of training for cities in urban areas."

[28] ". . . Also one member from the County Attorney's Association, Montana Municipal League, the County Commissioners' Association, and one member from that unit of the University of Montana selected as a site for the academy . . ."

[29] ". . . all officers shall be paid their regular salaries during attendance . . . expenditure of funds by any city or town, for the board, room, or travel expenses of officers attending, is lawful . . ."

[30] ". . . It is stated by law that the academy will remain open for a period of three weeks per year . . ."

[31] ". . . Three members who are sheriffs, chiefs of police, or peace officers nominated by their respective sheriffs or chiefs of police . . . one member who is an elected county official . . . one member who is an elected city official . . ."

[32] "The law was voluntary from 1961 to 1965."

[33] ". . . The League of Municipalities."

[34] ". . . Council composed of 8 members . . . 3 appointed by the governor . . . 2 sheriffs . . . 2 chiefs of police . . . Commissioner of Police of New York City . . ."

[35] ". . . Superintendent of Bureau of Criminal Identification . . . State Parole Officer . . . State Attorney . . . representative of each House of the legislature . . ."

[36] ". . . Council consists of nine members appointed by the governor with the advice and consent of the Senate . . . These members are as follows: one mmber from the Ohio Board of Regents, two incumbent sheriffs, two incumbent chiefs of police, one member of Bureau of Criminal Identification and Investigation, one member from State Highway Patrol, one member from F.B.I., one member from the State Department of Education . . ."

[37] ". . . One man from the State Highway Patrol and one from the Bureau of Criminal Identification and Investigation."

[38] "One Peace Officer selected by Court of Criminal Appeals; one Peace Officer selected by Commissioner of Public Safety; one selected by Board of Directors of the Oklahoma Sheriffs and Peace Officers Association; one selected by Board of Directors of the Fraternal Order of Police; and one member who shall be the Director of the Southwest Center for Law Enforcement Education."

[39] "Consists of nine members of which one must be a city policeman and one must be a county policeman. The other seven can be citizens."

[40] "Administration of the Program is handled by the Superintendent of the State Police."

[41] ". . . Five members appointed by the Attorney General's office . . . The Chief Agent of the Division of Criminal Investigation, who shall serve as chairman . . . The special agent of the F.B.I. in charge of the district in which South Dakota is located . . ."

[42] ". . . consists of eighty hours of classroom training; ten hours of first aid training; and a required two day firearms school."

[43] "Governor appoints the Agency."

[44] "Governor appoints the commission of nine members with the advice and consent of the Senate."

[45] "Council composed of nine members . . . attorney general, one member from F.B.I., and three persons selected at large by the Governor . . . Governor also appoints one member from each of the following categories: incumbent mayors, incumbent county commissioners, incumbent sheriffs, and incumbent police chiefs . . ."

[46] "Council composed of nine members: two sheriffs, two chiefs of police, one member of F.B.I., two citizens at large, a Commissioner of Public Safety, and Commissioner of Motor Vehicles . . . The Attorney General is also a member of the Council, but he has no voting power."

[47] "Also includes one attorney from a city with less than 50,000 population, one attorney from a city with more than 50,000 population, one member from the Senate, and two members from the House of Representatives."

[48] "The committee of nine is appointed by the governor . . . The two members listed under the category of mayor represent one incumbent executive officer of a city within the state and one incumbent County Commissioner.

The Dumb Cop

By
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This article originally appeared in Adult Leadership, a publication of Adult Education Association and is reprinted here with permission of both the author and the publisher.

◆ It has been estimated that there are 50,000 openings in the field of law enforcement and that it is getting harder and harder to fill the positions. Recruitment of policemen is a national problem. To the question WHY, the commonest answer is money. But I am convinced that it goes far beyond money. If I were pushed for a one word answer, I would have to say "prestige." For the most part, policemen are looked down upon. The phrase "dumb-cop" is in common usage.

Several years ago I became interested in the education of police officers and decided to find out if the "cops" were dumb. There are about 450,000 law enforcement officers in the United States. About half of them never finished high school. About 12,000 departments do not require a high school diploma. Out of a total of 40,000 police units, only twenty require some college. Multnomah County, Oregon, is the only department in the United States that requires a college degree. Many officers in the Deep South are illiterate and unable to write even a traffic ticket. When I became interested in this problem, I discovered that out of 970 police officers in the city of New Orleans, only nine had college degrees and none of the degrees had anything to do with law enforcement. Incidentally, of the nine degrees, six were held by Negroes.

When we look at police training, the picture is darker. To earn a college degree a student must spend about 2,000 hours in the classroom. To become a beautician an applicant must "put in" 1,200 hours. To become a policeman all you need in most places is an appointment. The City of New Orleans has one of the longest training periods in the country, which is 520 hours. In the same city, the barbers require 2,000 hours plus an 18 month apprenticeship before an applicant can operate his own shop.

To further complicate this training or lack of training, very few agencies do any kind of testing. The City of New Orleans gives a civil service exam, a physical exam, a psychological exam and conducts a background investigation. This combination of tests rejects 91 out of every 100 applicants. When we remember that police work attracts "the lunatic fringe" it is appalling to know that the 91 rejects can apply to non-testing departments and be accepted.

...For the most part, we have better policemen than we deserve...

In New Orleans, a group of citizens became alarmed over the recruitment problem and decided to do something about it. They organized themselves into the Police Scholarship Foundation. Since so many citizens looked down upon the police, the group looked around for a method to create prestige. It was soon apparent that the policeman was the only non-professional in the field of criminal justice. The judge and attorney were professionals in the strictest sense of the word, while the policeman, whose testimony was often vital to the prosecution of a case, was an uneducated and poorly trained adjunct to the system of criminal justice. Therefore, the first step would be to professionalize the policeman and in our society this meant education.

Truly to professionalize the policeman, the education should be directly related to law enforcement. When we started to look for such programs at a college level, we were amazed that the closest university to New Orleans with such a curriculum was over 500 miles away at Tallahassee, Florida. We then approached the local universities and requested that a department of criminology be established. My Board of Directors gave the necessary permission as long as it was started in the Evening Division.

The Evening Division was under my jurisdiction but unfortunately I knew nothing about professional degrees in criminology. To prepare myself for this new responsibility, I visited the major schools of criminology in the United States and spoke with both police students and faculty members. The consensus of opinions was that the curriculum should be built around a core of social sciences. This really disillu-

sioned me. I always thought of the police officer as a science oriented sleuth who used all of the new gadgets to apprehend the criminals. But as I got acquainted with policemen, I found that they spend only 10 per cent of their time in "sleuthing." The balance of their work is spent in preparing reports, interviewing innocent citizens, community relations, and in what can only be described as social work. Therefore, both the students and the faculty were emphatic that the curriculum should be related to such endeavors. Consequently, I organized the four-year degree around a Bachelor of Arts with a Major in Criminology. At this writing we have graduated 32 police officers who are members of the local police force. There are another 150 working toward graduation.

COLLEGE V. NON-COLLEGE COPS

It might be well to point out that the purpose of professional police education is not to turn out more efficient criminal catchers. *Its purpose is to give the students additional tools with which to work. Nevertheless we have been told that the "college cops" go about their job in a different way. They are much more assured in their approach to the non-criminal. Their superintendent says that they seem to approach their job from a fresh viewpoint.* Furthermore, the results of the educational program introduced by the Police Scholarship Foundation has made the Orleans and Jefferson Parishes (counties) police departments education minded. We no longer have to recruit police students. The Superintendent and the Sheriff do all of the urging.

In an attempt to find out if the college cop is a better policeman than the non-college cop, one department carried out a secret experiment. Two police districts with similar populations and problems were selected. Over a period of several months one was staffed with college graduates (any kind of college degree) and the other was manned with men with a high school level education. After six months the crime rate remained the same in each district. But the district with the higher level of education showed a higher rate of morale, fewer complaints, less time off, and a quicker response to calls. Since the bulk of a policeman's time is spent in dealing with honest citizens, I think these differences represent worthwhile dividends.

Once he got into college, the dumb cop proved to be anything but dumb. When our program started in 1963, individual faculty members, reflecting the attitudes of the community, asked that the dumb cops be kept out of their classes. As a result of this, I purposely scheduled no all-police classes. Even in the criminology classes, I always found enough non-police interested in the subject so that it was a mixed class. At the end of the first year, I tabulated the police grades. Sixty percent of their grades were A and B. While the police students comprise about 15 percent of the Evening Division student body, they received about 40 percent of the honors. In the last graduating class the police comprised 50 percent of the graduates but the highest scholastic averages for the total college program were earned by two policemen. Now the faculty complains if there are no policemen in the class.

From the instructors' standpoint, there is no more gratifying teaching assignment than working with police students. First of all, since police work is becoming more and more social work, the police students bring a lot of maturity and experience to the classroom. Problems of psychology, sociology, and political science are part of their normal workday. They can give dozens of examples of personal contact with persons and situations involved in deviant behavior, delinquency, marital problems, practical politics, sub-standard housing, and most of the other factors touched on in many of the social science courses. But over and above the maturity and experience that they add to the class, the police students are welcomed by most faculty members for their gratitude. The policeman is the first to admit his inadequacies and is most appreciative for the assistance given him. In spite of hardships, they have proven to be sincere, hardworking, conscientious students. They maintain this attitude in the face of obstacles that would make most other students drop-outs. The "college cop" must take a lot of kidding from his fellow officers. He must put up with jealousy from those who look upon his education as a threat to their own position. He must give up all thought of "moonlighting," a favorite extra income activity of most police officers. He must even give up overtime because it would interfere with his studies.

The policeman is the first to admit that he needs professional education. To get it, he is knocking on the doors of colleges all over the country. That is why the number of colleges offering degrees in criminology have more than tripled in the last five years. They now number about 200.

In my six years of close contact with many police officers, I have learned to respect them. For the most part we have better policemen than we deserve. Despite low salaries and lower prestige, we have a lot of good, honest, professional policemen. In New Orleans we have hundreds of officers who are dedicated to their job and who are professionals in every sense of the word. But it is just such men who are the first to admit that it is impossible today for a new recruit to duplicate the on-the job growth that was accomplished by the men who joined the department twenty years ago. Whereas we now have many good, efficient, professional officers who never attended high school, these same men could not duplicate their achievements were they to start over today with the same level of education. Today, the policeman's role is more that of a social worker than a criminal catcher. Just as the social workers realized that they could not continue their work and growth with just the untrained volunteer ladies who formerly assumed the tasks as a civic duty, so, too, the modern police administrator realizes that the whole recruitment effort must start at a much higher level than it did a quarter of a century ago. Not only must it start higher, it must rapidly go higher and, of course, be supplemented by in-service training. As an educator in the field of adult education, I know of no other segment of the adult population that is more deserving of help or more appreciative of whatever educational assistance is given. ☆

◆ Is the legal training now offered by the state colleges, junior colleges and police academies adequate? Attention will be directed to programs offered in California because of the author's assumption that California has programs which compare favorably with the best training available in the nation. Indications are that present efforts on all levels are quantitatively and qualitatively deficient.

A "MINUS" IN POLICE LEGAL EDUCATION ?

By ROBERT JAGIELLO

THE AUTHOR is Assistant Professor of Police Science, Sacramento State College, Sacramento, Calif. 95819. He holds the Juris Doctorate from Loyola University, Master of Laws from Yale University, and is presently pursuing a Master of Arts degree in Liberal Studies at Wesleyan University. He held a teaching fellowship at Loyola Law School and a Sterling fellowship at Yale Law School. He was awarded the Bancroft-Whitney award for highest honors for the entire law school curriculum.

The police role requires that officers make decisions on essentially legal issues. These issues can be divided for purposes of discussion into two large groupings: (1) issues of substantive criminal law and (2) issues related to criminal procedure. Whether, in a given case, the police have enough legally significant evidence to satisfy the elements of burglary is in part an example of the former as well as a matter of evidence, and whether there is probable cause to arrest is an example of the latter. These decisions often have to be made instantaneously and call for sophisticated legal judgment. The decision made in an instant may be the subject of attention by lawyers and court officials for weeks, months or years. The results of these decisions, even if they go no further than an arrest, might have a lasting impact on the life of the person who was the subject of the decisions.

This article will examine three institutions involved in police legal education (1) the police academies, (2) California junior colleges, and (3) California state colleges. It will limit its considerations to instruction in criminal law. No attempt is made to assess the value of courses in evidence or other legal areas.

The present training in criminal law received in police academies by new recruits is extremely limited. According to the standards established by the California Commission on Peace Officer's Standards and Training peace officers must receive sixteen hours of instruction in law. Twelve hours are devoted to a study of penal codes and four hours to the law of arrest. Some departments offer somewhat more substantial programs. For example, the Los Angeles Police Department - requires approximately 48 hours of instruction in penal codes and 8 hours in the law of arrest.

The junior colleges offer a program which is more extensive but still with substantial inherent deficiencies. The average curriculum contains two nuts-and-bolts courses in the area of criminal law. One is concerned with elements of common law crimes and crimes enumerated in the penal code. It may contain a brief discussion of some of the more basic criminal law concepts like *mens rea, actus reus,* insanity and limited capacity as a defense. The other course is usually called the administration of justice or criminal procedure and is designed to acquaint students with the nature of court systems, the criminal procedures employed from incident to final disposition and principles of constitutional law. Surface treatment of the topics discussed is common to both courses because of limitations in time and faculty resources. Training for six semester hours is not adequate preparation for an officer whose total working commitment is to the function of law enforcement. Staffing is also a problem, the teacher is not necessarily a law trained faculty member. Often he is a police officer, either active or retired, and has not had a substantial grounding in legal theory.

The state colleges with some exceptions have programs which closely parallel the junior college curriculum and suffer from the same inadequacies. Those which offer a more extensive course of instruction will have a course in arrest, search and seizure and advanced criminal law. Though the curriculum in these colleges approaches the needed level of training, the number of colleges which have the expanded program is small.

There are decided disadvantages in the limited legal training offered in the academies, junior colleges and most state colleges. The police officer does not act alone in the criminal legal process. He is part of a team engaged in enforcing the law. His work brings him into constant contact with prosecutors, judges and defense lawyers. If he is to have a meaningful understanding of what is expected of him, he must understand how they think. He must appreciate the underlying presuppositions they make about the law. His work only has effective relevance in a system which is administered and controlled by people who often entertain a different conception of the law than he does. What accounts for that difference is training. The police officer must re-

ceive the same type of training in criminal law that the other members of the law enforcement team receive, but his training must be more intense because he is expected to make under far more trying circumstances the same kinds of decisions they do.

If he does not have this kind of training, he cannot begin to understand the reasons which motivate the court in dismissing the case he has carefully investigated; there is a failure to appreciate why the prosecutor is unable to prosecute the case; he tends to rail against Supreme Court decisions without understanding the reasons which support the decision or what is to be expected of him in the future.

Another crucial reason why the present programs are deficient lies in the conception of law that is created in the minds of students in a nuts-and-bolts law course. The student whose training in criminal law consists primarily, if not solely, in a consideration of penal code elements of common law crimes and a smattering of information on the concepts of *mens rea*, criminal negligence, the defenses of infancy and insanity, is likely to be led into a serious misconception about the law. He will attribute to the law far greater certainty than actually exists. He will often see the law as a fixed body of rules which are applied with more or less uniform regularity against violators. His explanation for an arrest will often be in its totality: "he broke the law."

But *the law is not a fixed body of rules*, sitting off somewhere, simply waiting to be used as the basis for an arrest or conviction. The law is a very human enterprise. One can cite hundreds of principles of law if he has had sufficient training, but that does not mean that those principles compel a particular conclusion in a particular case. The particular case involves human beings. It is a one act drama, played only once. The principles of law are used as reference points in that drama, but it is the decision-makers—the judge, the prosecutor and in the first instance the police officer—who will decide what principles will be referred to and what those principles will be deemed to mean in *this* case. Underlying this choice of principles, and the content that will be assigned to those principles chosen, are value choices of the decision-maker. The proper study of law will recognize this reality and discuss the underlying values which actually enter into the decision-making process.

A familiar example to police officers is the case involving the first time youthful offender. Perhaps he has engaged in petty theft. Will a decision to arrest him be made? "The law" as a fixed body of rules would seem to compel the result that he be arrested, prosecuted and convicted. If all an officer knew about the law is the appropriate penal code section and the elements of common-law crimes, he would with utmost logic say "I am compelled to arrest him." But he does not say that. At times the officer will arrest and at other times he will not. What has happened in those cases where he has decided not to arrest? He has engaged in some kind of balancing. Perhaps he concluded that the advantages to be gained from prosecution were outweighed by advantages gained by consultation with the parents. Perhaps he decided it would be unwise under the circumstances to tie the boy to a criminal record. What is clear, however, is that the officer has a large measure of discretion in deciding what will be the law for a particular case in all but the most serious offenses. If he decides not to arrest he has for this case assumed the role of legislator (he has nullified the law), police officer, prosecutor and court (he has decided the case in the suspect's favor). The police officer truly is a law unto himself in such cases.

How much he is the maker and interpreter of the law becomes clearer as his action is judged under the vague and more amorphous laws which give wide ranging discretion to a police officer. Officers will readily admit that if they want to arrest a person with whom they are having a confrontation, they can generally find a law which will permit them to do so. After the arrest the process of rationalization takes place in an effort to qualify the arrest under appropriate penal code sections.

There are many examples of open-ended laws which give police wide discretion: loitering, failure to identify, drinking in public, disorderly conduct, obstructing an officer in the line of duty, failure to disperse and others. For the motorist there is the whole arsenal of vehicle code sections which can always be referred to as a justification for stopping a car. Police in California are permitted to stop and question a person to ascertain his identity if the surrounding circumstances indicate to a reasonable man that the public safety demands such identification. What conduct or circumstances can form the basis for the officer's conclusion that public safety demands such identification? If the area is a high crime rate area and the officer has determined the subject has acted strangely or made a furtive gesture, the citizen can be stopped and questioned.

The question in these cases is what is loitering, disorderly conduct, obstructing an officer, failure to disperse? What constitutes acting strangely, and what is a furtive gesture? The inquiry then becomes: who is to decide whether this conduct is disorderly, strange or furtive?

It can be said that the police officer originally defines what each of these things are. To the extent that he defines the content of these terms in particular cases, he is making law for that case. He decides that particular behavior constitutes disorderly conduct; that a given movement was a furtive gesture; that certain conduct was strange. He thereby decides that the sanctions of criminal law, at least to the extent of making an arrest, booking and requiring bail in some cases will be employed against this particular defendant.

Did the law compel the officer in his decision in this particular case? The answer is no. With equal justification, he could have found that the movement of the arm was not a furtive gesture; that the conduct was not strange, but rather that it was explainable under the circumstances; that the conduct, though boisterous, was not so offensive as to be regarded as disorderly.

In most cases, when acting under an amorphous statute, the po-

lice officer is the initial interpreter of the law. The law could either acquit or convict at this first level of confrontation between the officer and the suspect. The officer chooses to bring the suspect into the criminal process. The important question then becomes: Why did the officer decide to bring *this* defendant into the criminal process? It is submitted that his decision is largely one based on values other than the compulsion of law. For example the officer's discretion is framed by his self-conception of his role as an officer. Perhaps he sees himself as a person entitled to more respect than the average person because he is the law incarnate. An officer with this mental set is more likely to view an argumentative suspect as disorderly or strange. The officer might have a prejudice against minority groups. He is likely in such cases to be more willing to interpret certain conduct by a black youth as furtive than he would be if the suspect were in a "safe" part of town and similar in appearance to the officer's own social group. Hippies and Yippies run a far greater risk of being considered disorderly (particularly if they are in a place where their presence is unusual) than would their clean-shaven counterparts dressed in more traditional garb.

The principle that these cases demonstrate is crucial to an understanding of criminal law. The law often does not compel a result in a particular case. The principles of law which will be used as the touchstones for decision in the particular case will be chosen at the discretion of the police officer, prosecutor and judge. The choice they make will be determined by values independent of any appeal to "the law" as a justification. Once the decision to arrest is made, an appropriate section of the penal code will be chosen and the facts will then be interpreted to satisfy the requirements of that section. The same phenomena occurs as the defendant is moved along in the criminal process. The prosecutor possesses an enormous amount of discretion. Depending on his interpretation of the law and the facts, he can proceed with the case or dismiss it. He will, for example, exact the full measure of the law's sanctions against one defendant and allow another to cop a plea to a lesser charge. Again, the question why this occurs must be asked. To what extent has he acted as a judge or a legislator in this case?

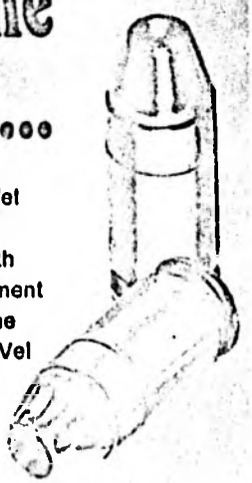
The judge also has enormous discretion to define criminal behavior. By proper judicial management of the trial, a discreet acceptance or rejection of preferred items of evidence, by allowance or rejection of certain defenses, he can and often does cause an acquittal or conviction. His decision, if he were questioned, would be couched in legal justifications, but often the answer simply masks the enormous discretion he has and fails to disclose his real reasons for exercising it in a particular way. The question then becomes: Why did he choose to allow or reject this defense or evidence? The whole range of questions posed regarding police conduct would be appropriate here.

This analysis is not to be taken as a criticism of discretion in the criminal legal process. Rather, it is a frank recognition that law enforcement is a human undertaking, riddled with the usual human failings. But we must recognize and declare that the process is discretionary and address ourselves to the important question: *How can we best train police officers in criminal law so that their judgments and decisions, though discretionary, will be informed and well conceived?*

I must of necessity reject any solution which concentrates solely on the penal codes and sterile pronouncements on the elements of common law crimes. Instead, we need to examine the values which underlie the entire criminal process both in its substantive and procedural aspects. The scope of the inquiry into criminal law can best be indicated by a series of questions which, though perhaps unanswerable in an ultimate sense, provide a working framework for a critical examination of a system of criminal laws.

"1. Considering law as a method of social control, what ends should men endeavor to achieve by

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law? Are these desirable in themselves or as means to ends desirable but more remote?

2. What special aims or purposes should the criminal law try to achieve and what means are well adapted to serving them?

(a) To what extent should a law of crimes be designed to control individual and group thoughts, beliefs and actions and to warn persons and groups subject or subjected to the criminal process?

(b) To what extent should a law of crimes be designed to control official action by specifying who has what power under what circumstances?

3. What persons, situations and events, under what circumstances should be labeled "criminal?"

(a) What correlation should there be between the degree and extent of a disturbance and the designation of its source as criminal?

(b) Whatever the degree or extent of disturbance, should actual or potential danger and benefit to community values determine whether situations or events be designated "criminal?"

(c) To what extent should the consequences, both official and unofficial, be taken into account in designating persons, situations, or events "criminal?"

4. What consequences should be officially authorized to follow the designation "criminal?"

(a) What correlation should there be between the consequences authorized and the degree and extent of the disturbance?

(b) Whatever the degree or extent of disturbance, should actual or potential danger and benefit to community values determine the consequences officially authorized?

(c) To what extent should actual consequences be taken into account in deciding what official consequences should be authorized?

"To facilitate analysis and discussion of these general questions and to illustrate the variety of contexts in which each may arise, specific questions are posed. These specific questions are stated in traditionally descriptive terms but answers to each of them should be by WHY? WHAT OUGHT TO BE? and HOW WHAT OUGHT TO BE, if it varies from what is, CAN BE ACHIEVED?

"1. What is a criminal act? Is an act a requisite element of a crime?

2. What is a criminal state of mind (*mens rea*)? Is a criminal state of mind a requisite element of a crime?

3. What is a criminal result? Is a criminal result a requisite element of a crime?

4. What is a criminal relationship? Is a relationship between act, state of mind, and result a requisite element of a crime?

5. To what extent and degree are any of the foregoing elements taken into account in the decision to promulgate, invoke or administer custody, care, release or destruction of persons or property.

6. To what extent are culture, maturity, race, ancestry, family, associations, criminal and educational record, and mental, physical, political, economic, occupational, professional and religious statutes and needs taken into account in defining crime and determining consequences?

7. To what extent are such justifications and excuses and protecting self, others or property, provocation, entrapment, and official orders taken into account in defining crime and determining consequences?

8. How adequate are the procedures for obtaining and introducing data and how relevant are the data used and available to the decisions being made throughout the process by, for example, legislator, citizen, policeman, prosecutor, magistrate, bondsman, grand juror, investigator, defense counsel, judge, petit juror, diagnostician, correctional officer, parole or pardon board member?" [1]

These questions indicate the general tenor of the inquiry. It is to be a broad ranging examination of the fundamental assumptions of the criminal law process.

The direction is clear. The present emphasis on abstract rules and penal codes must be redirected. A far greater emphasis must be placed on underlying legal theory and assumptions, and the sociological realities of criminal law. Legally trained faculty members are absolutely essential. If at all possible the full range of academic resources should be brought into play. Ideally, sociologists, psychologists, social workers, corrections personnel, anthropologists, and economists would participate in the teaching process. Accepting the realization of the ideal as remote, the law trained faculty member must equip himself to deal with elementary considerations in these other disciplines. The materials used in the criminal law courses should be rich in non-legal literature.

Recognizing the direction that police training must take, Sacramento State College has substantially revised its criminal law offerings for police science majors. They will have a three-unit course equivalent to that offered at the junior colleges in the elements of common law crimes and penal codes. A course in constitutional law taken in the government department is also required. This will be followed by a six-unit course which will examine the fundamental assumptions of criminal law as discussed above. A six-unit course, titled the Criminal Legal Process, will also be required. The concepts which will be considered are: the nature of due process, role of the police in a democratic society, arrest, search and seizure, interrogation and confessions, wiretapping and electronic eavesdropping, preliminary examination, bail, role of the prosecutor, arraignment, plea bargaining, and right to counsel. Students will be exposed to an indepth discussion of the theory as well as the reality of the criminal legal process.

The role of the police in today's society requires some critical rethinking regarding their legal training. Their exposure on the academic level to criminal law and procedure should equal or exceed that of law students. Their position within the larger structure of law enforcement, their impressive discretionary powers and the spontaneity with which they have to make decisions all demand that they receive the finest legal training available. ☆

[1] Donnelly, Richard C., Goldstein, Joseph, Schwartz, Richard D., *Criminal Law* (New York, 1962), p. 2.

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jection of all social institutions. Hence, we may expect a continuation of the vicious circle of confrontation and police terror tactics.

Liberal moderates properly react to this situation by demanding that the police act toward deviant behavior much as all other professionals do, that they have no more right to react aggressively toward provocative acts than psychiatrists faced by maniacal and dangerous patients, that no matter what extremists do, the police should not lose their self-control. Such a policy is easy to advocate; it is difficult to carry out.

Furthermore, it ignores the fact that most of the police are "working-class" professionals, not the products of postgraduate education. As James Q. Wilson points out, "This means they bring to the job some of the focal concerns of working-class men —a preoccupation with maintaining self-respect, proving one's masculinity, 'not taking any crap,' and not being 'taken in.' Having to rely on personal qualities rather than on formal routines . . . means that the officer's behavior will depend crucially on how much deference he is shown, on how manageable the situation seems to be, and on what the participants in it seem to 'deserve.' " If society wants police to behave like psychiatrists, then it must be willing to treat and train them like psychiatrists rather than like pariahs engaged in dirty work. At present, it treats their job like a semiskilled position which requires, at best, a few weeks' training. Norman Kassoff of the research staff of the International Association of Chiefs of Police has compared the legal minimum training requirements for various occupations in the different American states. Calculated in terms of hours, the median minimums are 11,000 for physicians, 5000 for embalmers, 4000 for barbers, 1200 for beauticians, and less than 200 for policemen. The vast majority of policemen begin carrying guns and enforcing the law with less than five weeks' training of any kind.

The new tensions have increased the old conflict between the police and the liberals. For it must be said that liberals are prejudiced against police, much as many white police are biased against Negroes. Most liberals are ready to assume that all charges of police brutality are true. They tend to refuse to give the police the benefit of any doubt. They rarely denounce the extreme black groups and left radicals for their confrontationist efforts. They do not face up to the need for tactics to deal with deliberate incitement to mob violence. If the liberal and intellectual communities are to have any impact on the police, if they are to play any role in reducing the growing political alienation of many police, they must show some recognition that the police force is also composed of human beings, seeking to earn a living. They must be willing to engage in a dialogue with the police concerning their problems.

HB195

STATEMENT ON HB 195

HOUSE JUDICIARY COMMITTEE

Submitted by

Don M. Berry, Executive Director
Alaska Municipal League

For the record my name is Don M. Berry, Executive Director of the Alaska Municipal League, an association representing 9 boroughs and 30 cities throughout the State. On behalf of the members of the League, I want to thank the Committee for this opportunity to express our opposition to HB 195.

Our opposition, of course, is to delete lines 16 and 17 on page 1 of the bill which states: "Payment of this fee is in lieu of all ad valorem taxes by local government units."

In the first place, there is no local government unit in Alaska which can stand this erosion of its tax base. The League has been gratified this year at the apparent willingness of the Legislature to try to assist political subdivisions with their financial problems. However, exemptions, such as that provided in HB 195, is certainly doing just the opposite.

It must be remembered that this property-exemption would be in addition to the millions of dollars of property owned by the federal and state governments, religious organizations, charitable institutions, etc. which are exempt under the Constitution.

More important than the revenue loss, though, is the deteriorating effect HB 195 would have on a municipality's tax base. Our bonding and financing capacity is controlled primarily by the value of the real property which can be used to support bond issues. We are sure that most of you are aware of the unfavorable market conditions now existing on municipal bonds. Provisions such as that contained in HB 195 would cause this condition to worsen insofar as Alaska local governments are concerned and would certainly make our bonds much less desirable to buyers.

Also, HB 195 does not specify whether all of the real property is exempt or just that used for banking purposes. What does the bill envision as far as that portion of the property used for office space rental, parking lots, commercial enterprises, etc. are concerned? Even religiously-owned property is exempt only to the extent that it is used for religious purposes. We question whether or not properties owned by banks should enjoy a greater tax privilege than that.

We have compiled and are submitting herewith certain figures as to the evaluation of real property owned by banks, trust companies and savings and loan associations throughout the State and the tax loss to boroughs which would result from the passage of HB 195. We wish to stress that these figures are only from the boroughs and do not take into consideration the loss which would also accrue to the cities. Nor do these figures take into consideration the taxable personal property owned by state banks.

Once again, we wish to thank the Committee for this opportunity to express our opposition to HB 195 and urge you not to act favorably on the bill as it now reads.

Respectfully submitted,

Don M. Berry

Don M. Berry, Executive Director
Alaska Municipal League

COMPILATION ON HB 195

Borough	Mil Rate	Real Property Evaluation	Tax Loss
Ketchikan Gateway	6.4	$1,089,070	$7,000.00
Greater Anchorage Area	14.78	9,188,950	137,834.25
Kodiak Island	7.84	334,850	2,625.00
Greater Sitka	5.5	270,000	1,485.00
Greater Juneau	12.91	1,884,200	24,494.60
Fairbanks North Star	15	179,650	2,694.75
Kenai Peninsula	7	480,750	3,365.25

It is interesting to note that in the Fairbanks Borough only 1 bank owns its building. All the others are leased and therefore the exemption in HB 195 would be of no advantage to anyone in Fairbanks. The bill would result only in an increase in the license fee.

The Greater Anchorage Area Borough reported a "considerable amount of proposed construction" as did the Kodiak Island Borough.

File AB202

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Dr. Paul Haggland
Chairman of the Senate Commerce Committee
Alaska Senate
Juneau, Alaska

Dear Dr. Haggland:

We have received copy of the comments of Mr. Don Hall ("Hall"), Executive Director of the Alaska Public Service Commission regarding CSHB 202 ("202"), dated December 18, 1969. We have discussed various considerations with him, and we believe he is willing to agree to the following changes which we are suggesting:

1. Section 171:
202-page 6
Hall-page 4,
4th paragraph

Mr. Hall had asked to delete in lines 18, 19, 20 of 202 the requirement that:

> A commissioner who has not read or heard the entire record, including the argument, may not participate in making a decision of the commission.

Comment:

We suggest that the foregoing sentence be revised to read:

> A commissioner may not participate in making a decision of the Commission unless he certifies that he is familiar with the testimony and evidence adduced, and has read or heard the argument.

This revision would permit a commissioner to participate in a decision after reviewing the record as required above, even though he may have missed some or all of the proceedings. Without some such requirement it could be that the Hearing Officer (or staff) version alone could become the basis for a decision. Apparently this may already have happened in Alaska and may be responsible for some current objections to the use of a Hearing Officer.

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2. Section 421(a):
202-page 17
Hall-page 15/16

Mr. Hall had asked authority to suspend tariff changes for an initial period of six months (last 2 lines, page 15) and a further period of three months (top of page 16).

Comment:

Nine months' suspension of tariff changes could be very harmful if a utility had urgent need of relief. We suggest that the six-month period be revised to three months (last 2 lines, page 15).

3. Section 421(b):
202-page 17/18
Hall-page 16

Mr. Hall had intended to recommend deletion of 421(b).

Comment:

421(b) should be deleted if 421(a) is instituted as proposed.

4. Section 421(c):
202-page 18
Hall-page 17

Mr. Hall had intended to recommend deletion of 421(c).

Comment:

421(c) should be deleted if 421(a) is instituted as proposed.

5. Section 421(d):
202-page 18
Hall-page 17

Mr. Hall agrees that to place monies into escrow is not of material help to a utility during a pending tariff change, and that the alternative of a bond might be of real benefit.

Comment:

(i) Add, at the end of 421(d):

"The utility may at its option substitute an acceptable bond in lieu of the escrow requirements hereof."

(ii) In our view (which is not Mr. Hall's past or present position) it would be most helpful to utilities, and no jeopardy to the public, to further amend the first sentence of 421(d) to read as follows: (adding the words as underlined)

"In the case of a proposed increased rate the utility may institute the new rate and the commission may by order require...."

(iii) 421(d) would become 421(b) after deleting 421(b) and 421(c).

ANCHORAGE NATURAL GAS CORPORATION
P. O. BOX 6288
ANCHORAGE, ALASKA

6. Section 441(a) and (b):
202-page 19
Hall-page 18

Mr. Hall had asked that the word "fair" be deleted wherever it appears.

Comment:

Mr. Hall's position is that since a majority (32 out of 50) of states use depreciated original cost, Alaska should abandon the "fair" value to be considered in determining the rate base for its utilities.

It is our position that fair value has been found to be a necessary requirement for assuring successful utility regulation in 18 states, and that the decisions of the courts or commissions of 18 other states are ample precedent for use of the fair value concept in Alaska. Samples of such decisions are attached, with source references.

By retaining the word "fair" but by adopting Mr. Hall's proposed language for 441(b), a compromise position would be reached which would provide fair consideration to be given to economic factors other than original cost, while not requiring the actual determination of reproduction cost per CSHB 202.

Alaska is a "fair value" state under existing law, and this law has served as incentive to attract private capital for investment in utilities in Alaska. The consequences of over-turning this concept could be unfair to the utilities now operating in Alaska, and would surely discourage future private investment.

On this section we are not in agreement with Mr. Hall, but we believe he may be willing to accept the compromise we are suggesting above.

ANCHORAGE NATURAL GAS CORPORATION
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ANCHORAGE, ALASKA

7. Section 501:
202-page 22
Hall-page 33/34

Line 9, delete "or their affiliated interests"
Line 10, delete "or its affiliated interests"

Comment:

In our view Mr. Hall's proposed language proposed as Section 511(c) provides adequate protection against "affiliated interests." If desired a new Section 511(d) could be added as follows, to amplify or strengthen Section 511(c):

> "The utility may at its discretion supply documentation to the commission to substantiate and justify its position with respect to its arrangements or agreements or practices with affiliated interests. In the event of the utility's failure so to do, the commission's findings as to the reasonableness of such arrangements or agreements or practices shall be based upon the commission's own evaluation thereof, subject to Section 42.05.551 hereof."

8. Section 701(2)(E)
202-page 27
Hall-page 70

Mr. Hall has advised that regulation of pipelines for "petroleum or petroleum products" (line 20 of 202) may be undertaken per a new bill with authority vested in the Department of Natural Resources. For this reason we would recommend:

Line 20, delete "petroleum or petroleum products"
Line 23, delete "for gas, petroleum or petroleum products as operating expenses"

Comment:

These deletions would remove commission jurisdiction from and responsibility for the transmission of crude oil (e.g. TAPS) and petroleum products, while leaving intact the commission's power to establish for gas transmission the "reasonable price to be allowed in determining the reasonableness of the regulated public utilities rates."

9. Section 701(6):
202-page 28
Hall-page 72

Mr. Hall has agreed that 701(6)(H) is a duplication of 701(6)(D) already included in CSHB 202, and should be deleted.

ANCHORAGE NATURAL GAS CORPORATION
P. O. BOX 6288
ANCHORAGE, ALASKA

Comment: Paragraphs (G), (I), and (J) also should be deleted, regardless of Mr. Hall's experience with such law in Oregon.

Paragraph (G) might effectively prevent a utility from attracting to its Board of Directors any person having a directorship or officership in any other business or profession, since such other business or profession would become an "affiliated interest" and could be subjected to unreasonable restraints, investigations, or harrassment.

Paragraphs (I) and (J) are likewise unreasonable, impractical, and intolerable, regardless of Mr. Hall's experience in Oregon. These paragraphs could serve as a basis to investigate or harrass almost anyone having contact with a utility or its management. There is no justification, stated or real, for such a far-ranging definition, other than the precedent in Oregon. These paragraphs should be deleted.

We have addressed our comments to those elements of CSHB 202 which we believe need attention for administrative reasons, and we are not commenting on regulation of municipalities, composition of the Commission, duplication of regulatory responsibility, etc. We hope that the legislature will favor a gradual and orderly evolution of the regulatory process in Alaska rather than immediate and major changes. We hope the decision will be to build upon the existing organization, rather than to reorganize the utility regulatory process which now exists in Alaska.

Very truly yours,

Dale Teel
President

Paul F. Robison
Counsel for
Anchorage Natural Gas Corporation
and
Alaska Pipeline Company

cc: Senate Commerce Committee
House Judiciary Committee
PSC Commissioners
Mr. Don Hall, Exec. Director
Mr. Walter Kubley,
Commissioner of Commerce

RATE CASES RELATED TO FAIR VALUE

ILLINOIS Commerce Commission v. Peoples Gas, Light & Coke Co. (1953) 99 PUR NS 361 The Commission, in determining present fair value for rate making, is required to consider current economic conditions, price levels, reproduction cost, and original cost as well as the cost of improvements and the probable earning capacity of the property under prescribed rates.

INDIANA Re Indiana Bell Teleph. Co. (1950) 85 PUR NS 129. The commission, in determining the fair value of utility property, must give consideration to all bases of valuation which may be presented and to the reasonable cost of bringing the property to its present state of efficiency.

MISSOURI Missouri ex rel. Dyer v. Missouri P.S.C. (1960) 37 PUR 3d 507. The commission did not act arbitrarily or unreasonably in fixing a rate base calculated upon the fair value of utility properties (an amount between net original cost and net reproduction cost).

TEXAS Re Houston Nat. Gas Corp. (1963) 52 PUR 3d 244. The commission, in fixing rates, must determine a reasonable balance between original cost less book depreciation and replacement cost new less an adjustment for present age and condition, and in doing so it must use its own judgment and discretion.

NEW MEXICO Re Moyston (Hobbs Gas Co.) (1963) 48 PUR 3d 459. A fair value rate base for a gas utility was computed on the basis of the average of original cost and reproduction cost.

ILLINOIS Re Northern Ill. Water Corp. (1959) 26 PUR 3d 497. The commission, in arriving at a fair value rate base, must use reasonable judgment in determining the weight to be given reproduction cost, original cost, depreciation, book cost, work in progress, materials and supplies and cash working capital.

ILLINOIS Re General Telephone Co. of Illinois (1959) 29 PUR 3d 369. Fair value is not original cost depreciated, nor is it reproduction cost depreciated, nor is it a matter of formulas, but it is rather a matter of reasonable judgment based upon the consideration of all relevant facts.

NORTH CAROLINA Re Piedmont Nt. Gas Co. (1961) 40 PUR 3d 62. Upon evidence of average net original cost of a gas company's properties of $17 million, net property value at the end of the period of $19,600,000, and trended original cost of $31,500,000, and considering that no evidence of reconstruction new cost or present-day values by visual appraisal was offered, the commission fixed a fair value rate base of $20,300,000.

NORTH CAROLINA Re Nantahala Power & Light Co. (1963) 51 PUR 3d 96. The commission, in establishing a fair value rate base, considered all the evidence offered relating thereto, including, but not limited to, trended cost, reproduction cost new, original cost, average net investment, allocated cost, actual investment, normal depreciated value, and accelerated depreciation value.

DELAWARE Re Wilmington Suburban Water Corp. (1962) 47 PUR 3d 175. In determining a fair value rate base, the commission must give weight to original cost depreciated and reproduction cost depreciated.

OHIO Re Cleveland Electric Illum. Co. (1963) 47 PUR 3d 44. A fair rate of return is a figure which must be determined under Ohio law on the reproduction cost new less depreciation rate base.

HB-202

April 15, 1969

Senator P.B. Hagglund
Chairman
Senate Commerce Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Senator Hagglund:

HB 202 as introduced provided in Sec. 42.05.421(b) that in determining fair value of public utility property for rate making purposes the Commission shall be guided primarily by the element of original cost less accrued depreciation. The committee substitute changed this in Sec. 42.05.441(b) to provide that the Commission shall be guided primarily by the average of original cost, less accrued depreciation, and reproduction cost, less physical depreciation. This change is not sound in principle and would create major difficulties in practice. The Alaska Public Service Commission has rejected the RCND approach for use in Alaska. For example in an order entered December 30, 1965 in P-65-2-1, entitled A.J. Rate Investigation the Commission said:

> "A comment is in order regarding "reproduction cost new depreciated" (sometimes called RCND) and "trended original cost" methods of arriving at fair value. Even though they may be used in some other jurisdictions, the Commission specifically rejects them for use in Alaska, except as t they may be used in connection with other techniques to establish the value of a substitute plant. After studying the matter, the Commission is convinced that to admit their use here would result in gross injustice to the ratepayer.
>
> For one thing, both the RCND and trended original cost methods ignore the higher operating expenses of older plants, even though operating expenses make up the "lion's share" of gross revenue requirements. Another argument against their use is that no one is going to build an old, out-of-date, obsolete plant and there is therefore no reliable way of knowing what it would cost."

The entire approach is not realistic. First it allows a utility to obtain a return on investment never made by the utility. It provides a reconstruction dollar value at today's price which in many cases is completely divorced from economic realism. It does not allow for economic or funtional obsolesence, allowing only for physical depreciation. Where major plant items are relatively new or have relatively short lives this factor is not greatly unresponsive to the cost of a substitute plant but, at least in the production of electricity major plant items of very long useful lives are involved. In such cases this approach injects a wholly unrealistic element into the valuation. For instance here in Juneau a large concrete dam built in 1914 or thereabout is a key element in supplying electrical energy to the Boroggh. Competeat engineers have testified in court and before the Public Service Commission that no one would build a dam in that manner today. The dam is adequate for its purpose and apparently has, with reasonably maintenance, an almost indefinate useful life. In a superior court case contesting the valuation of the A.J. Complex for tax purposes RCND was estimated at $1,934,600. The court held that the fair market value was original cost, depreciated, which amounted to $389,260. (A.J. Industries v Greater Juneau Borough, First Judicial District, Civ. No. 65-300). Adding these together and dividing by two, as the substitute provision requires gives a rate base value of $1,161,930,, Since the major components of these, especially the dam, deteriorate very slowly physically unless a sharp reversal of the economic trend toward increasing prices occurs, the rate base valuation will constantly increase even though with the pace of modern technology the functional obsolesence will become even greater.

This is not an isolated case, the same situation would occur in any system which combined major elements with long service lives and an even moderate rate of technologisal advancement. Placing such a premium on functional obsolesence seems to insure that modernization will come to Alaska only limping haltingly on unsure, uncertain feet.

The formula would double the problem of determination of value since the original cost study, with its attendant question would remain as controversial and as necessary as ever while the RCND study would be added.

This is certainly not an argument against the bill as a whole. We do however agree fully with the Commission's statement quoted above that to admit this technique would be to work a gross injustice

on the rate-payer. For these reasons we strongly submit that it would serve the public interest best if the language in the original bill were substituted for the language of the committee substitute.

Very truly yours,

Billy G. Berrier
Borough Attorney

cc: Rep. Barry Jackson, Chairman
House Judicary Committee

BGB/llh

file
HB 202

OFFICE OF THE MAYOR
CITY OF ANCHORAGE
BOX 400
ANCHORAGE, ALASKA 99501

GEORGE M. SULLIVAN
MAYOR

February 26, 1969

The Honorable Barry Jackson
Alaska House of Representatives
Pouch V Capitol Building
Juneau, Alaska 99801

Dear Barry:

On Friday, February 21, 1969, the Anchorage City Council and the Fairbanks City Council met in joint session to consider the merits of Senate Bills #54 and #128 which would confer jurisdiction over certain municipal utilities to the Public Service Commission.

The enclosed Resolution was unanimously approved at the joint Council meeting. Your consideration in reviewing this joint resolution will be greatly appreciated.

Sincerely yours,

George M. Sullivan
Mayor

GMS:gm

JOINT RESOLUTION NO. A/F-2-69

A JOINT RESOLUTION OF THE CITY COUNCILS OF THE CITIES OF ANCHORAGE AND FAIRBANKS OPPOSING REGULATION BY THE PUBLIC SERVICE COMMISSION OF MUNICIPAL UTILITIES AND URGING LEGISLATION TO RESOLVE SERVICE AREA CONFLICTS.

WHEREAS, Senate Bills No.'s 54 and 128 have been introduced in the Senate to confer jurisdiction over certain municipal utilities to the Public Service Commission; and

WHEREAS, few states have granted such jurisdiction over municipal utilities, and most granting jurisdiction only do so in limited cases; and

WHEREAS, no studies, facts or findings have been advanced to show, or attempting to show, that municipal utility rates are unreasonable or that municipal utility services are inadequate to the extent that a public service commission could lawfully remedy such rates or services; and

WHEREAS, municipally owned and operated utilities have, in fact, and traditionally, furnished the lowest cost utility services feasible to its consumers; and

WHEREAS, the Public Service Commission itself has not requested the Legislature to grant the Commission any jurisdiction over municipally owned and operated utilities; and

WHEREAS, municipal utilities can best be regulated by city councils and their citizen boards on a local level and at a place accessible to consumers, and consumers have a forum at all meetings to voice their grievances and criticisms as to rates and services without compliance with complicated and costly Public Service Commission proceedings in Anchorage; and

WHEREAS, the Public Service Commission regulation over municipal utilities would be a costly and undue burden on municipal utilities and their consumers, particularly since S.B. 54 would create a gross business tax of 1/2 of 1% on municipal utilities; and

WHEREAS, the Public Service Commission regulation would undoubtedly lead to increased rates for consumers because the costs of such regulation must be passed on to the consumers; and

WHEREAS, proponents of Public Service Commission regulation contend that such regulation is necessary to enable consumers outside the corporate boundaries to have a forum for their complaints and to resolve service area conflicts between municipal electric utilities and R.E.A. electric cooperatives in a few cities in this State; and

WHEREAS, a long standing history of a lack of complaints to the city councils and citizen boards concerning municipal rates and services outside corporate limits does not appear to justify any contention that customers outside of the area have complaints not justified by sparse, scattered populations outside cities and economic feasibility; and

WHEREAS, the city councils and their citizen boards have not been shown to be unresponsive to complaints over rates and services; and

WHEREAS, the proposed legislation would not eliminate the duplication of facilities in service areas in that no standards are provided and no provision is made in any proposed legislation for payment to a utility for the loss of the facilities and service and utilities could serve within their duplicating grandfather areas; and

WHEREAS, the service area conflicts and problems may be resolved by legislation other than costly and ineffective public service commission regulation; and

WHEREAS, millions of dollars of publicly owned utilities

controlled by the elected officials responsible to the public, and assisted by citizen boards, should not be entrusted to a part-time public service commission and insufficient staff; and

WHEREAS, the Alaska Municipal League has opposed regulation of municipally owned and operated utilities by the Public Service Commission; and

WHEREAS, regulation of municipally owned and operated utilities is contrary to the principle in this State that local governments are best able to govern themselves and municipal utility regulation should remain with local government;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCILS OF THE CITIES OF ANCHORAGE AND FAIRBANKS THAT:

1. The City Councils of the Cities of Anchorage and Fairbanks, strongly oppose the passage of Senate Bills No.'s 54 and 128, or any other legislation granting jurisdiction over municipally owned and operated utilities.

2. The City Councils urge that the Legislature study, develop, and enact, in consultation with cities and R.E.A. electric cooperatives, adequate legislation to resolve the alleged service area conflicts between municipal utilities and R.E.A. cooperatives by agreement or arbitration without resort to public service commission regulation.

3. Copies of this resolution be sent to the Honorable Keith Miller, Governor of the State of Alaska, and all members of the Alaska State Legislature.

4. This resolution shall become effective immediately upon passage.

Passed and approved by the City Councils of the cities of Anchorage and Fairbanks, Alaska, at a special joint council meeting, the 27 day of February, 1969.

George D. Sullivan
Mayor, City of Anchorage

ATTEST:

City Clerk, City of Anchorage

V. A. Boucher
Mayor, City of Fairbanks

ATTEST:

City Clerk, City of Fairbanks

The Legislature of the State of Alaska
FISCAL NOTE
First Session - Sixth State Legislature

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST, POUCH V
___THE LEGISLATIVE FINANCE COMMITTEES' STAFF, POUCH Y
___THE DIVISION OF BUDGET & MANAGEMENT, POUCH C
___RETAIN A COPY FOR YOUR FILES

subject _____ HB 188 _____ SB _____
requested by Chairman Barry W. Jack.on, House Judiciary Committee
referred to _____ date of request _____
completion date requested _____ date received _____

EXPENDITURE DETAIL	FY 1969-70	FY 1970-71	FY1971-72
100 PERSONAL SERVICES	$243,300	$265,400	$272,700
200 TRAVEL	28,500	26,300	27,000
300 CONTRACTUAL SERVICES	120,400	73,000	73,200
400 COMMODITIES	4,000	5,000	5,000
500 EQUIPMENT	7,700	2,500	2,500
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
900 Inter-agency Charges	22,000	23,000	23,000
TOTAL	$425,900	$395,200	$403,400
FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	425,900	395,200	403,400
Man Months	180	204	216
Permanent Positions	15	17	18
Temporary Positions	0	0	0

FISCAL ANALYSIS

Please see attached.

DATE 3/4/69 SIGNATURE George Howard

NAME & TITLE George Sharrock, Commissioner of Commerce

FORM SA-18

MEMORANDUM State of Alaska

TO: B. L. McMurtrey
Deputy Commissioner
Department of Commerce

DATE : February 27, 1969

FROM: Don Hall
Executive Director
Public Service Commission

SUBJECT: HB 188 and HB 202

You asked for my comments in regard to HB 188 but made no similar request in regard to HB 202.

I have compared HB 188 and SB 54 and find that they are identical in every respect. I have also compared HB 202 with SB 128 and find that they too are identical in every respect with one exception; namely, that Sec. 42.05.691(b) of SB 128 has been omitted from HB 202. This deletion has the effect of broadening the Commission's authority.

I have already prepared detailed comments on SB 54 and SB 128, copies of which are in Mr. Sharrock's possession--and these comments, of course, apply also to their respective House companion bills.

You have the Commission's original budget in the amount of $347,800 as subsequently modified by the cost of upgrading certain positions and by adding $8,500 to cover the cost of regulating pipeline companies (principally the Alaska Pipeline Company). The cost of administering SB 54 would be somewhat greater than the cost of administering SB 128 because of the fact that SB 54 requires more extensive regulation of municipally owned and operated utilities. However, I believe that the aforementioned original budget as modified would be adequate to administer SB 54, at least during the first year.

Estimates have also been submitted regarding our budgetary requirements for the years ending June 30, 1970, 1971, and 1972. These estimates were specifically based upon administering SB 128 and consist of a three-year projection compiled in one document.

I believe the foregoing is an adequate response to your request for information in regard to the House and Senate bills mentioned above.

By Don Hall

DH:SG

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

ALASKA PUBLIC SERVICE COMMISSION

Detail of Personnel Requirements

NOTE #1

Position Title	Approved FY 1968-1969	Projected FY 1969-1970	Projected FY 1970-1971	Projected FY 1971-1972
Executive Director	18,888	21,612	21,612	21,612
Deputy Director	17,844	19,992	19,992	19,992
Utilities Engineer	14,916	17,844	17,844	17,844
Financial Analyst II	15,876	15,876	15,876	15,876
Tariff Specialist II		15,876	15,876	15,876
Financial Analyst I	12,156	13,908	13,908	13,908
Tariff Specialist I		13,908	13,908	13,908
Accountant IV			13,032	13,032
Assistant Utilities Engineer		12,156	12,156	12,156
Administrative Officer I		12,156	12,156	12,156
Accountant II	9,960			
Secretary III		8,496	8,496	8,496
Secretary II	7,956			
Secretary I		7,488	7,488	7,488
Secretary I		7,488	7,488	7,488
Documents Clerk III		7,488	7,488	7,488
Clerk Steno II	6,420	6,420	6,420	6,420
Clerk Steno II			6,420	6,420
Clerk Typist III	6,420	6,420	6,420	6,420
Clerk Typist III				6,420
Sub-total	110,436	187,128	206,560	213,000
Commissioner 5 es @$6,000 each per year		30,000	30,000	30,000
Employee Benefits	11,164	26,172	28,820	29,700
Total Personnel Services	$121,600	$243,300	$265,400	$272,700

The difference between this amount and the request for perso el services included on our original FY 1969-1970 budget request ($228,300 - $194,900 = $33,400) i comprised of nominal salaries for the five Commissioners plus six reclassifications which were rec mmended by consultants in recommendations on Commission Staffing.

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

NOTE # II

200 Travel
We anticipate that our travel fund requirements, both outside and within the State, will remain fairly constant for the next three years. The moderate decrease projected for FY 1970-1971 is comprised of two items included in our present budget (ACS Sale Bid Proposal Evaluation conferences and transportation of new employees) which will no longer be needed. The moderate increase in FY 1971-1972 is anticipated because of increase in workload. **Add increase of 2,000 for each Year covering additional 2 commissioners for a total of 5 .**

NOTE # III

300 Contractual Services
The $28,500 increase in FY 1969-1970 projected requirements is made up of the following costs:

a) $20,000 to provide funds for hearing officers appointed pursuant to AS 42.05, Section 181 of SB 128
b) $8,500 to provide funds for consultants to investigate operations of existing oil transmission pipelines within the State

The $47,400 decrease in FY 1970-1971 was computed as follows:

a) $5,100 increase in overall contractual services account due to increase in workload and change in methods and procedures utilized in accomplishing program of utility regulation.
b) $52,500 total decrease possible because of anticipated finalization of ACS sale by July 1, 1970 ($35,000); completion of investigation of safety programs of natural gas utilities ($18,500); completion of investigation of oil transmission pipelines ($8,500); and an increase of $10,000 for hearing officer fees.

NOTE # IV

400 Commodities
Our requirements in this area have reached a fairly stable level. The increase in FY 1970-1971 is necessary because of additional personnel to handle the added workload. However, we then expect requirements in this account to level off at the amount shown.

NOTE V

500 Equipment
Continuing decrease in requirements in this area is a reflection of the adequacy of budget requests made and appropriations received in the past.

NOTE VI

900 Interagency Charges
Moderate increase is for additional travel funds for the attorney on full-time assignment from Department of Law.

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

	FY 1969 - 1970			FY 1970 - 1971			FY 1971 - 1972			
	Original APSC Request	Increase	Decrease	Projected Budget Requirement	Increase	Decrease	Projected Budget Requirement	Increase	Decrease	Projected Budget Requirement
Personal Services (See Detailed Note I)	174900	3300		228300	22100		250400	7300		257700
Travel	26500			24500		1200	24300	200		24500
Transportation (See Detailed Note II)				2000			4400	1		4000
Rental Services										
Communications	5100			5100	900		6000	500		6500
Miscellaneous	3000			2000	1500		3500		2000	3500
Rent	9300			9000	1200		10200			10200
Utilities	700			700	500		1200	200		1400
Transportation of Things	1200			1200		500	700			700
Garage Rental	2400			2400	1000		3400			3400
Fire & Burglary	100			100	100		200			200
Professional Services	65000	2500		96000		52000	44500	1500		46000
Utility Fees	100			200	100		1000			1000
Sub-total (See Detailed Note III)	91700			120400			73200			73200
Miscellaneous (See Detailed Note IV)	4000			4000	1000		5000			5000
Equipment (See Detailed Note V)	7700			7700		5200	2500			2500
Emergency Fund (See Detailed Note VI)	23000			23000	1000		23000			23000
TOTALS	347000			468200			378200			384400
			+	17668		+	17000		+	17000

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

HB226

Memorandum

Alaska Court System

TO: Representative Irwin L. Metcalf

DATE : March 17, 1969

FROM: Judge Thomas B. Stewart TBS

SUBJECT: House Bill No. 226

You asked for my very brief comment on H.B. No. 226. After further consideration, I think I should not comment specifically on its merits without making a full explanation, and it is not feasible to do this in the time available to me today.

In general I would not favor the bill in its present form, if only because of vagueness of the amendatory language. This is solely a personal view and should not be attributed to the Alaska Court System.

FORM SA-1B

MEMORANDUM State of Alaska

TO: Representative Irwin L. Metcalf
Sixth State Legislature

DATE : March 17, 1969

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: HB 226
Our File #151 - 1969

As you have requested, the following are my comments on HB 226:

1. As the situation now stands, I would personally prefer that the entire section be repealed, and information be made available as it is with adults.

   The original idea and intent of juvenile proceedings was good -- informal hearing, rules of evidence relaxed, etc. -- with the entire thought being to help the child and straighten him out if necessary. In many cases it was possible to do so before the child actually went so far as to actually commit an offense.

   This is no longer possible since rules of evidence and constitutional guarantees as interpreted by the Supreme Court also apply to juveniles.

   Juvenile court, as it existed when this statute was necessary and desirable, is a thing of the past.

2. If AS 47.10.090 (a) and (b) were amended to be applicable only to minors 14 years of age or younger, the persons most in need of protection would still be covered.

   HB 226 would still protect the unlicensed or "license suspended" 17-year old drunken driver since it states, "holder of an operator's license".

1. The juvenile concept is based on a sacrifice of certain legal rights by a minor child in return for special measures of judicial processes designed to rehabilitate those young offenders while they are still "impressionable". Given the benefit of special counseling, separate facilities, and an informal, confidential atmosphere the system remains in balance. But when benefits are taken away, legal rights must be restored, or the system gets out of balance. Recently the U. S. Supreme Court has found that "rehabilitation" facilities in the various states were largely unsatisfactory, and accordingly restored a number of legal rights to the minor child. See In Re Gault.

2. The State of Alaska has subjected the minor child to adult court for certain violations of Title 28 dealing with motor vehicles. AS 47.10.010(b). This is quite proper, as full legal rights are then afforded. If the legislature deemed it in the public interest to except certain other crimes from juvenile jurisdiction under AS 47.10.010(b), there could be no objection.

3. HB 226, however seeks to leave jurisdiction alone, but alter the balance of the juvenile concept. It would accomplish this by removing the benefit of confidentiality of a juvenile proceeding without restoring any "legal rights". In effect, HB 226 is saying... "we're going to privately, confidentially, informally and without affording you your legal rights, adjudicate you a delinquent. We're thereby going to make you a 'child of the state' for dispositive purposes. And when we get through setting you up, we're

going to tell the world about it if there was a motor vehicle involved in your misconduct." This would not be proper.

4. There is another objection to HB 226, in that the language it seeks to insert into AS 47.10.090(b) is quite vague. A motor vehicle may be "used in connection with the act" in an infinite variety of collateral ways. Under HB 226 it doesn't even have to be used by the minor child, so that if a licensed 16 year old hides marijuana in his dad's car, the case would seem to qualify for publication. This may not be the legislative intent.

HB258

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

January 23, 1970

The Honorable Barry W. Jackson
Chairman, Judiciary Committee
House of Representatives
Alaska State Legislature
Juneau, Alaska 99801

Re: House Bill No. 258

Dear Mr. Jackson:

Reference is made to your letter to Commissioner Morrison dated January 15, 1970 asking for our current views relating to House Bill 258 which deals with the bond required to be filed by nonresidents.

It is our recommendation that Article 4 of AS 43.10 which consists of AS 43.10.160-200 be repealed and re-enacted to read as set forth on the attached proposed Committee Substitute Bill.

The advantages gained by the State from the existing statute (AS 43.10.160) are so small compared to the problems it presents and the hard feelings it engenders from legitimate businesses that the statute requiring the bond should be repealed. However, to assist the State in collecting taxes from nonresident firms, particularly those involved in the construction field it is requested that the State adopt two sections which are set forth in the accompanying draft of a committee substitute bill. The first section was passed by Congress for the Internal Revenue Service in 1966 to correct abuses in the construction industry. The second section is taken from AS 23.20.265 of the Labor Code. It has been most beneficial to the Employment Security Division in collecting its taxes.

Enclosed with the draft of the committee substitute bill is a copy of the Internal Revenue Code section and the Department of Labor section.

When your Committee considers this bill it is requested that I be given an opportunity to appear and clarify any questions that it may have.

Thank you for your interest and concern in this matter.

Very truly yours,

Vernon L. Snow

Vernon L. Snow, Deputy Commissioner

VLS/ge
Enclosures as noted
cc: John Beard w/enclosures

D R A F T

CS FOR HOUSE BILL NO. 258

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act repealing the bond required to be filed with the Department of Revenue by nonresidents under AS 43.10.160 and providing other methods of protecting tax revenue; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article 4 of AS 43.10 consisting of AS 43.10.160-200 are repealed and re-enacted to read:

ARTICLE 4

LIABILITY OF CONTRACTORS AND THIRD PARTIES

FOR TAXES, LICENSES AND FEES

* Sec. 43.10.160. Liability of third parties paying or providing for wages. (a) If a lender, surety, or other person, who is not the employer, pays wages directly to an employee or group of employees, employed by one or more employers, or to an agent on behalf of the employee or employees, the lender, surety, or other person shall be liable in his own person and estate to the state of Alaska in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by the employer.

(b) If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purposes of paying wages of the employees of the employer, with actual notice or knowledge that the employer does not intend to or will not be able to make timely payment of the amounts of tax required by statute to be deducted and withheld by such employer

from the wages, the lender, surety, or other person shall be liable in his own person and estate to the state of Alaska in a sum equal to the taxes (together with interest) which are not paid over to the state of Alaska by the employer with respect to the wages. However, the liability of the lender, surety, or other person shall be limited to an amount equal to 25 per cent of the amount so supplied to or for the account of the employer for such purpose.

(c) Effect of payment. Any amounts paid to the state of Alaska pursuant to this section shall be credited against the liability of the employer.

* Sec. 43.10.170. Liability of contractor and principal for taxes. (a) No employing unit which contracts with or has under it a contractor or subcontractor who is an employer under the provisions of this section may make a payment to the contractor or subcontractor for a debt due until the contractor or subcontractor has paid or furnished a sufficient bond acceptable to the department for payment of taxes, licenses and fees, including penalty and interest, due or to become due for personal services which have been performed by individuals for the contractor arising during the course of the employment of the contractor or subcontractor by the employing unit.

(b) Failure to comply with this section makes the employing unit directly liable for the taxes, licenses and fees, including penalty and interest, and the department has the remedies of collection against the employing unit under this title as though the services in question were performed directly for the employing unit.

(c) "employer" means an employing unit which for some portion of a day within the calendar year has or had in employment one or more individuals.

(d) "employing unit" means an individual or type of organization, partnership, association, trust, estate, joint trust company, insurance company or domestic or foreign corporation, or the receiver, referee in bankruptcy, trustee, or successor of one of these, or the legal representative of a deceased person, which has one or more individuals performing service for it within the state.

* Sec. 2. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

BOX 1149 — JUNEAU 99801

February 3, 1970

The Honorable Barry W. Jackson
Chairman
House Judiciary Committee
House of Representatives
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

Dear Mr. Jackson:

Vernon L. Snow, Deputy Commissioner, Department of Revenue, has asked me to write you concerning our experience with AS 23.20.265 (liability of contractor and principal for contributions).

AS 23.20.265 was passed in 1955, and amended slightly in 1959.

Our Employment Security Division advises that the section has been a great aid in the collection of Employment Security contributions during the past 15 years. To their knowledge, there has never been a question of constitutionality raised about this section.

We recommend adoption of a section similar to AS 23.20.265 for the Department of Revenue to assist it in the collection of taxes.

Very truly yours,

Bill Jermain

William K. Jermain
Deputy Commissioner of Labor

cc: Vernon L. Snow

R. E. ROBERTSON (1865-1961)
M. E. MONAGLE
F. O. EASTAUGH
R. J. ANNIS
J. B. BRADLEY
W. G. RUDDY
[redacted]T
T. P. BLANTON

ROBERTSON, MONAGLE, EASTAUGH & ANNIS
ATTORNEYS AT LAW
P. O. BOX 1211
JUNEAU, ALASKA 99801

200 NATIONAL BANK OF ALASKA BLDG.
PHONE JUNIPER 6-3340
CABLE ADDRESS: ROMEA

April 2, 1969

Hon. Wendell P. Kay
House of Representatives
Alaska State Legislature
Juneau

Re: House Bill No. 258

Dear Wendell:

Enclosed is the "proposed language".

Reviewing Ch. 71. SLA 1955 I found "unencumbered" to be redundant.

Let me know when convenient to discuss this.

Sincerely,

F. O. Eastaugh

FOE:bh
Enc.

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

February 21, 1970

The Honorable Barry Jackson
Chairman, House Judiciary Committee
Alaska State Senate
Juneau, Alaska 99801

Re: CSHB 258

Dear Mr. Jackson:

Committee Substitute for House Bill 258 repeals AS 43.10.160 - AS 43.10.200 which require a bond to be filed with the Department of Revenue by nonresident businesses to cover estimated taxes which will be incurred during the year. The bond is a condition precedent to doing business in the state. The Department of Revenue has never collected on one of these bonds.

AS 43.10.160 provides that if acquiring the bond would be a hardship on the business the Attorney General may waive the bond. This waiver provision has resulted in most businesses asking for a waiver. A business which is sound financially can seldom ever show a hardship and must obtain a bond by paying a premium which seldom goes to an Alaska business. A nonresident business which can show a hardship is often a business in a poor financial condition and is a business which should not receive a waiver. The result is a sound business is penalized and the unsound business has a way out.

The Department of Revenue recommends and concurs in section 1 of CSHB 258 which repeals the nonresident bond requirement.

Section 2 of Committee Substitute for House Bill 258 adds two new sections. The first (section 43.10.165) is adopted from the Internal Revenue Code of 1954. It makes a lender, surety, or other person who pays the wages directly to an employee or a person who supplies funds to or for the account of an employer for the purposes of paying wages when he knows the employer does not intend or will not be able to make timely payment of the tax deducted from employees wages liable for the tax.

The second section (43.10.175) is adopted from AS 23.20.265 of the Labor Code. It provides that a contractor is liable for the taxes of his subcontractor.

The two new sections will assist the Department of Revenue in collecting taxes in the construction field which is probably our major collection problem area.

CSHB 258 will not cost the state any additional funds. It will result in savings in administering the bill and should help increase collections.

Very truly yours,

Vernon L. Snow

Vernon L. Snow
Deputy Commissioner

VLS/ge
cc: John Beard

FORM SA-18

MEMORANDUM State of Alaska

TO: John Beard
Legislative Assistant
Office of the Governor

DATE : February 24, 1970

FROM: Vernon L. Snow
Deputy Commissioner
Department of Revenue

SUBJECT: CSHB 258 - Repeal of Nonresident Bond Requirement

Reference is made to my conversation with you on February 24, 1970. At that time I suggested that you talk with Representative Boardman and other legislators regarding the administration's position with respect to House Bill 258. I pointed out to you the Department of Revenue and the administration favors the adoption of the House Judiciary Committee's Substitute Bill for House Bill 258. A brief history of this act and our reasons for favoring the Committee Substitute Bill are set forth below.

The nonresident bond requirement (AS 43.10.160-200) was passed in 1955 apparently because many construction firms and fishery businesses were coming into the State and leaving without paying their taxes. Since that time several changes have occurred which require a change be made in our law. Among these are the following:

1. AS 43.75 requires fish processors to post a bond covering the fishery taxes. Thus the bond required by AS 43.10.160 is no longer needed for the fish processors tax.

2. Experience indicates that we have never collected on any bond which has been filed with the department.

3. A tremendous amount of time is required to administer the nonresident bond statute because nearly all businesses ask for a waiver. Not only does this entail searching our records to ascertain the current status of the business, but it also requires us to transmit this information to the Attorney General who in turn must examine it to see if a waiver should be granted. If one is granted then additional search is required. Correspondence is created by the "reams".

4. AS 43.10.160 provides that a waiver may be given to a business which can show that furnishing the bond is a hardship. A firm which is financially responsible such as a billion dollar corporation can seldom ever show that payment of a bond premium is a hardship. For example one large orporation paid out $21,000 for premium for a bond for one year. On the other hand a financially weak business which could show a hardship in posting a bond and obtain a waiver is the very company which may end up not paying the state taxes and should not be given a waiver. Accordingly, the good business is penalized and the poor business may obtain a waiver.

5. Few if any of the bond premiums paid for bonds posted with this department are paid to Alaska insurance firms. The nonresident firm generally gets its bond from a broker in the city where its home office is located.

During the 1969 session of the legislature the administration introduced H.B. 258 which would do away with the waiver provision and require that nonresident businesses post the bond, prepay the tax, or own sufficient real property in Alaska not to need to file a bond under the act. This change would eliminate most of the wasted expenditure of time in the Departments of Revenue and Law. It would also have eliminated any possibility of favoritism being claimed in granting waivers to some and refusing waivers to others.

House Bill 258 was referred to the House Congress Committee which approved the original bill with one or two minor changes. The bill then went to the House Judiciary Committee.

Hearings were held by the House Judiciary Committee in 1969 on House Bill 258. Because of the harshness of the bond requirement and the absurd results that could and did arise other approaches were sought. One committee substitute was proposed by a lobbyist, but that proposal would have been more onerous and burdensome to the Department of Revenue in administering the law than the present act. Finally near the end of the 1969 session the Judiciary Committee requested the Department of Revenue to provide it with additional recommendations at the commencement of the 1970 session.

After reviewing the entire nonresident bond provisions and the act's history the Department of Revenue concluded that difficulties in administering the present act far exceed the benefits received. Accordingly we recommended to you in our memorandum of January 21, 1970 that the entire nonresident bond provisions (AS 43.10.160-200) be repealed and two new sections be adopted in its place to assist the Department of Revenue in collecting taxes in the construction industry which constitutes the principal delinquent area where we have trouble.

The first new section is adopted from section 3505 of the Internal Revenue Code of 1954. It provides that a lender, surety, or other person who supplies funds for the payment of wages for an employee is liable for the taxes withheld from the employee's wages if the lender has actual notice or knowledge that the employer does not intend to or will not be able to make timely payment of the taxes. This section was adopted by the United States Congress in 1966 to assist the Internal Revenue Service in dealing with its problem in the collection of taxes from contractors.

The second section which we recommended was patterned after AS 23.20.265 of the Alaska Labor Code. That section holds a prime contractor liable for the taxes of the subcontractor arising from personal services which have been performed on the contract.

After obtaining your approval, we communicated to Representative Barry Jackson our revised views. Committee hearings were held and the House Judiciary Committee adopted our new recommendations with slight wording changes to the second section we recommended be adopted.

Although the House Judiciary Committee has changed the title to House Bill 258, the Committee Substitute does represent the Department of Revenue's position on this subject. It is recommended that you notify Representative Boardman and other legislators that Committee Substitute for House Bill No. 258 be adopted.

VLS/ge

Enclosure: Copy of CSHB 258
cc: Copy of this memorandum w/enclosure

Judiciary Committee Report

on

CS for HOUSE BILL NO. 258

Committee Substitute for House Bill No. 258 repeals AS 43.10.160-AS 43.10.200 which require a bond to be filed with the Department of Revenue by nonresident businesses to cover estimated taxes which will be incurred during the year. The bond is a condition precedent to doing business in the state. The Department of Revenue has never collected on one of these bonds.

AS 43.10.160 provides that if acquiring the bond would be a hardship on the business the Attorney General may waive the bond. This waiver provision has resulted in most businesses asking for a waiver. A business which is sound financially can seldom ever show a hardship and must obtain a bond by paying a premium which seldom goes to an Alaska business. A nonresident business which can show a hardship is often a business in poor financial condition and is a business which should not receive a waiver. The result is that sound business is penalized and unsound business has a way out.

The Department of Revenue recommends and concurs in Section 1 of CSHB-258 which repeals the nonresident bond requirement.

Section 2 of CSHB-258 adds two new sections. The first (section 43.10.165) is adopted from the Internal Revenue Code of 1954. It makes a lender, surety, or other person who pays the wages directly to an employee or a person who supplies funds to or for the account of an employer for the purposes of paying wages when he knows the employer does not intend or will not be able to make timely payment of the tax deducted from employees wages liable for the tax.

The second section (43.10.175) is adopted from AS 23.-20.265 of the Labor Code. It provides that a contractor is liable for the taxes of his subcontractor.

The two new sections will assist the Department of Revenue in collecting taxes in the construction field which is probably the major collection problem area.

According to the Department of Revenue, which supports the committee substitute, CSHB-258 will not cost the state any additional funds. It will result in savings in administration and should help increase collections.

Barry W. Jackson
Chairman
House Judiciary Committee

A M E N D M E N T

Offered in the HOUSE By Commerce

To: HOUSE Bill No. 258

SENATE Bill No. _____

AMENDMENT: Page 1 Line 10

Add:

Section 1. AS 43.10.160 (a), (b), and (c)

Second amendment:

Delete the words "before June 2 of" of Sec. 43.10.160 of Article 4 as follows:

Sec. 43.10.160

(a) Every nonresident person, as a condition precedent to the act of severing or taking resources from or transacting or doing business in the state, shall file (BEFORE JUNE 2 OF) each year a sworn statement in affidavit form with the Department of Revenue setting forth the following information;

DRAFT

CS FOR HOUSE BILL NO. 258

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act repealing the bond required to be filed with the Department of Revenue by nonresidents under AS 43.10.160 and providing other methods of protecting tax revenue; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article 4 of AS 43.10 consisting of AS 43.10.160-200 are repealed and re-enacted to read:

ARTICLE 4

LIABILITY OF CONTRACTORS AND THIRD PARTIES

FOR TAXES, LICENSES AND FEES

* Sec. 43.10.160. Liability of third parties paying or providing for wages. (a) If a lender, surety, or other person, who is not the employer, pays wages directly to an employee or group of employees, employed by one or more employers, or to an agent on behalf of the employee or employees, the lender, surety, or other person shall be liable in his own person and estate to the state of Alaska in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by the employer.

(b) If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purposes of paying wages of the employees of the employer, with actual notice or knowledge that the employer does not intend to or will not be able to make timely payment of the amounts of tax required by statute to be deducted and withheld by such employer

from the wages, the lender, surety, or other person shall be liable in his own person and estate to the state of Alaska in a sum equal to the taxes (together with interest) which are not paid over to the state of Alaska by the employer with respect to the wages. However, the liability of the lender, surety, or other person shall be limited to an amount equal to 25 per cent of the amount so supplied to or for the account of the employer for such purpose.

(c) Effect of payment. Any amounts paid to the state of Alaska pursuant to this section shall be credited against the liability of the employer.

* Sec. 43.10.170. Liability of contractor and principal for taxes. (a) No employing unit which contracts with or has under it a contractor or subcontractor who is an employer under the provisions of this section may make a payment to the contractor or subcontractor for a debt due until the contractor or subcontractor has paid or furnished a sufficient bond acceptable to the department for payment of taxes, licenses and fees, including penalty and interest, due or to become due for personal services which have been performed by individuals for the contractor arising during the course of the employment of the contractor or subcontractor by the employing unit.

(b) Failure to comply with this section makes the employing unit directly liable for the taxes, licenses and fees, including penalty and interest, and the department has the remedies of collection against the employing unit under this title as though the services in question were performed directly for the employing unit.

(c) "employer" means an employing unit which for some portion of a day within the calendar year has or had in employment one or more individuals.

(d) "employing unit" means an individual or type of organization, partnership, association, trust, estate, joint trust company, insurance company or domestic or foreign corporation, or the receiver, referee in bankruptcy, trustee, or successor of one of these, or the legal representative of a deceased person, which has one or more individuals performing service for it within the state.

* Sec. 2. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

Work Draft

Original sponsor: Rules Committee by request of the Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 258

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the collection of taxes, licenses, and fees; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 43.10.160 - 43.10.200 are repealed.

* Sec. 2. AS 43.10 is amended by adding new sections to read:

ARTICLE 4. LIABILITY OF EMPLOYERS AND THIRD PARTIES FOR TAXES, LICENSES AND FEES.

Sec. 43.10.165. LIABILITY OF THIRD PARTIES. (a) If a lender, surety, or other person, who is not the employer, pays wages directly to an employee, employed by one or more employers, or to an agent on behalf of the employee, the lender, surety, or other person is liable in his own person and estate to the State of Alaska in a sum equal to the taxes (together with interest) required to be deducted and withheld from the wages by the employer.

(b) If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of the employer, with actual notice or knowledge that the employer does not intend to or will not be able to make timely payment of the amounts of tax required by statute to be deducted and withheld by the employer from the wages, the lender, surety, or other person is liable in his own person and estate to the State of Alaska in a sum equal to the taxes (together with interest) which are not paid over to the State of Alaska by the employer with respect to the wages. However, the liability of the lender, surety, or other person is limited

Work Draft

to an amount equal to 25 per cent of the amount so supplied to or for the account of the employer for this purpose.

(c) An amount paid to the State of Alaska under this section shall be credited against the liability of the employer.

Sec. 43.10.175. LIABILITY OF EMPLOYER AND CONTRACTOR. (a) A person who contracts with or employs a contractor or subcontractor who is an employer is liable for taxes, licenses and fees, including penalty and interest, due or to become due for personal services which have been performed in the state by an individual for the contractor or subcontractor arising during the course of the contract with or employment of the contractor or subcontractor; and the department has the remedies of collection, provided in this title, against the person as though the services in question were performed directly for him. The department shall, however, first pursue the collection remedies against the contractor or subcontractor who is the immediate employer of the individual performing the services.

Sec. 3. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

HB 264

Ketchikan League of Women Voters
President Mrs. Jeff Collins
P. O. Box 1133
January 26, 1970

The Honorable Barry Jackson
Chairman: House Judiciary Committee
House of Representatives
Juneau, Alaska

Dear Mr. Jackson:

Last spring the Ketchikan League of Women Voters studied the problem of the dual city council-borough seats. After studying the problem we came to the conclusion that this was not a desirable arrangement. Our group felt that the two seats should be separate, and each should be voted upon by the city voters. Since this can be accomplished only at the state level, we are urging support for House Bill 264, which provides for assemblymen representing a first class city to be elected by the city voters rather than being appointed by and from city councils.

Our reasons for supporting legislation to make the city council and borough assembly seats separate positions are:

1. Voters inside the city limits would like to have a direct vote as to who would represent them on the borough assembly.

2. The duties of a city councilman and a borough assemblyman are too time consuming for one man to adequately do both jobs.

3. Since over 80% of our borough budget is ear-marked for schools, the voters would like to select someone to fill the assembly seat who has an interest in working with the schools.

4. A man running for city councilman does not find out until after he takes office whether he will also be appointed to the borough assembly.

In the last session this bill did not get out of your committee. Please act on this bill so that it can get out on the floor and get passed.

Thank you.

Sincerely,

Melva Joan Hiatt
Chairman, Borough Studies Comm.

HB 265

ALL-AMERICA CITY 1956 & 1965

CITY OF ANCHORAGE ALASKA

International
Polar air crossroads of the world

March 25, 1969

Hon. Barry Jackson, Chairman
House Judiciary Committee,
Alaska State House of Representatives
Capitol Building
Juneau, Alaska 99801

Re: HB 265 - Leasing of Public Buildings

Dear Representative Jackson:

I would have only two comments in regard to the above bill which would permit cities and boroughs to acquire and construct public building and facilities for cities and boroughs. It would probably be advisable for the State to be mentioned as a party in that all three forms of government may in many instances be able to use one public building. The second comment would be to permit an option to purchase the building after a specified period of time. Without such a provision, a long term rental proposition may prove to be more attractive to government planning if public ownership of the building would be a possibility. I have not explored the result of what would happen to the tax problems, and these questions would have to be answered upon further analysis.

Very truly yours,

Karl L. Walter, Jr.,
City Attorney

KLW/gl

AIRMAIL IS FASTER

file HB-280

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

BOX 1149—JUNEAU 99801

January 20, 1970

Jackson placing Hold on this 1-22-70

The Honorable Barry W. Jackson
Chairman
Judiciary Committee
House of Representatives
Pouch V
Juneau, Alaska 99801

Dear Mr. Jackson:

Thank you for the opportunity to comment on Committee Substitute for House Bill 280.

The Department of Labor has questioned whether or not it should properly have the responsibility for involvement in this area.

It is now our understanding that the Inland Boatmen's Union, at whose behest this bill was originally introduced, no longer feels there is urgent need for such legislation by the State of Alaska; as it is now anticipated that Federal regulations will be extended to this area of maritime safety.

Since Committee Substitute for House Bill 280 provides that vessels subject to similar regulation by an agency or department of the United States would be exempt from the provisions of the bill, it appears that this legislation is not needed at this time.

Sincerely,

Thomas J. Moore

Thomas J. Moore
Commissioner of Labor

A6281

Question of appeal from Dist. C

Supreme Court

State of Alaska
Pouch U
~~Box 2007~~
JUNEAU, ALASKA
99801

Come please review & revise as a committee report

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE

April 1, 1969

Hon. Barry W. Jackson, Chairman
House Judiciary Committee
State Capitol Building
Juneau, Alaska 99801

Dear Mr. Jackson:

House Bill 281 has been recommended by the Alaska Judicial Council and its Statewide Committee composed of judges, lawyers, legislators and prominent citizens from all areas of the state.

Appellate courts of the states of the United States and the federal courts have held that they do not have the inherent authority to review and modify a lawful criminal sentence, ~~imposed by a trial judge on the ground that the sentence was excessive or too lenient. The decisions of~~ these courts are based in large part on the fact that during the growth of the common law the prerogative of prescribing punishment for the violation of criminal ordinances was in ~~the crown and later in the legislative bodies.~~ The majority of the courts have held that where a sentence imposed by a trial judge is within the limits prescribed by statute and otherwise legal, an appellate court cannot review the discretion of the trial judge exercised in determining the sentence, even though it may appear in retrospect to have been too severe or too lenient.

The concept that the discretion of the trial judge exercised in imposing a particular sentence should not be questioned on appeal is now being challenged in more and more jurisdictions. In approximately eleven states of the United States constitutional or statutory provision for the appellate review of criminal sentences is now provided. The Congress of the United States has held hearings for the past three years on proposed federal legislation which would provide for the appellate review of sentences in the federal courts. ~~It is predicted by~~ Senator Hruska, ~~that~~ the pending legislation will be enacted into law during the 1969 session of Congress. For the past ten years the states of Massachusetts and Connecticut have provided by statute for the appellate review of criminal sentences and only recently the state of Maryland has adopted the techniques employed in those two states.

The general advantages of appellate review of sentences are considered to be:

1. Prison unrest generated by long-term prisoners can be alleviated to a large extent by providing for review of sentences which are claimed to be excessive on the ground that the trial judge "railroaded" the offender.

2. Where sentences are appealed by the offenders the appellate review panel can adjust the sentence upward as well as downward if in its opinion the original sentence was too lenient or too severe, resulting in a more just treatment of the defendant and the state.

3. Since every other aspect of a criminal trial prior to conviction is subject to appellate review there is, in this enlightened day, no reason in logic or justice why a sentence imposed by the trial judge after conviction should not likewise be reviewed.

Enactment of ~~the above legislation~~ H.B. 281 would provide the jurisdiction and substantive guidelines required to provide for appellate review of sentences in Alaska. The supreme court of Alaska would promulgate detailed rules of procedure providing for the preparation and forwarding of the record, hearing procedures, etc. In general, these rules

It is expected that

would be identical with those proposed to implement the federal legislation. Upon the institution of an appeal the clerk of court would forward to the appellate court the probation officer's report, the district attorney's recommendation, the defendant's statement, the written statement of the judge explaining in detail why the sentence was imposed and any other written material which was before the trial judge at the time he imposed the sentence. The record would also include a transcript of the proceedings held in court at the time the sentence was imposed. No other record would be forwarded and the appeal would be determined by the court on the record unless in its discretion it ordered the production of the defendant before the court. Such production would be required in any case where the court considered increasing the sentence. The additional expense to the state which would result from providing appellate review ~~as above contemplated~~ would be negligible. According to Chief Justice Burdick,

Experience in Massachusetts and Connecticut has indicated that the fact that a sentence may be modified by the appellate body upward as well as downward has restricted the appeals taken by defendants to those cases where the defendant sincerely believes that his sentence was excessive. The statistics of those states also reveal that less than 20 percent of sentences imposed are appealed. During the past calendar year a total of 113 sentences of one year or more were imposed by the superior courts of the state. These statistics indicate that approximately 20 appeals from superior court sentences might be expected annually. Since many of the criminal appeals already being taken would be able to incorporate as an additional point an appeal for claimed excessiveness of the sentence imposed, it is not expected that the total number of separate appeals from the sentence alone would exceed 15 in a given year. Under the same reasoning it is not expected that the number of appeals from the district or magistrate's courts to the superior court would exceed a total of 35 in a given year in the entire court system.

The ~~legislation should be made~~ effective six months from the date of enactment in order to give the courts time to formulate rules of procedure. The act ~~should be made~~ applicable only to sentences imposed after its effective date, as has been provided in the federal legislation.

Sincerely yours,

Buell A. Nesbett
Chief Justice

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE
GEORGE F. BONEY, ASSOCIATE JUSTICE
ROGER G. CONNOR, ASSOCIATE JUSTICE

Supreme Court
State of Alaska
POUCH U, CAPITOL BUILDING
JUNEAU, ALASKA
99801

April 11, 1969

Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Capitol Building
Juneau, Alaska 99801

Re: HB 281 - Appellate Review of Criminal Sentences

Dear Chairman Jackson:

In our recent conversation I was under the impression that we had agreed that the captioned bill should be amended to provide that the superior court would have the power to modify a sentence upward as well as downward. I notice that the bill has come out of Judiciary without this amendment, perhaps by oversight.

The amendment would have two desirable effects, I believe:

(1) It would discourage appeals of every sentence on the "gamble" that a "break" might be received.

(2) It would be more likely to pass the Senate where some senators view the act as one to obtain more lenient sentences.

The change could be effected by interlining the words "upward or" between the words "from" and "downward" in line 18 of page 2 of House Bill 281.

I urge this amendment.

Sincerely yours,

Buell A. Nesbett
Chief Justice



Alaska Judicial Council
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

February 26, 1969

The Honorable Jalmar M. Kerttula
Speaker of the House
Alaska House of Representatives
Capitol Building
Juneau, Alaska 99801

Dear Speaker Kerttula:

House Concurrent Resolution No. 47 of the 1968 session asked the Alaska Court System to review its sentencing techniques and suggested that it hold a sentencing seminar for its judges. Efforts were made to appraise sentencing techniques and methods and a sentencing seminar was held at the annual judicial conference in Ketchikan in May of 1968. Other sentencing seminars are planned.

In addition, the Alaska Judicial Council voted in 1968 to sponsor a study of the need for a procedure to provide for the appellate review of sentences in Alaska. In the course of its study it further undertook to review and report to the Alaska legislature on the pending proposed revised criminal code and the sentencing aspects of this proposed code. To provide a broad base for its studies the Judicial Council created a statewide blue ribbon committee composed of approximately 60 legislators, judges, lawyers and leading lay leaders in Alaska. Considerable background study material was collected and distributed to all members of the committee. Nationally recognized experts on the subject from Connecticut, New York and California were brought to Alaska to assist the statewide committee in its studies and discussions at its first meeting held in Sitka on December 12, 1968. As a result of the two-day Sitka conference on sentencing the statewide committee voted to establish subcommittees to further study the main interests of the statewide committee as evidenced at the Sitka conference.

Accordingly subcommittees on Appellate Review of Sentences, Probation and Parole in the Courts, and Sentencing Aspects of the Proposed Revised Alaska Criminal Code were created. These committees studied the aspects of sentencing assigned to them and reported to the Statewide Committee at its meeting held in Juneau

on February 19, 1969.

The Statewide Committee adopted the subcommittee report on Appellate Review of Sentences and recommended it to the Alaska Judicial Council for further recommendation to the Alaska Legislature. At its meeting on February 20, 1969 the Alaska Judicial Council adopted the report and recommendations of the subcommittee and voted to recommend the passage of legislation which would provide authority for the appellate review of sentences by Alaska's courts.

Appellate courts of the states of the United States and the federal courts have held that they do not have the inherent authority to review and modify a lawful criminal sentence imposed by a trial judge on the ground that the sentence was excessive or too lenient. The decisions of these courts are based in large part on the fact that during the growth of the common law the prerogative of prescribing punishment for the violation of criminal ordinances was in the crown and later in the legislative bodies. The majority of the courts have held that where a sentence imposed by a trial judge is within the limits prescribed by statute and otherwise legal, an appellate court cannot review the discretion of the trial judge exercised in determining the sentence, even though it may appear in retrospect to have been too severe or too lenient.

1

The concept that the discretion of the trial judge exercised in imposing a particular sentence should not be questioned on appeal is now being challenged in more and more jurisdictions. In approximately eleven states of the United States constitutional or statutory provision for the appellate review of criminal sentences is now provided. The Congress of the United States has held hearings for the past three years on proposed federal legislation which would provide for the appellate review of sentences in the federal courts. It is predicted by Senator Hruska that the pending legislation will be enacted into law during the 1969 session of Congress. For the past ten years the states of Massachusetts and Connecticut have provided by statute for the appellate review of criminal sentences and only recently the state of Maryland has adopted the techniques employed in those two states.

2

The general advantages of appellate review of sentences are considered to be:

1. Prison unrest generated by long-term prisoners can be alleviated to a large extent by providing for review of sentences which are claimed to be excessive on the ground that the trial judge "railroaded" the offender.

2. Where sentences are appealed by the offenders the appellate review panel can adjust the sentence upward as well as

3

downward if in its opinion the original sentence was too lenient or too severe, resulting in a more just treatment of the defendant and the state.

3. Since every other aspect of a criminal trial prior to conviction is subject to appellate review there is, in this enlightened day, no reason in logic or justice why a sentence imposed by the trial judge after conviction should not likewise be reviewed.

The Alaska Judicial Council, assisted by its statewide committee, has considered all aspects of the problem and has concluded that the administration of criminal justice would be improved if the courts of Alaska were granted jurisdiction to review and modify criminal sentences imposed by the trial judges. The Council was considerably impressed by the simplicity of the procedure proposed for federal appellate review of sentences and its suggested method of providing such review in Alaska is based primarily on proposed federal legislation.

The Alaska Judicial Council therefore respectfully requests that this legislature grant jurisdiction to the Supreme Court of Alaska to sit in appellate judgement on criminal sentences imposed by the Superior Courts of Alaska by enacting the following:

Amend AS 22.05.010 to add the following two sentences:

The supreme court has jurisdiction to hear appeals of sentences of imprisonment lawfully imposed by the superior courts upon the ground that the sentence or sentences are excessive or too lenient and in the exercise of this jurisdiction may modify the sentence as provided under law and under the constitution of this state. For the purpose of considering appeals of sentences upon the above grounds the supreme court may sit in divisions.

DISCUSSION: Enactment of the above would give the Supreme Court of Alaska the jurisdiction to hear appeals of criminal sentences which it has held in a recent decision that it does not now have. The last portion of the first sentence which reads "may modify the sentence as provided under law and under the constitution of this state" was worded in that manner rather than to state, as was originally proposed, that the court "may modify the sentence upward or downward." The reason being that where the defendant appeals he can be held to have waived his constitutional right not to be twice placed in jeopardy for the same offense in the event the sentence should be modified upward. However, where the state has

appealed on the ground that the sentence is too lenient, but the defendant has not also appealed, the court would not be justified in holding that the defendant had waived his right against double jeopardy and would be prevented from increasing the sentence by reason of that fact. The above wording was finally adopted which provides for modifying the sentence upward or downward where the defendant himself has appealed but prevents the court from modifying the sentence upward if the defendant has not appealed but the state has appealed.

Add as separate sections to Chapter 25, Title 12 of Alaska Statutes the following:

Sentence Appeal.

(a) Any sentence or sentences of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding one year may be appealed to the supreme court by the defendant upon the ground that the sentence or sentences are excessive. By a sentence appeal under this section the defendant waives any right to plead that by any revision of the sentence resulting from such appeal he has been twice placed in jeopardy for the same offense.

(b) Any sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the state upon the ground that the sentence is too lenient provided, however, that when a sentence has not also been appealed by the defendant, the court is not authorized to increase the sentence but may express its approval or disapproval and its reasons therefore in a written opinion.

(c) A sentence appeal under this section does not confer or enlarge any right to bail pending appeal. Where a defendant in the prosecution of a regular appeal urges excessiveness of the sentence as an additional ground for appeal, the defendant's right to bail pending appeal shall be governed by the statutes and rules of court.

DISCUSSION: It is believed that the above proposed sections are self-explanatory. Subsection (b) takes care of the situation mentioned in the above discussion with respect to appeals by the state. The advantage of enacting this subsection would be to permit the state to draw to the attention of the appellate courts sentences which were considered to be too lenient. The appellate court would review such sentences and express its approval or

disapproval in a written opinion. Whether the appellate court affirmed the sentence on the ground that it was not too lenient or whether it merely expressed disapproval of the sentence on the ground that it was too lenient, the written opinions of the court would in time provide guidelines for the other courts of Alaska to use in their determination of the appropriate sentence. As the case law of Alaska built up over the years considerable guidelines would be supplied to the lower courts which would be binding upon those courts within the limits of the exercise of their judicial discretion. It is believed that this would be a tremendous advantage because at the present time there are no binding guidelines for the courts of Alaska to employ in determining the appropriate sentence. Subsection (c) would prevent indiscriminate appeal being taken on the ground that the sentence was excessive in order to obtain release pending appeal. It was not intended to prevent release of the defendant on bail pending appeal where the excessiveness of the sentence was only one of several grounds of appeal in the usual appeal. In those situations the defendant should have the right to release on bail pending appeal provided he can convince the court that he qualified for bail pending appeal under the statutes and rules of court now in effect.

In subdivision (a) of AS 22.10.020, interline the following sentence as a next to last sentence:

An appeal to the superior court may be taken on the ground that a sentence of imprisonment of 180 days or more was excessive and the superior court in the exercise of this jurisdiction has the power to modify the sentence appealed from downward.

DISCUSSION: This would provide an appeal for the defendant only from the magistrate's and district courts to the superior court. The Council felt that the appellate review procedure should be extended to the lower courts, for it is in those courts, particularly the courts presided over by lay judges, that abuses of discretion too often occur. The appeal would be heard by a single superior court judge on the record created by the defendant's written statement, the sentencing judge's written statement of reasons, and the district attorney's or the enforcement officer's written statement. The hearing procedure would be fairly summary and expeditious, but it would provide for a mature review by a more experienced judge and would undoubtedly prevent occasional injustices.

Enactment of the above legislation would provide the jurisdiction and substantive guidelines required to provide for appellate review of sentences in Alaska. The Supreme Court of Alaska would promulgate detailed rules of procedure providing for the preparation and forwarding of the record, hearing procedures, etc. In general these rules would be identical with those proposed to implement the federal legislation. Upon the institution of an appeal the clerk of court would forward to the appellate court the probation officer's report, the district attorney's recommendation, the defendant's statement, the written statement of the judge explaining in detail why the sentence was imposed and any other written material which was before the trial judge at the time he imposed the sentence. The record would also include a transcript of the proceedings held in court at the time the sentence was imposed. No other record would be forwarded and the appeal would be determined by the court on the record unless in its discretion it ordered the production of the defendant before the court. Such production would be required in any case where the court considered increasing the sentence. The additional expense to the state which would result from providing appellate review as above contemplated would be negligible.

4

Experience in Massachusetts and Connecticut has indicated that the fact that a sentence may be modified by the appellate body upward as well as downward has restricted the appeals taken by defendants to those cases where the defendant sincerely believes that his sentence was excessive. The statistics of those states also reveal that less than 20% of sentences imposed are appealed. During the past calendar year a total of 113 sentences of one year or more were imposed by the superior courts of the state. These statistics indicate that approximately 20 appeals from superior court sentences might be expected annually. Since many of the criminal appeals already being taken would be able to incorporate as an additional point an appeal for claimed excessiveness of the sentence imposed, it is not expected that the total number of separate appeals from the sentence alone would exceed 15 in a given year. Under the same reasoning it is not expected that the number of appeals from the district or magistrate's courts to the superior court would exceed a total of 35 in a given year in the entire court system.

5

The legislation should be made effective six months from the date of enactment in order to give the courts time to formulate rules of procedure. The act should be made applicable only to sentences imposed after its effective date, as has been provided in the federal legislation.

6

Sincerely,

Buell A. Nesbett

Buell A. Nesbett
Chairman, Alaska Judicial Council

BAN:eb

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 281

This bill draws on the concepts for appellate review of criminal sentences contained in proposed federal legislation. Such legislation is expected to be enacted into law during the 1969 session.

The majority of the courts have held that where a sentence imposed by a trial judge is within the limits prescribed by statute and otherwise legal, an appellate court cannot review the discretion of the trial judge exercised in determining the sentence, even though it may appear in retrospect to have been too severe or too lenient.

Enactment of House Bill No. 281 would provide the jurisdiction and substantive guidelines required to provide for appellate review of sentences in Alaska. The supreme court of Alaska would promulgate detailed rules of procedure providing for the preparation and forwarding of the record, hearing procedures, etc. In general, it is expected that these rules would be identical with those proposed to implement the federal legislation. Upon the institution of an appeal the clerk of court would forward to the appellate court the probation officer's report, the district attorney's recommendation, the defendant's statement, the written statement of the judge explaining in detail why the sentence was imposed and any other written material which was before the trial judge at the time he imposed the sentence. The record would also include a transcript of the proceedings held in court at the time the sentence was imposed. No other record would be forwarded and the appeal would be determined by the court on the record unless in its discretion it ordered the production of the defendant before the court. Such production would be required in any case where the court considered increasing the sentence. According to Judge Nesbitt, the additional expense to the state which would result from providing appellate review would be negligible.

The effective date is six months from the date of enactment in order to give the courts time to formulate rules or procedure. The act is applicable only to sentences imposed after its effective date, as has been provided in the federal legislation.

Barry Jackson
Chairman
House Judiciary Committee

NO.3

HB

File 4
HB 309

MEMORANDUM State of Alaska

TO: The Honorable Barry Jackson
Chairman, House Fiduciary Committee
Alaska State Legislature
Juneau, Alaska

DATE : February 3, 1970

FROM: V. L. Snow
Deputy Commissioner
Department of Revenue

SUBJECT: House Bill 309, An Act Relating to Motor Vehicle Financial Security and Providing an Effective Date of January 1, 1970

A copy of our fiscal note on HB 309 is attached per your request. We have reviewed the attached and find it valid. The effective date of the bill should be changed to January 1, 1971.

We would be happy to provide any additional data that you might require.

VLS:cs

Attachment

cc: R. D. Stevenson, Supervisor
Excise Tax Section

MEMORANDUM State of Alaska

TO: The Honorable Bill Ray
Chairman, House Finance Committee
Alaska State Legislature
Juneau, Alaska

DATE : April 8, 1969

FROM: R. D. Stevenson
Chief, Excise Tax Section
Department of Revenue
Alaska Office Building
Juneau, Alaska

SUBJECT: House Bill No. 309, An Act relating to motor vehicle financial security and providing an effective date of January 1, 1970

Attached is a copy of a memorandum from P. A. Wall, Director, Administrative Services Division, Department of Revenue to Mr. George A. Morrison, Commissioner of Revenue concerning House Bill 309, An Act relating to motor vehicle financial security and providing for an effective date of January 1, 1970.

Mr. Wall is extremely familiar with the operation of the Motor Vehicle Division of the Department of Revenue and prepared his report after conferring with Paul D. Goodrich, Director of the Motor Vehicle Division in Anchorage.

A detailed fiscal note is included. Mr. Goodrich in a wire to Mr. Wall advised "that the bill has intermingled functions and responsibilities of two departments, Public Safety and Revenue Motor Vehicle Division in the administration of the Act and delegated those responsibilities and functions to Public Safety".

Mr. Wall would be most happy to discuss any or all of the information contained in the attached memorandum concerning House Bill no. 309. He may be reached at the Department of Revenue by calling 6-5265.

RDS:se
cc: Mr. P. A. Wall
Director
Administrative Services Division
Department of Revenue

MEMORANDUM State of Alaska

TO: G. A. Morrison, Commissioner of Revenue

DATE : April 4, 1969

FROM: P. . . Wall, Director
Administrative Services Division

SUBJECT: House Bill 309 "An act relating to Motor Vehicle Financial Security."

This bill requires an operator of a motor vehicle to show proof of financial security as a pre requisite to operation of a motor vehicle in the state.

EFFECT UPON THE TREASURY:

Section 28.18.040 - requires that an abstract of the operating records of a person to whom the chapter applies that contains a lists of accidents, the conviction record for violation of motor vehicle laws and a record of vehicle registered in the operators name be furnished for a fee of one dollar. It is our experience that in other states having a liked law that insurance companies and the courts do request abstracts upon the renewal of each insurance policy and in conjunction with each court case. The minimum number of abstracts is estimated at 150,000 for effect upon the treasury of an increase of $150,000.

ADMINISTRATION:

A very detailed fiscal note is attached as prepared by Mr. Goodrich. We believe that the bill lays the burden of information retrieval upon the Department of Revenue, and that the Department of Public Safety will be required to furnish the Department of Revenue with drivers record and violation data to which the Department of Revenue would add a record of the motor vehicle operated by the individual and, for which the Department of Revenue would collect with the one dollar abstract fee.

The annual cost of this bill is estimated at $218,076. This estimat does not include the cost to the Department of Public Safety for establishing files of drivers licenses and violations in promptly retrievable form. It does not include the additional cost of Motor Vehicle Department for establishing files on approximately 8,000 vehicles now operated by military personnel, and who are not presently required to license their vehicles in Alaska.

We also note that probable correction on page 17 line 27 where the new included Alaska Statutes Reference of AS 28.22.050 should probably be AS 28.18.050.

COMMENTS:

The Department of Revenue presently charges one dollar for a search for the title and registration files. This one dollar would be preempted by the new charge of one dollar in section 28.18.040 of the bill.

When we compare the cost of the program which is over $200,000.00 for the Department of Revenue annually, it is recommended that the charge for each abstract be raised to $10.00 to cover the cost of the assembling and certifing each request.

PAW:pr
cc: Vernon L. Snow, Deputy Commissioner
R. D. Stevenson, Supervisor Excise Tax Section
ATTACHMENT:

This report very briefly describes the factors, personal services, forms and other costs that will be necessary in the Administration of the Bill.

28.18.040

Requires the Department to furnish a certified abstract of accidents and a record of vehicles registered in that persons name. The fee per abstract is $1.00.

Comment: The cost will be substantially in excess of $1.00. It requires this department $1.00 per item to research Title and Registration files. The abstract specified would be very extensive. Recommended fee - $10.00.

28.18.050

This section requires that the owner of any vehicle submit proof of financial security.

(A) Requires Certificate of Insurance with each registration.

(B) Requires Financial Security Deposit.

(C) Requires statement of security at renewal.

Forms: Financial Statement
Insurance Certificate
Yearly Statement

Personal Services:

At initial registration, each document submitted will be examined for accuracy and compliance. There will be a document generated at every initial registration and at every transfer of registration for each year during re-registration for every vehicle.

Section 8

There will be a continuous flow of insurance documents into the system as insurance is renewed, terminated or cancelled, or when a person adds to or deletes from a specific policy or when other conditions of the policy changes.

28.18.070

The department will receive, account for, deposit and control financial security deposits.

Personal Services:

Accounting Services, Files and Records

28.18.070
Section 3

This section will require some type of evidence such as a Title Search to determine that there are no unsatisfied judgements against the depositor. The department would be required to examine and verify whatever documents are submitted.

28.18.090 & 100

Requires that a Bond be filed with the Department. This Act specifies that the Department must maintain a record of actions and damages pending or judgements outstanding or unsatisfied, etc.

Files and Personal Services:

Actions pending, Liabilities outstanding or unsatisfied, drivers involved in accidents.

Forms: Affidavit of Non-existence of these facts.

28.19.110

Files: Self Insurer
Forms: Certificate of Self-Insurance

(b) Forms & Files:
Financial Statement by Self Insurer

(c) Substantial clerical services required to process files and initiate correspondence.

28.18.120

Sets out action to be taken when evidence is received that security is no longer in effect. Revocation of registration occurs; clerical services will be required for the purpose of initiating correspondence and maintaining files. Very prosably, services of a Field Representative will be required in many instances to take physical possession of license plates and Driver's license.

28.18.130

Specifies action to be taken on any transfer of Motor Vehicles. It would required an examination of all Titles registered to any specific individual or firm. It would require very substantial clerical services.

28.18.190

Concerns the removal of vehicles from the United States or Canada and would require the maintenance of still another file and records. Clerical services would be required for the purpose of initiating correspondence and maintaining the files on the specific vehicles.

28.18.210

This section defines the Liability policy that must exist on each initial registration. It is required that a Certificate of Insurance be submitted and that this insurance meet certain standards and specifications. It would be necessary, on each initial registration to examine both the owner and the vehicle to make certain of the following facts:

1. That the insurance is of the amount and type specified.
2. That all persons driving any one vehicle registered to any given individual are included in the policy.
3. That none of the individuals driving any of the vehicles had violated the Motor Vehicle Operator's Code.

This procedure will be similar to our Title examining function except more extensive. A substantial number of clerical personnel will be required as Policy Examiners.

28.18.230

Forms: Certificate of Insurance.
There will be one for every initial registration, one for every transfer and one for every change in policy on each individual vehicle. There will be an affidavit certificate on each individual vehicle for every re-registration period.

The procedures required to administer this act, insofar as the Motor Vehicle Division is concerned, will be essentially the same as our Title Examining function. Certificates of insurance replacing Lien documents but examined for similar purposes.

There would be exceptions (additional procedures) to the Title Examining parallel, however. For example:

1. There will be a yearly statement to be filed on each active Title (vehicle currently registered) which must be recorded and filed.

2. There will be statements or affidavits generated in each instance where the condition of a policy changes.

3. There will be terminations and cancellations throughout the year.

4. There will be reports of suits pending, liabilities unpaid and judgements issued, to be recorded and appropriate action taken.

Personal Services

Policy Examiners

Examine each initial title

a. That policy is in compliance as related to vehicle.

b. That self insurer is qualified.

c. That registered owner nor any person driving vehicle currently in violation of Operators License Ordinance.

a. That policy covers all vehicles registered to any one person.

e. That all persons operating vehicle (including registered owner) are properly insured to operate this specific vehicle.

5	Document Processing Clerks I @ $6,264		$31,320
1	Document Processing Clerks III @ $7,764		7,764

File Clerks

1. Each initial registration generates one document (certificate of insurance) 120,000 estimated for 1970.

2. Each re-registration generates one document (Affidavit of Insurance) 161,000 estimated for 1970.

3. Each change in condition of insurance either generates new document or moves the files.

4. A separate "Financial Statement" is generated by each self insurer.

5. Files will move in each instance of revocation by virtue of

a. Cancellation of Insurance Policy
b. Revocation of Operators permit
c. Failure to maintain financial responsibility.
d. Suit is pending or judgment given

4	Clerks I	@ $5,880	$23,520
1	Clerk III Sup.	@ $6,600	6,600

There will be an area of work concerned with violations or non-compliance with the Act. The processing of folio where a suit is pending or judgement has been given. The control of vehicles moved from the U.S.A. and other requirements of the act. Work will be extensive and exacting and will require the services of higher grade clerical personnel. There will be very extensive correspondence and reports.

2	Clerk Typist IV	@ $7,200	$14,400
1	Clerk Typist V	@ 8,256	8,256
2	Clerk Steno	@ 6,264	12,528
2	Clerks I	@ 5,880	11,760

The prime end function of this program will be the production of reports and information for use by the Courts and which must be in suitable form. All must be extremely accurate and generally suitable for admission as evidence. In conjunction, there will be a wide assortment of documents generated by various court actions which will require some action by the department.

There must be an area of supervision and guidance, then, within this section staffed by a person reasonably skilled in legal areas. Probably an attorney will be required but possible a secretary (Legal) with exceptional training and experience might suffice.

1	Administrative Assistant	$10,320
1	Secretary II	6,808

The Accounting sections will be required to process a number of Revenue Documents roughly equal to those presently processed under the Motor Vehicle Act, since there will be a Revenue bearing document, generated at each registration and re-registration. In addition, the Accounting section will receive, hold and control disbursements against security deposits. There will be a substantial number of miscellaneous fees generated. Accounting requirements for the Administration of the Act will, in fact, parallel the present Motor Vehicle Accounting system. Since the present system is effective in processing bulk quantities of paper.

Equipment

3 Desks	@ $300	$ 900
3 Chairs	@ 30	90
2 File Cabinets	@ 150	300

Personal Services

1 Accountant III		$11,796
2 Accounting Clerks II	@ $7,200	14,400

There will be a substantial amount of field investigation and activity involving the locating of and personal contact with persons, the repossession of plates and/or Drivers Licenses, physical inspection and identification of vehicles. Will require the services of either a full time State Trooper or a Special Agent.

1 Agent	@ $13,344	$13,344

The function will require about 14,000 square feet of area at $.60 per square foot. $8,400

15	Desks	@ $ 300	$4,500	
15	Chairs	@ 30	450	
5	Chairs	@ 50	250	
15	File Cabinets	@ 150	2,250	
10	Title File Cabinets	@ 200	2,000	
2	Dictaphones	@ 400	800	
6	Typewriters	@ 400	2,400	
1	Duplicator	@ 1,000	1,000	(Year)
	Microfilm Unit	@ 3,500	3,500	

Certificate of Insurance - 1st Year
(Initial registration and New registration, Transfer, etc.)
240,000 23. per thousand $ 5,520.00

Affidavits of Renewal Re-registration

(1st Year re-registration 150,000 @ 23. per thousand $3,450.00

Title Project

a. Security Deposit or Bond
b. Self Insurer
c. Financial Statement (Self-Insurer)
d. Notice of Revocation of Plates or Driver's License
e. Notice of execution against Security Deposits
f. Affidavit of Non-Existence of violations
g. Affidavit of Removal of Vehicle
h. Other

150,000 23.00 $ 3,450.00
Misc. - Stationery-Postage, etc. [illegible]
$[illegible]

We cannot consider the matter of correlating Driver's Licensing information to vehicle licensing, having insufficient data. It appears that the only feasible manner would be by either incorporating the two functions into one operating entity or by combining the records by making provision for a very extensive and fairly sophisticated computerized system.

Personal Services	$174,816
Equipment	18,440
Forms, Stationery, etc.	15,420
Rents and Utilities	9,400
	$218,076

This estimate does not include the cost to the Department of Public Safety for establishing files of Drivers License violations in promptly retrievable form.

It does not include the additional cost to the Motor Vehicle Department for additional cost of establishing files (or registering without fee) for the approximately 8,000 vehicles driven by military personnel and not required to be registered in Alaska.

Potential Revenue from Program:

150,000 ~~re-registration~~ X ~~$2.00~~ 1.00 ~~$300,000~~ $150,000

It does not include the cost of personal services to the State.

It does not include additional administrative costs incidental to the function: ie personnel matters, equipment, storage, the building and facilities etc.

Use the complete list and know who else would be placed on this list. Mark

COUNTRYWIDE

Exhibit 17 (a)

AUTOMOBILE LIABILITY INSURANCE - STATEWIDE AVERAGE RATES ϕ - PRIVATE PASSENGER CARS

Based on Automobile Casualty Manual Rates Effective As Of August 15, 1968

State	Effective Date	$10,000/20,000 Limits Bodily Injury	$5,000 Limits Property Damage	Bodily Injury & Property Damage Combined
Dist. of Col.	7-31-68	$ 89.83	$ 57.16	$146.99
Massachusetts	1-1-67	90.56	42.03	132.59
New York	7-26-67	83.67	32.36	116.03
Rhode Island	2-23-66	66.37	31.00	97.37
Illinois	1-11-67	61.53	31.81	93.34
Connecticut	3-6-68	58.72	31.43	90.15
Maryland	3-27-68	56.88	28.07	84.95
New Jersey	4-13-66	54.97	27.46	82.43
Louisiana	2-28-68	53.87	27.65	81.52
Michigan	5-3-67	42.05	39.29	81.34
Minnesota	10-5-66	53.52	26.82	80.34
Oregon	5-24-67	49.99	28.46	78.45
Ohio	3-29-67	42.37	34.97	77.34
Wisconsin	8-2-67	51.61	25.57	77.18
Nevada	2-22-67	[illegible].04	27.92	75.96
Washington	10-4-67	[illegible].91	26.93	73.84
Arizona	11-1-67	[illegible].14	23.57	73.81
Indiana	9-20-67	35.43	37.89	73.32
Vermont	5-10-67	48.78	24.08	72.86
New Hampshire	6-26-68	46.94	23.79	70.73
West Virginia	3-15-67	42.69	26.61	69.30
Arkansas	4-10-68	43.02	25.86	68.88
Utah	2-21-68	39.45	28.75	68.20
Florida	7-17-68	47.46	20.24	67.70
Pennsylvania	10-1-65	40.72	26.52	67.24
Texas	8-1-67	38.79	28.20	66.99
Mississippi	9-21-66	44.40	20.99	65.39
Virginia	8-2-67	40.05	24.57	64.62
Kentucky	8-2-67	40.36	23.18	63.54
South Carolina	2-17-66	41.37	21.85	63.22
Maine	1-10-68	37.30	25.62	62.92
Alabama	3-20-68	38.30	24.29	62.59
Oklahoma	3-6-68	38.81	21.79	60.78
Tennessee	4-6-66	43.42	21.79	60.60
Iowa	5-1-68	31.36	28.82	60.18
Kansas	5-22-68	37.72	22.38	60.10
North Carolina	4-24-68	35.20	19.96	55.16
New Mexico	10-11-67	29.58	24.07	53.65
Georgia	12-4-63	31.75	18.31	50.06
Nebraska	1-3-68	27.04	22.78	49.82
Delaware	10-18-67	26.40	22.98	49.38
Colorado	4-17-68	31.54	17.63	49.17
North Dakota	5-18-68	25.97	19.77	45.74
Wyoming	8-23-67	18.47	18.34	36.81
South Dakota	7-19-67	20.45	13.64	34.09
Countrywide	--	51.99	27.91	79.90

ϕ Based on Voluntary Risk exposures.

Mutual Insurance
Rating Bureau

Bob Hunter

AUTOMOBILE LIABILITY INSURANCE

PRIVATE PASSENGER CARS

Average Rates for $10,000/20,000 Bodily Injury and $5,000 Property Damages Coverages Combined

State	Present Average	January 1, 1957 Average	January 1, 1947 Average
Alabama	$ 59.22	$ 38.91	$ 37.98
Arizona	74.37	47.78	29.26
Arkansas	65.13	35.86	32.08
Colorado	54.88	29.96	25.60
Connecticut	90.66	73.54	43.59
Delaware	52.13	33.81	24.39
Dist. of Col.	108.43	54.21	33.52
Florida	59.12	39.93	24.95
Georgia	55.34	43.81	31.83
Illinois	107.39	55.48	38.98
Indiana	71.97	36.72	24.84
Iowa	59.97	30.20	19.45
Kansas	54.80	32.69	20.48
Kentucky	72.26	45.46	32.30
Louisiana	80.65	43.54	27.98
Maine	58.03	45.01	28.98
Maryland	86.59	56.49	32.76
Michigan	80.29	37.09	20.56
Minnesota	94.28	53.27	37.42
Mississippi	73.29	43.67	31.02
Nebraska	58.31	28.95	25.67
Nevada	85.06	44.64	28.37
New Hampshire	83.66	54.23	43.31
New Jersey	95.71	58.93	44.12
New Mexico	56.14	27.74	21.80
New York	123.59	96.53	57.55
North Carolina	62.84	34.63	33.41
North Dakota	43.60	22.74	25.57
Ohio	87.88	48.98	79.08
Oklahoma	67.24	41.23	34.22
Oregon	84.25	43.55	26.93
Pennsylvania	75.03	50.18	32.24
Rhode Island	97.07	46.03	28.17
South Carolina	72.34	38.67	33.00
South Dakota	37.88	21.60	17.83
Tennessee	76.01	53.36	32.41
Texas	65.87	28.95	25.76
Utah	69.44	39.20	25.08
Vermont	83.07	48.00	29.63
Virginia	64.62	36.26	29.40
Washington	78.28	40.73	27.23
West Virginia	78.07	49.91	34.90
Wisconsin	85.34	52.32	34.38
Wyoming	40.57	27.24	25.33
Countrywide	84.03	53.54	38.03

84.03
53.54
30.49

53.54 | 3014900 | .58
26770
32208
32147

A Realistic Look at Auto Insurance Costs

Today's policyholder spends less of his income for basic coverages than he did 20 years ago.

AS EVERY CAR OWNER KNOWS, it takes more dollars to pay for auto insurance today than it did, say, 20 years ago. The same is true of most other products and services.

But in terms of consumer purchasing power, basic auto liability insurance is a better value than it was in 1947. The typical policyholder is able to pay for his coverages with fewer hours of work, and with a smaller percentage of his family income, than were required to pay for the same coverages 20 years ago.

For example, the typical U.S. factory production worker had to put in 30.9 hours of work to earn the annual premium for $10,000/$20,000/$5,000 auto liability coverages in 1947, when wages averaged $1.23 an hour and the average cost of insurance was $38.03 a year.

In 1967, the typical production worker put in only 29.7 hours of work to pay for the same coverage. The average insurance premium for these basic coverages had risen to $84.03, up 121 per cent in the 20-year period. But average hourly wages had risen to $2.83, up 130.1 per cent, in the same period.

The improvement is even greater when the comparison is based on median family income, perhaps the best single yardstick of consumer affluence. In 1947, when median family income was $2,854, the typical American family spent 1.33 per cent of its annual income to buy basic auto liability coverages with limits of $10,000 per person, and $20,000 per accident, for bodily injuries, plus $5,000 for property damage.

By 1967, when median family income was $7,400, the portion of annual income spent for basic auto insurance coverages had dropped to 1.14 per cent.

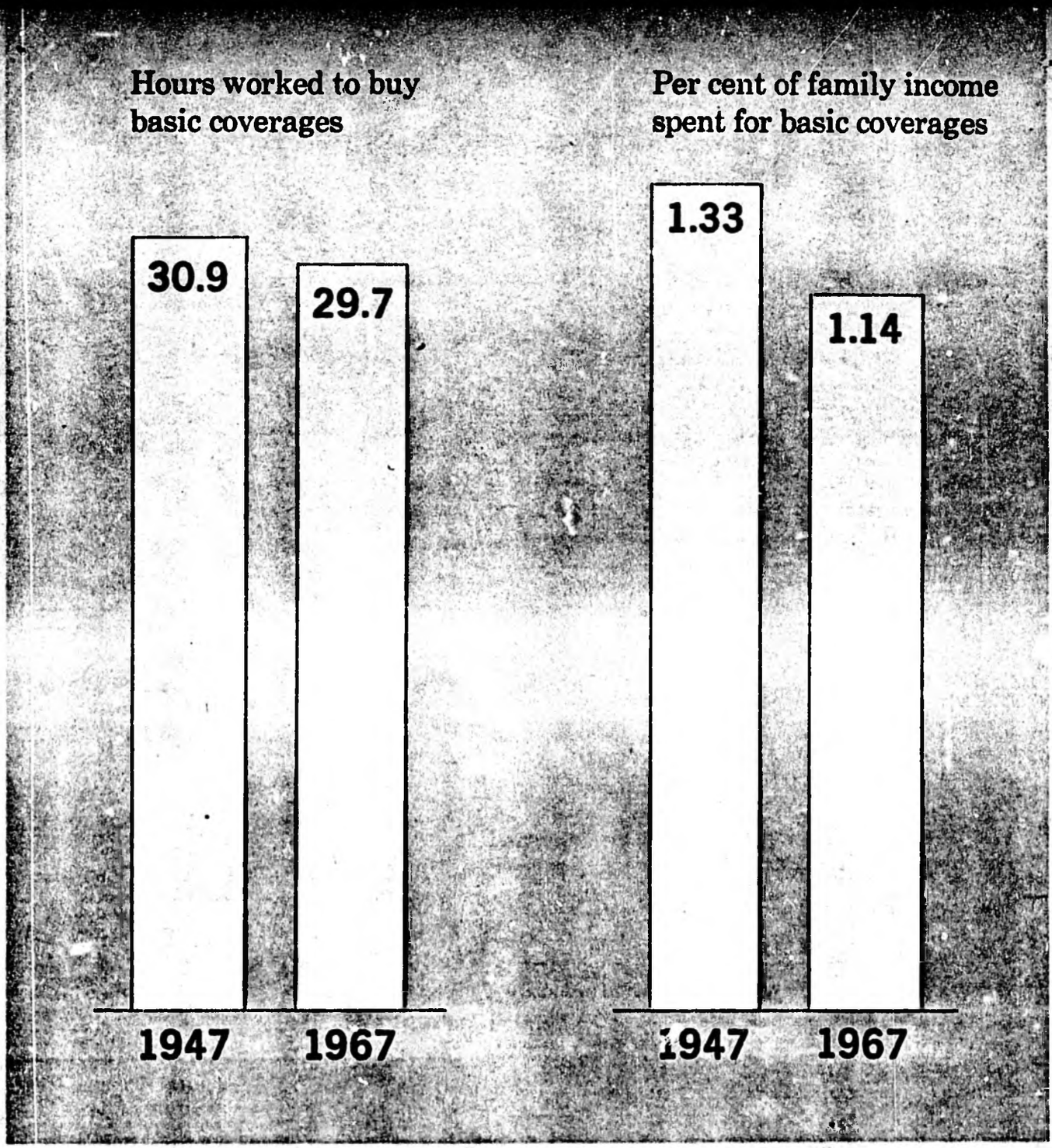
All of these comparisons are based on country-wide averages for private passenger vehicles and Class 1-A drivers. This means the policyholder is an adult who has no under-25 drivers in the family and who does not use his car for business or commuting. About 38 per cent of auto policyholders fit into this rating category. The premium paid by this group is the "base rate" from which all other rates are computed. Another 38 per cent is comprised of adults who drive to work 10 miles or less. They pay the base rate in nonurban areas and about 10 per cent more than the base rate if they live in urban areas.

All other rating categories account for the remaining 24 per cent of policyholders. This group includes young drivers who pay varying surcharges depending on their age, sex and marital status. It also includes low-risk groups such as farmers, who pay about 30 per cent less than Class 1-A rates. In other words, relatively few drivers pay the high rates frequently cited in articles deploring the rising cost of auto insurance.

No doubt these facts run counter to the general impression many persons have about what's happening to the cost of auto insurance. This is especially true of those who look solely at the total bill they pay, without considering what they are receiving for the expenditure.

For example, many families purchase more coverages today than they did 20 years ago. Instead of buying $10,000 auto liability limits, they buy policies with limits of $50,000 or higher to protect their improved financial standing. Higher limits also are purchased to provide better protection to persons who may be injured by the policyholder's negligence, and in recognition of the fact that claims and lawsuits run higher today.

In addition, car owners now buy more optional



Sources: Mutual Insurance Rating Bureau and U.S. Bureau of Labor Statistics

coverages to pay for collisions, theft, damage done by vandalism and storms, medical expenses, towing charges, and injuries caused by uninsured motorists.

A third major reason why many families spend more for auto insurance today is the trend toward ownership of two or more cars. Even though policyholders receive a special discount when they insure two or more vehicles under the same policy, the total bill naturally is higher than when the family owned a single vehicle. The increase is greatest when the second car is purchased for use by a young driver, since young drivers as a group cause substantially more accidents and insurance losses than their more experienced and more cautious elders.

In short, people who judge the cost of auto insurance solely by the number of dollars they pay are not always using a valid yardstick. Most families today are much more adequately insured than they were 20 years ago, and are receiving good value for their insurance expenditures. ⊙

Reprinted from Journal of American Insurance
AMERICAN MUTUAL INSURANCE ALLIANCE
20 North Wacker Drive
Chicago, Illinois 60606

ACCIDENT DATA

Compiled By
DEPARTMENT OF PUBLIC SAFETY

RECEIVED
APR 3 1969
BY F. B. B. & D

	TOTAL INJ.	TOTAL ACC.	PROP. DAMAGES	INSURANCE COVERAGE YES	NO	UNCERTAIN (not req.)	% UNINSURED
1968	1856	8056	3,971,721	9962	1090	3559	9.9
1967	1842	7744	3,943,083	10,567	1154	2490	9.9
1966	1862	7470	3,331,623	9092	952	2390	9.5
1965	1801	7343	3,285,821	9730	838	2048	7.9
1964	1687	7028	2,864,013	9350	565	2130	5.7
1963	1479	UNKN	2,375,353	5149	553	781	9.4

It should be noted that the above percentages apply only to persons involved in accidents reportable under present law.

It has been proven by research that the more "responsible" driver has fewer accidents than his counterpart who is classed as "irresponsible" by society. In other words, the uninsured rate taken from accident reports will be much higher than would appear if an entire cross section of drivers was studied.

Alaska Association of Insurance Agents, Inc.

SEND REPLY TO:

P. O. Box 1313
Juneau, Alaska 99801

April 9, 1969

Honorable Barry Jackson
Chairman Judiciary Committee
State House of Representatives
Capitol Building
Juneau, Alaska 99801

Dear Chairman Jackson:

The Alaska Association of Insurance Agents is extremely interested in appearing before your Committee when House Bill #309 is up for discussion. The Association is very much against this bill and we wish to have the opportunity to present the facts to you and to your Committee for deliberation.

I will be available to discuss this bill and all of its ramifications with you at your convenience.

Our best regards.

Very truly yours,

Ross P. Duncan
Executive Secretary

RPD:lk

cc: N. E. Segelhorst

Susan note

LAW OFFICES OF
FAULKNER, BANFIELD, BOOCHEVER & DOOGAN
ROOM 201, 311 FRANKLIN STREET
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NORMAN C. BANFIELD
ROBERT BOOCHEVER
FRANK M. DOOGAN
DONALD L. CRADDICK
AVRUM M. GROSS
MICHAEL M. HOLMES

April 1, 1969

The Honorable Barry W. Jackson
Chairman, Judiciary Committee
House of Representatives
State of Alaska
Juneau, Alaska 99801

Re: H. B. No. 309 - Compulsory Vehicle Insurance

Dear Mr. Jackson:

House Bill No. 309 is being reported out of the House Commerce Committee and goes to your committee next.

At a hearing on this bill before the Commerce Committee, Mr. F. O. Eastaugh, the Director of Insurance and I opposed the bill. I represented American Mutual Insurance Alliance, the Director was requested to testify and Mr. Eastaugh represented American Insurance Assocation.

This is a very important bill and although the Alliance is not opposed to the concept of compulsory insurance, because of the experience of other states in its administration, together with the effect it will have on insurance rates and the difficulties of enforcement in Alaska we cannot recommend this bill to the State of Alaska. I have a considerable amount of information regarding this type of statute and would appreciate being given the opportunity of appearing. Please notify me when your committee will consider the bill. I also suggest that you request the Director of Insurance to be present.

Yours very truly,

N. C. Banfield

N. C. Banfield

NCB:db

cc: Chas. A. Brown
C. Clarke Imbler

HB 336

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MICHAEL M. HOLMES

January 28, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Juneau, Alaska

Re: House Bill No. 336
Comparative Negligence

Dear Mr. Chairman:

As legislative agent for American Mutual Insurance Alliance I wish to state the position of the Alliance on House Bill No. 336. I will be attending a hearing on House Bill No. 202 (the Public Utility bill) and I may not be able to get away to attend your hearing on House Bill No. 336. Therefore, I would like to have this letter read to the Judiciary Committee.

The Alliance neither opposes or supports the substitution of comparative negligence for the contributory negligence doctrine. However, if the comparative negligence doctrine is adopted, then we want to see it done in the most complete and practical manner. Enclosed is a copy of a Model Comparative Negligence Bill which we believe is the most practical and acceptable of the comparative negligence statutes now being used. The provisions of HB 336 are all contained in Section 1 of the Model Bill except for some change in language to make the paragraph more positive in some respects. It also eliminates some unnecessary wording and makes it very clear that no recovery shall be allowed against a person whose negligence is less than that of the person seeking recovery. To state it another way - the negligence of the plaintiff must be less than that of the defendant. Section 1 of the Model Bill also provides for the same principles to apply where a counterclaim is made by a defendant, whereas HB 336 does not specifically mention counterclaims although they probably come within the purview of HB 336.

We are particularly anxious to have the provisions of the Model Bill with respect to special verdicts. It also provides that the court will compute the amount of the judgment. In other words, the special verdicts would determine the amount of the damages and the percentage of negligence of each party and then, the Judge would compute the damages and enter judgment accordingly.

Section 3 of the Model Bill is necessary with respect to joinder of defendants.

Section 4 of the Model Bill limits the actions to those arising out of ownership, maintenance or use of motor vehicles and limits the effect of the Act to causes of action arising prior to the effective date.

We particularly wish to call yourattention to the fact that HB 336 states that contributory negligence "may" not bar recovery. The word "may" should be changed to the word "shall".

The Wisconsin statute is almost identical to HB 336 but contains no reference to the jury or the court without a jury determining the damages as such reference is unnecessary and we think it is advisable that the damages awarded be computed by the Judge after the jury determines the proportion of negligence attributed to each on a comparative basis and the total amount to be awarded.

Yours very truly,

N. C. Banfield

NCB:db

cc: Chas. A. Brown
C. Clarke Imbler

MODEL COMPARATIVE NEGLIGENCE BILL

An Act to amend the Code of Civil Procedure to adopt a comparative negligence law and to provide for special interrogatories and joinder of parties defendant in automobile tort cases.

Section 1. Comparative negligence. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence is less than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished to the amount represented by the percentage by which the negligence of each of the defendants exceeds that of the person seeking recovery, provided that no recovery shall be allowed against any defendant whose negligence is less than that of the person seeking recovery. In the event of a counterclaim by a defendant this section shall apply to the same extent as if the defendant were the party initially seeking recovery.

Section 2. Special Verdicts. The court may, and when requested by either party, before the introduction of any testimony in his behalf, shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of written questions, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find upon particular questions of fact.

The court shall make the computation as to the amount of judgment. The jury shall not be informed as to the effect of its findings.

Section 3. Joinder of Defendants. Any party to the action may join as additional defendants any person against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, or whom it is necessary to make a party defendant for the complete determination of settlement of any question in the controversy. Judgment may be given according to the party's respective liabilities.

Section 4. This Act shall apply only to actions arising out of the ownership, maintenance or use of motor vehicles. This Act shall not be construed to extend or apply to causes of action arising prior to the effective date of this Act.

Section 5. This Act shall take effect _____.

6/26/58

Comparative Negligence: Wisconsin's Answer

by C. R. Heft and C. J. Heft

Wisconsin uses the doctrine of comparative negligence, under which the defendant, if he is guilty of the greater negligence, pays the plaintiff an award which is diminished by a percentage equivalent to the percentage of the plaintiff's negligence. "No-fault" compensation schemes have been suggested as an alternative to automobile accident tort suits, but why experiment with an untried scheme that dispenses with the adversary system when the Wisconsin doctrine is successfully meeting the test of time?

TODAY THE DOCTRINE of contributory negligence is under severe criticism, the critics contending that many victims of accidents are either not compensated at all or are not adequately compensated. With regard to automobile accident reparations, the well-publicized no-fault compensation schemes have been put forth as an alternative. For example, Professors Robert E. Keeton and Jeffrey O'Connell have proposed a basic protection plan for traffic victims under which every injured person would be compensated for out-of-pocket losses up to $10,000.[1]

The State of Wisconsin, however, has adopted a doctrine of comparative negligence, and this doctrine lies, geographically, between the no-fault automobile compensation schemes and old-fashioned contributory negligence. But it is not a compromise.

Wisconsin law provides for payment to the plaintiff whenever the defendant is guilty of the greater negligence. Since charitable, governmental, husband-wife, host-guest and parent-child immunities have been eliminated in Wisconsin, more plaintiffs recover, but because the percentage of causal negligence attributed to the plaintiff reduces the award in that amount, they recover less. Wisconsin, then, has put an end to the problems of contributory negligence. And the collateral problems of delays in payment, cost of delivering insurance benefits, elusive insurance coverages and even congestion in the courts do not exist. Why? Because the state's philosophy that a person is, and should be, responsible for injury to another to the extent he caused that injury is honest, fair, just and easy to understand and apply.

The historical origin of contributory negligence in itself explains the doctrine's inadequacy—its inability to meet current social and economic demands and to adapt to change and growth. The doctrine arose during the horseriding days of the seventeenth century. The classic case is *Butterfield* v. *Forrester*, 103 Eng. Rep. 926 (K.B. 1809), in which a horseman was thrown because of an obstruction which it was held he should have seen and avoided. In other words, society was satisfied with the theory that the greater duty was that of the individual to avoid injury to himself. Such being the case, it was further reasoned that a person who was himself at fault was not justified in seeking recovery from others.

What has happened to this reasoning today? On a world-wide basis the doctrine of comparative negligence generally is accepted and is more widespread than that of contributory negligence. The research of Chief Justice E. Harold Hallows of the Wisconsin Supreme Court discloses evidence of comparative negligence in the 1794 Prussian Code, in the 1804 Code of Napoleon, in the 1811 Austrian Civil Code, in 1867 in Portugal, in 1881 in Switzerland and in 1896 in Germany. And despite the fact that English admiralty law goes back to the seventeenth century and contributory negligence days, damages in ship collision cases were divided equally. The Brussels Maritime Convention in 1909 adopted pure comparative negligence in the admiralty cases, and this rule is applied by all the major nations in the world. Other countries which have adopted the apportionment rule are China, Japan, Russia, Persia, Poland, the Philippine Islands and Canadian provinces. Even England, the country that

1. KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

originated the doctrine of contributory negligence, abolished it by the English Reform Act of 1945.

Logically, what happens when contributory negligence stubbornly persists and many injured persons are deprived of a remedy? Thirty states have adopted railway employer's liability acts, workmen's compensation acts or similar laws liberalizing certain areas of recovery beyond contributory negligence. The Federal Employers' Liability Act and the Merchant Marine Act are examples of the substitution of comparative negligence for contributory negligence. Seven states have adopted the apportionment doctrine.

Wisconsin torts law has evolved toward a pure form of comparative negligence over the years and has opened the state's forums to many injured persons who had no legal remedy or even a theoretical cause of action before. Wisconsin has abolished implied assumption of risk and gross negligence, and these areas are included as ordinary negligence in the comparison or apportionment. It has abolished religious, charitable, governmental and parent-child immunities. A host owes his guest the duty of ordinary care, and the state does not impute negligence to the guest. The basic philosophy is that tortfeasors ought to be liable to the extent they have injured or damaged others. The wrongdoer should pay for the damages caused by his wrong. Wisconsin believes that the adversary system is the surest method of determining the truth and that the system should not be so limited by rules of law that justice cannot be done. On the other hand, a plaintiff who is himself a tortfeasor should not profit from his own wrong.

Suggested Comparisons of Negligence Between Drivers in Ordinary Cases

	Defendant	*Plaintiff*
Rear End	100%	
Intersection		
Uncontrolled	60%	40%
Stop Sign	85%	15%
Signal Light	90%	10%
Left Turn		
Oncoming	80%	20%
Failure to Yield	70%	30%
Improper Passing	75%	25%
Wrong Side of Road	90%	10%
Improper Turn	80%	20%

How Does Apportionment Work?

Section 895.045 of Wisconsin Statutes, "Contributory Negligence; When Bars Recovery", provides:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death, or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Originally, the jury was instructed to diminish the damages in proportion to the amount of negligence attributable to the recovering party. In 1949, however, the statute was amended so that now the jury finds the facts, finds the percentage of negligence attributable to each party, compares the negligence and finds the damages sustained by the plaintiff without regard to the comparison. Then the court does the mathematics and applies the percentages of negligence to the amount specified in the damage question, reduces the recovery and orders judgment.

A few examples will suffice to illustrate how comparative negligence is applied. Assume that in each example the total damage suffered by the plaintiff is $10,000 and the causal negligence of each party is the percentage set forth.

Example 1: Plaintiff—40 per cent. Defendant—60 per cent. Plaintiff recovers $6,000. His damages of $10,000 are reduced by 40 per cent or the amount of his causal negligence.

Example 2: Plaintiff—60 per cent. Defendant—40 per cent. No recovery by the plaintiff.

Example 3: Plaintiff—50 per cent. Defendant—50 per cent. No recovery. The Wisconsin law is stated in terms of greater negligence, so equal negligence does not permit recovery.

Assume damages are $10,000 and the plaintiff guest sues both defendant drivers of the vehicles that were in the accident. The percentage of causal negligence are as stated.

Example 4: Plaintiff—40 per cent. Defendant driver A—10 per cent. Defendant driver B—50 per cent. As between the plaintiff (40 per cent) and defendant A (10 per cent), the plaintiff collects nothing from defendant. A. As between the plaintiff (40 per cent) and defendant B (50 per cent), the plaintiff recovers $6,000. A joint tortfeasor is liable for the entire amount of the plaintiff's recovery. The plaintiff's negligence is not compared to that of all defendants as a whole, but only to that of each defendant individually.

Example 5: Assume the plaintiff and defendant A and defendant B are all equally negligent. No recovery.

Example 6: Assume the plaintiff is 10 per cent negligent, defendant A 50 per cent negligent and defendant B 40 per cent negligent. Plaintiff recovers $9,000 or 10 per cent less than the total damages of $10,000. As between the defendants, defendant A contributes $5,000 and defendant B $4,000 for a total of $9,000. The plaintiff can recover the total amount from either tortfeasor, and as between the tortfeasors there is contribution in the percentages and amounts just stated.[2]

The comparative negligence concept tends to prompt an accurate investigation in order to determine the percent-

2. *Walker* v. *Kroger Grocery & Baking Company*, 214 Wis. 519, 252 N.W. 721 (1934); *Schweun* v. *Laraine Hotel Company*, 14 Wis. 2d 601, 111 N.W. 2d 495 (1961); *Reber* v. *Hanson*, 260 Wis. 632, 51 N.W. 2d 505 (1952).

ages of fault for apportionment. This preparation results in a greater number of settlements. The adjacent table illustrates suggested prorations in typical automobile accident cases. The unusual case is treated on its own merits. The first hypothetical case is the rear-end collision. In this table the defendant is deemed negligent in the greater degree, and the negligence of the plaintiff is the lesser percentage which represents the percentage used in diminishing plaintiff's recovery.

Special Verdict Procedure

The special verdict is a statutory procedure, § 270.27 Wis. Stat., and is a necessary corollary to comparative negligence. An example follows:

Question No. 1: Immediately prior to the accident, was the defendant negligent in any of the following respects:

(a) As to speed?
Answer: _____

(b) As to lookout?
Answer: _____

Question No. 2: If you have answered any subdivision of Question No. 1 "yes", then answer the corresponding subdivision of this question:

Was such negligence a cause of the collision in any of the following respects:

(a) As to speed?
Answer: _____

(b) As to lookout?
Answer: _____

Question No. 3: Immediately prior to the accident, was the plaintiff negligent in any of the following respects:

(a) As to lookout?
Answer: _____

(b) As to failing to yield the right of way?
Answer: _____

Question No. 4: If you have answered any subdivision of Question No. 3 "yes", then answer the corresponding subdivision of this question:

Was such negligence a cause of the collision in any of the following respects:

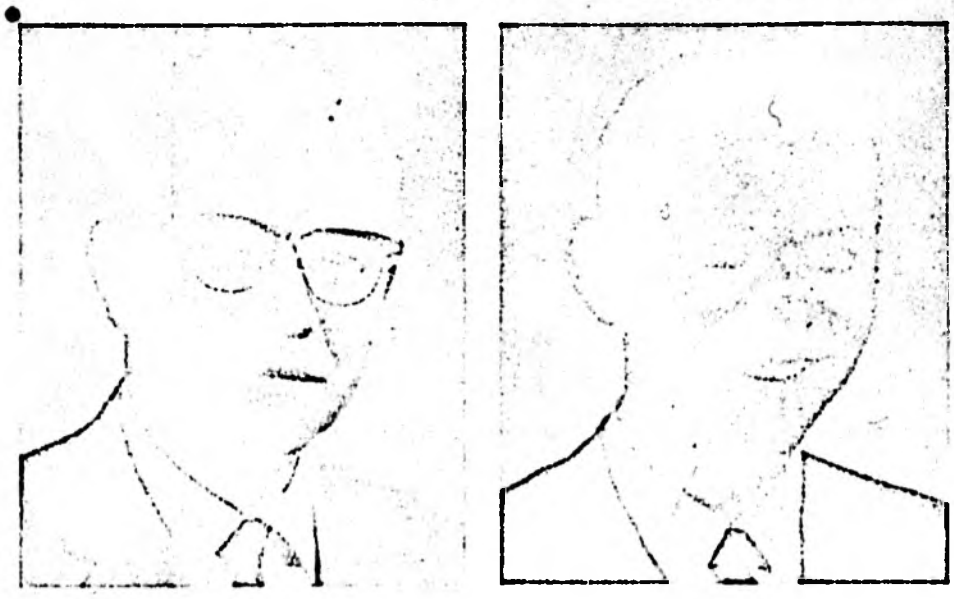
(a) As to lookout?
Answer: _____

(b) As to failing to yield the right of way?
Answer: _____

Question No. 5: If you have answered any subdivisions of Questions Nos. 2 and 4 "yes", then answer this question:

Taking the combined negligence that caused the accident as 100 per cent, what percentage of that negligence was attributable to:

Defendant _____%
Plaintiff _____%
Total 100%



Carroll R. Heft (left) of the Wisconsin Bar has been actively engaged in trial work since 1925. He is a graduate of Lawrence College (B.A. 1920) and the University of Wisconsin School of Law (J. D. 1923). He has served as president of the Federation of Insurance Counsel (1961-1962) and chairman of the Negligence Section of the State Bar of Wisconsin, and he is, at present, a member of the American Bar Association's House of Delegates. Charles James Heft (right) has been active in trial work in Wisconsin for the past ten years. He holds B.B.A. (1956) and LL.B. (1958) degrees from the University of Wisconsin. He is a member of the Association of Insurance Attorneys, the Federation of Insurance Counsel and the International Association of Insurance Counsel. The authors are members of a law firm in Racine.

Question No. 6: What sum of money would reasonably compensate the plaintiff for:

(a) Medical expenses for injuries resulting from the accident: $_____

(b) Wage loss sustained from the injuries resulting from the accident: $_____

(c) Personal injuries resulting from the accident: $_____

Dissenting Jurors: (name of jurors)	Number of Question to Which Juror Dissents:
_____	_____
_____	_____

Dated this _____ day of _____, A. D., 19__.

_____
Foreman or Forelady

Contribution — or Spreading the Burden

Contribution is an important part of comparative negligence. Wisconsin has always had common law contribution. As between tortfeasors common law contribution meant that all tortfeasors contributed equally. "The pot should not call the kettle black."

In Wisconsin, the anomaly was that we had a comparative negligence statute, and we had common law contribution. When the plaintiff guest sued drivers A and B, and driver A was found 95 per cent negligent and driver B 5 per cent negligent, it was illogical to say that drivers A and B should share the award to the plaintiff on a fifty-fifty basis.

This very case finally came to the Wisconsin Supreme Court. It was a left-turn case. The plaintiff, Mrs. Bielski, was a guest passenger in her husband's car. Two cars were approaching each other. When the Bielski car was seventy to eighty feet from the intersection, the defendant, Schulze, made a left turn across the pathway of the Bielski vehicle. The jury found the left turning vehicle 95 per cent negligent and the Bielski vehicle 5 per cent negligent. The total award was $25,000. Under the rule then existing, contribution required the Bielski carrier to pay $12,500, although its assured was

only 5 per cent negligent. The case went to the supreme court. Chief Justice Hallows wrote the opinion.

The court pointed out that Wisconsin was unique in possessing devices of procedure and practice which made a new rule realistically just. The use of the special verdict, the joining of automobile insurance carriers, the pleadings permitting contribution, the fixing of a percentage of the plaintiff's contributory negligence, constituted a procedure in which it was possible to do equity and natural justice.

So Chief Justice Hallows held in that opinion that henceforth contribution would be determined in proportion to the percentages of causal negligence attributed to each in the comparison question. Consequently Bielski, driver A, who was 5 per cent negligent, would pay 5 per cent of the jury award, and in addition thereto, he would pay only 5 per cent of the contribution as between the drivers themselves. In other words, Bielski's automobile liability carrier paid 5 per cent of $25,000 or $1,250 and not 50 per cent of $25,000, $12,500, as under old common law contribution. Of course, Schulze, driver B, would pay 95 per cent of the award to the plaintiff and 95 per cent of the total sum due in contribution as between the drivers.

This decision, *Bielski* v. *Schulze*, 16 Wis. 2d 1, 102 N.W. 2d 393 (1960), is one of the greatest decisions in Wisconsin jurisprudence. It recognizes the need for change and accomplishes it.

Damages—the New Rule

As a part of the Wisconsin concept, a very practical trial technique was evolved in *Powers* v. *Allstate Insurance Company*, 10 Wis. 2d 78, 102 N.W. 2d 393 (1960). Prior to the *Powers* case, it had been customary in cases of excessive awards to fix the lowest amount that an unprejudiced jury, properly instructed, might award for damages and then to grant the plaintiff the opportunity of accepting that amount or having a new trial. But there was an alternative.

First of all, the right to the trial by jury had to be preserved because it is a constitutional right, and it existed prior to the time of the adoption of the Wisconsin Constitution in 1848. The power of courts to set aside excessive verdicts and to grant new trials was firmly established even before the adoption of the United States Constitution.

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January 27, 1970

Mr. Wendell P. Kay
House of Representatives
Juneau, Alaska

Dear Wendell:

You have asked our comments on pending legislation which will affect the parties involved in personal injury litigation. The uniform contribution among tort feasors act would, in my opinion, clarify existing law. Recent decisions of the Supreme Court are in line with the provisions of this act and I believe it is fair to all parties involved in a tort claim.

You have also asked our comments on the comparative negligence statute which is presently before the Judiciary Committee. Unfortunately, the relatively short notice makes it impossible for any of us to be present to testify. I hope you will make the following comments known to the committee.

First, let us point out that the comparative negligence statute should accomplish two major goals. It would eliminate the often unjust and harsh result of an injured person being denied any compensation because he was slightly negligent as compared to the greater negligence of the act of tort feasor. All of the commentators agree that the rule of contributory negligence is a harsh rule which grew up during the industrial revolution to protect capital short industry from having to pay for the injuries inflicted upon its victims. The rule of contributory negligence as an absolute bar to recovery has no place in today's society where the potential tort feasor can easily protect himself.

Perhaps more important, many cases would not go to Court and once in Court would be settled if the adjustor and the defense attorney knew that contributory negligence would not be an absolute defense but would merely reduce the damages. In a majority of cases the hardest issue to evaluate is whether the slight negligence of the claimant should or will result in no liability for the potential defendant. I predict that if we were to adopt a rule of comparative negligence such as Wisconsin, we would be taking a step to eliminate or at least reduce Court congestion.

A rule of comparative negligence would apply to all claims arising out of negligence. It would not deny any person compensation for injuries but would merely reduce compensation by the amount of their contributory

negligence. Comparative negligence is the rule followed in Admiralty and in an increasing number of States.

Although contributory negligence as an absolute bar was a doctrine developed by the Courts, the Courts have shown a great reluctance to abolish the rule and adopt comparative negligence. Therefore, it would seem appropriate for the Legislature to enact this legislation.

I have read quite a few articles on the subject in law journals and law school publications and I don't recall ever reading any article critical of comparative negligence. Most of the commentators find contributory negligence an historical anachronism which should be abolished. In terms of a just result and in terms of financial benefit to the community and the Court system, I think we could predict a slow but sure return.

The adoption of a comparative negligence statute would be a small step in law reform. It would not be a disruptive step since the students of the subject point out that juries in fact often follow the rule of comparative negligence in reaching their result. But we should seek to eliminate a situation where jurors feel compelled to disregard the law. We should certainly eliminate the situation where a drunk driver going through a red light can escape liability because the person going through the green light didn't look to the left or right.

I hope you receive favorable testimony on this bill. I really can't foresee any reasonable opposition although some insurance companies may claim it will cost insurers money. I believe an increase in any claims paid would be more than offset by the reduction in verdicts and also by greater rate of settlement, hence reduced legal and adjusting fees. I am in the process of gathering material on the subject, meanwhile.

I hope you can use this letter as my statement on the matter.

Very truly yours,

William H. Fuld

WHF:dat

100% COTTON FIBRE

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MICHAEL H. HOLMES

March 28, 1969

The Honorable Barry W. Jackson
Chairman, Judiciary Committee
House of Representatives
State of Alaska
Pouch V
Juneau, Alaska

Re: House Bill No. 336

Dear Mr. Jackson:

On behalf of American Mutual Insurance Alliance which I represent before the legislature, I would like to have the privilege of appearing and testifying in opposition to House Bill No. 336.

The Alliance has opposed a similar or identical bill on several occasions and we believe your committee will follow the action taken by previous sessions of the legislature when the facts on comparative negligence are presented.

I would appreciate being advised of when I may appear.

Yours very truly,

N. C. Banfield

NCB:db

Judiciary Committee Report

on

House Bill No. 316

In the present law, in the United States and in Idaho, a suit for the recovery of damages resulting from an injury is completely barred if the injured party, but in any degree negligent himself. Exceptions are developed principally in which the party defendant (the injury was seriously negligent, and the injured party was slightly negligent. Under such circumstances, the injured person would recover both.

While [illegible] a number of states are making [illegible] a more reasonable rule which would permit recovery by the injured person, but would diminish his recovery in proportion to the degree of negligence attributable to him. This is known as the doctrine of "comparative negligence" and has now been adopted by seven states. The comparative negligence rule, we feel, provides a greater degree of justice than is now afforded by the contributory negligence doctrine.

Harry W. Jackson
Chairman
House Judiciary Committee

Comparative Negligence: Wisconsin's Answer

by C. R. Heft and C. J. Heft

Wisconsin uses the doctrine of comparative negligence, under which the defendant, if he is guilty of the greater negligence, pays the plaintiff an award which is diminished by a percentage equivalent to the percentage of the plaintiff's negligence. "No-fault" compensation schemes have been suggested as an alternative to automobile accident tort suits, but why experiment with an untried scheme that dispenses with the adversary system when the Wisconsin doctrine is successfully meeting the test of time?

TODAY THE DOCTRINE of contributory negligence is under severe criticism, the critics contending that many victims of accidents are either not compensated at all or are not adequately compensated. With regard to automobile accident reparations, the well-publicized no-fault compensation schemes have been put forth as an alternative. For example, Professors Robert E. Keeton and Jeffrey O'Connell have proposed a basic protection plan for traffic victims under which every injured person would be compensated for out-of-pocket losses up to $10,000.[1]

The State of Wisconsin, however, has adopted a doctrine of comparative negligence, and this doctrine lies, geographically, between the no-fault automobile compensation schemes and old-fashioned contributory negligence. But it is not a compromise.

Wisconsin law provides for payment to the plaintiff whenever the defendant is guilty of the greater negligence. Since charitable, governmental, husband-wife, host-guest and parent-child immunities have been eliminated in Wisconsin, more plaintiffs recover, but because the percentage of causal negligence attributed to the plaintiff reduces the award in that amount, they recover less. Wisconsin, then, has put an end to the problems of contributory negligence. And the collateral problems of delays in payment, cost of delivering insurance benefits, elusive insurance coverages and even congestion in the courts do not exist. Why? Because the state's philosophy that a person is, and should be, responsible for injury to another to the extent he caused that injury is honest, fair, just and easy to understand and apply.

The historical origin of contributory negligence in itself explains the doctrine's inadequacy—its inability to meet current social and economic demands and to adapt to change and growth. The doctrine arose during the horseriding days of the seventeenth century. The classic case is *Butterfield* v. *Forrester*, 103 Eng. Rep. 926 (K.B. 1809), in which a horseman was thrown because of an obstruction which it was held he should have seen and avoided. In other words, society was satisfied with the theory that the greater duty was that of the individual to avoid injury to himself. Such being the case, it was further reasoned that a person who was himself at fault was not justified in seeking recovery from others.

What has happened to this reasoning today? On a world-wide basis the doctrine of comparative negligence generally is accepted and is more widespread than that of contributory negligence. The research of Chief Justice E. Harold Hallows of the Wisconsin Supreme Court discloses evidence of comparative negligence in the 1794 Prussian Code, in the 1804 Code of Napoleon, in the 1811 Austrian Civil Code, in 1867 in Portugal, in 1881 in Switzerland and in 1896 in Germany. And despite the fact that English admiralty law goes back to the seventeenth century and contributory negligence days, damages in ship collision cases were divided equally. The Brussels Maritime Convention in 1909 adopted pure comparative negligence in the admiralty cases, and this rule is applied by all the major nations in the world. Other countries which have adopted the apportionment rule are China, Japan, Russia, Persia, Poland, the Philippine Islands and Canadian provinces. Even England, the country that

1. KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

originated the doctrine of contributory negligence, abolished it by the English Reform Act of 1945.

Logically, what happens when contributory negligence stubbornly persists and many injured persons are deprived of a remedy? Thirty states have adopted railway employer's liability acts, workmen's compensation acts or similar laws liberalizing certain areas of recovery beyond contributory negligence. The Federal Employers' Liability Act and the Merchant Marine Act are examples of the substitution of comparative negligence for contributory negligence. Seven states have adopted the apportionment doctrine.

Wisconsin torts law has evolved toward a pure form of comparative negligence over the years and has opened the state's forums to many injured persons who had no legal remedy or even a theoretical cause of action before. Wisconsin has abolished implied assumption of risk and gross negligence, and these areas are included as ordinary negligence in the comparison or apportionment. It has abolished religious, charitable, governmental and parent-child immunities. A host owes his guest the duty of ordinary care, and the state does not impute negligence to the guest. The basic philosophy is that tortfeasors ought to be liable to the extent they have injured or damaged others. The wrongdoer should pay for the damages caused by his wrong. Wisconsin believes that the adversary system is the surest method of determining the truth and that the system should not be so limited by rules of law that justice cannot be done. On the other hand, a plaintiff who is himself a tortfeasor should not profit from his own wrong.

How Does Apportionment Work?

Section 895.045 of Wisconsin Statutes, "Contributory Negligence; When Bars Recovery", provides:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death, or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Suggested Comparisons of Negligence Between Drivers in Ordinary Cases

	Defendant	*Plaintiff*
Rear End	100%	
Intersection		
Uncontrolled	60%	40%
Stop Sign	85%	15%
Signal Light	90%	10%
Left Turn		
Oncoming	80%	20%
Failure to Yield	70%	30%
Improper Passing	75%	25%
Wrong Side of Road	90%	10%
Improper Turn	80%	20%

Originally, the jury was instructed to diminish the damages in proportion to the amount of negligence attributable to the recovering party. In 1949, however, the statute was amended so that now the jury finds the facts, finds the percentage of negligence attributable to each party, compares the negligence and finds the damages sustained by the plaintiff without regard to the comparison. Then the court does the mathematics and applies the percentages of negligence to the amount specified in the damage question, reduces the recovery and orders judgment.

A few examples will suffice to illustrate how comparative negligence is applied. Assume that in each example the total damage suffered by the plaintiff is $10,000 and the causal negligence of each party is the percentage set forth.

Example 1: Plaintiff—40 per cent. Defendant—60 per cent. Plaintiff recovers $6,000. His damages of $10,000 are reduced by 40 per cent or the amount of his causal negligence.

Example 2: Plaintiff—60 per cent. Defendant—40 per cent. No recovery by the plaintiff.

Example 3: Plaintiff—50 per cent. Defendant—50 per cent. No recovery. The Wisconsin law is stated in terms of greater negligence, so equal negligence does not permit recovery.

Assume damages are $10,000 and the plaintiff guest sues both defendant drivers of the vehicles that were in the accident. The percentage of causal negligence are as stated.

Example 4: Plaintiff—40 per cent. Defendant driver A—10 per cent. Defendant driver B—50 per cent. As between the plaintiff (40 per cent) and defendant A (10 per cent), the plaintiff collects nothing from defendant. A. As between the plaintiff (40 per cent) and defendant B (50 per cent), the plaintiff recovers $6,000. A joint tortfeasor is liable for the entire amount of the plaintiff's recovery. The plaintiff's negligence is not compared to that of all defendants as a whole, but only to that of each defendant individually.

Example 5: Assume the plaintiff and defendant A and defendant B are all equally negligent. No recovery.

Example 6: Assume the plaintiff is 10 per cent negligent, defendant A 50 per cent negligent and defendant B 40 per cent negligent. Plaintiff recovers $9,000 or 10 per cent less than the total damages of $10,000. As between the defendants, defendant A contributes $5,000 and defendant B $4,000 for a total of $9,000. The plaintiff can recover the total amount from either tortfeasor, and as between the tortfeasors there is contribution in the percentages and amounts just stated.[2]

The comparative negligence concept tends to prompt an accurate investigation in order to determine the percent-

2. *Walker* v. *Kroger Grocery & Baking Company*, 214 Wis. 519, 252 N.W. 721 (1934); *Schwenn* v. *Lamine Hotel Company*, 14 Wis. 2d 601, 111 N.W. 2d 495 (1961); *Reber* v. *Hanson*, 260 Wis. 632, 51 N.W. 2d 505 (1952).

ages of fault for apportionment. This preparation results in a greater number of settlements. The adjacent table illustrates suggested prorations in typical automobile accident cases. The unusual case is treated on its own merits. The first hypothetical case is the rear-end collision. In this table the defendant is deemed negligent in the greater degree, and the negligence of the plaintiff is the lesser percentage which represents the percentage used in diminishing plaintiff's recovery.

Special Verdict Procedure

The special verdict is a statutory procedure, § 270.27 Wis. Stat., and is a necessary corollary to comparative negligence. An example follows:

Question No. 1: Immediately prior to the accident, was the defendant negligent in any of the following respects:

(a) As to speed?
Answer: _____

(b) As to lookout?
Answer: _____

Question No. 2: If you have answered any subdivision of Question No. 1 "yes", then answer the corresponding subdivision of this question:

Was such negligence a cause of the collision in any of the following respects:

(a) As to speed?
Answer: _____

(b) As to lookout?
Answer: _____

Question No. 3: Immediately prior to the accident, was the plaintiff negligent in any of the following respects:

(a) As to lookout?
Answer: _____

(b) As to failing to yield the right of way?
Answer: _____

Question No. 4: If you have answered any subdivision of Question No. 3 "yes", then answer the corresponding subdivision of this question:

Was such negligence a cause of the collision in any of the following respects:

(a) As to lookout?
Answer: _____

(b) As to failing to yield the right of way?
Answer: _____

Question No. 5: If you have answered any subdivisions of Questions Nos. 2 and 4 "yes", then answer this question:

Taking the combined negligence that caused the accident as 100 per cent, what percentage of that negligence was attributable to:

Defendant _____%
Plaintiff _____%
Total 100%



Carroll R. Heft (left) of the Wisconsin Bar has been actively engaged in trial work since 1925. He is a graduate of Lawrence College (B.A. 1920) and the University of Wisconsin School of Law (J. D. 1923). He has served as president of the Federation of Insurance Counsel (1961-1962) and chairman of the Negligence Section of the State Bar of Wisconsin, and he is, at present, a member of the American Bar Association's House of Delegates. Charles James Heft (right) has been active in trial work in Wisconsin for the past ten years. He holds B.B.A. (1956) and LL.B. (1958) degrees from the University of Wisconsin. He is a member of the Association of Insurance Attorneys, the Federation of Insurance Counsel and the International Association of Insurance Counsel. The authors are members of a law firm in Racine.

Question No. 6: What sum of money would reasonably compensate the plaintiff for:

(a) Medical expenses for injuries resulting from the accident: $_____

(b) Wage loss sustained from the injuries resulting from the accident: $_____

(c) Personal injuries resulting from the accident: $_____

Dissenting Jurors: (name of jurors)	Number of Question to Which Juror Dissents:
_____	_____
_____	_____

Dated this____day of_____, A. D., 19__.

_____
Foreman or Forelady

Contribution — or Spreading the Burden

Contribution is an important part of comparative negligence. Wisconsin has always had common law contribution. As between tortfeasors common law contribution meant that all tortfeasors contributed equally. "The pot should not call the kettle black."

In Wisconsin, the anomaly was that we had a comparative negligence statute, and we had common law contribution. When the plaintiff guest sued drivers A and B, and driver A was found 95 per cent negligent and driver B 5 per cent negligent, it was illogical to say that drivers A and B should share the award to the plaintiff on a fifty-fifty basis.

This very case finally came to the Wisconsin Supreme Court. It was a left-turn case. The plaintiff, Mrs. Bielski, was a guest passenger in her husband's car. Two cars were approaching each other. When the Bielski car was seventy to eighty feet from the intersection, the defendant, Schulze, made a left turn across the pathway of the Bielski vehicle. The jury found the left turning vehicle 95 per cent negligent and the Bielski vehicle 5 per cent negligent. The total award was $25,000. Under the rule then existing, contribution required the Bielski carrier to pay $12,500, although its assured was

only 5 per cent negligent. The case went to the supreme court. Chief Justice Hallows wrote the opinion.

The court pointed out that Wisconsin was unique in possessing devices of procedure and practice which made a new rule realistically just. The use of the special verdict, the joining of automobile insurance carriers, the pleadings permitting contribution, the fixing of a percentage of the plaintiff's contributory negligence, constituted a procedure in which it was possible to do equity and natural justice.

So Chief Justice Hallows held in that opinion that henceforth contribution would be determined in proportion to the percentages of causal negligence attributed to each in the comparison question. Consequently Bielski, driver A, who was 5 per cent negligent, would pay 5 per cent of the jury award, and in addition thereto, he would pay only 5 per cent of the contribution as between the drivers themselves. In other words, Bielski's automobile liability carrier paid 5 per cent of $25,000 or $1,250 and not 50 per cent of $25,000, $12,500, as under old common law contribution. Of course, Schulze, driver B, would pay 95 per cent of the award to the plaintiff and 95 per cent of the total sum due in contribution as between the drivers.

This decision, *Bielski* v. *Schulze*, 16 Wis. 2d 1, 102 N.W. 2d 393 (1960), is one of the greatest decisions in Wisconsin jurisprudence. It recognizes the need for change and accomplishes it.

Damages—the New Rule

As a part of the Wisconsin concept, a very practical trial technique was evolved in *Powers* v. *Allstate Insurance Company*, 10 Wis. 2d 78, 102 N.W. 2d 393 (1960). Prior to the *Powers* case, it had been customary in cases of excessive awards to fix the lowest amount that an unprejudiced jury, properly instructed, might award for damages and then to grant the plaintiff the opportunity of accepting that amount or having a new trial. But there was an alternative.

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MILTON M. SOUTER

LAW OFFICES OF
KAY, MILLER & LIBBEY
SUITE 500
FIRST NATIONAL BUILDING
P. O. BOX 1178
ANCHORAGE, ALASKA 99501

TELEPHONE
272-7471

January 27, 1970

Mr. Wendell P. Kay
House of Representatives
Juneau, Alaska

Dear Wendell:

You have asked our comments on pending legislation which will affect the parties involved in personal injury litigation. The uniform contribution among tort feasors act would, in my opinion, clarify existing law. Recent decisions of the Supreme Court are in line with the provisions of this act and I believe it is fair to all parties involved in a tort claim.

You have also asked our comments on the comparative negligence statute which is presently before the Judiciary Committee. Unfortunately, the relatively short notice makes it impossible for any of us to be present to testify. I hope you will make the following comments known to the committee.

First, let us point out that the comparative negligence statute should accomplish two major goals. It would eliminate the often unjust and harsh result of an injured person being denied any compensation because he was slightly negligent as compared to the greater negligence of the act of tort feasor. All of the commentators agree that the rule of contributory negligence is a harsh rule which grew up during the industrial revolution to protect capital short industry from having to pay for the injuries inflicted upon its victims. The rule of contributory negligence as an absolute bar to recovery has no place in today's society where the potential tort feasor can easily protect himself.

Perhaps more important, many cases would not go to Court and once in Court would be settled if the adjustor and the defense attorney knew that contributory negligence would not be an absolute defense but would merely reduce the damages. In a majority of cases the hardest issue to evaluate is whether the slight negligence of the claimant should or will result in no liability for the potential defendant. I predict that if we were to adopt a rule of comparative negligence such as Wisconsin, we would be taking a step to eliminate or at least reduce Court congestion.

A rule of comparative negligence would apply to all claims arising out of negligence. It would not deny any person compensation for injuries but would merely reduce compensation by the amount of their contributory

negligence. Comparative negligence is the rule followed in Admiralty and in an increasing number of States.

Although contributory negligence as an absolute bar was a doctrine developed by the Courts, the Courts have shown a great reluctance to abolish the rule and adopt comparative negligence. Therefore, it would seem appropriate for the Legislature to enact this legislation.

I have read quite a few articles on the subject in law journals and law school publications and I don't recall ever reading any article critical of comparative negligence. Most of the commentators find contributory negligence an historical anachronism which should be abolished. In terms of a just result and in terms of financial benefit to the community and the Court system, I think we could predict a slow but sure return.

The adoption of a comparative negligence statute would be a small step in law reform. It would not be a disruptive step since the students of the subject point out that juries in fact often follow the rule of comparative negligence in reaching their result. But we should seek to eliminate a situation where jurors feel compelled to disregard the law. We should certainly eliminate the situation where a drunk driver going through a red light can escape liability because the person going through the green light didn't look to the left or right.

I hope you receive favorable testimony on this bill. I really can't foresee any reasonable opposition although some insurance companies may claim it will cost insurers money. I believe an increase in any claims paid would be more than offset by the reduction in verdicts and also by greater rate of settlement, hence reduced legal and adjusting fees. I am in the process of gathering material on the subject, meanwhile.

I hope you can use this letter as my statement on the matter.

Very truly yours,

William H. Fuld

WHF:dat

3100

FORM Ec-2
1000M 6-66

STATE OF ALASKA
Inter-Department Route Slip

TO:
DEPT.: State Legislature

ATTN.: Representative Jackson

☐ Approval	☐ Note & Return
☐ Signature	☐ Initial & Return
☐ Comment	☐ Return As Requested
☐ Contact Me	☐ Return For Approval
☐ Prepare Reply	☐ Necessary Action
☐ For Your File	☒ Your Information

Remarks:

From:
Dept.: Commerce Date 4/10/70

By: Commissioner Kubley

HB 338

MEMORANDUM State of Alaska

TO: Walter L. Kubley
Commissioner
Department of Commerce

DATE : 6 April 70

SUBJECT: Comments on CSHB 338

FROM: Don Hall
Executive Director
Public Service Commission

I can see some real problems if CSHB 338 is passed in its present form. I, therefore, strongly urge that you make a copy of this memorandum available to Mr. Barry Jackson, Chairman of the Judiciary Committee. Read what I have to say on the subject and see if you don't agree with me.

Under present laws and regulations the utilities have many restrictions placed on them regarding construction along, over and under State Highways. The present regulations, however, do allow the utilities to negotiate with the State Department of Highways; and to date no impasses have been encountered.

Should CSHB 338 be enacted into law the utility companies would be completely without representation.

There is no question that the State Department of Highways has a very difficult task in attempting to serve the public and provide the best roads possible; however, the utilities also have a public commitment.

I do not feel it would be in the public's interest to pass CSHB 338. The added savings in time and monies to the State Department of Highways would certainly be outweighed by an added cost to the utility companies which, in turn, would have to be borne by the consumers.

I would strongly urge a committee of Highway and Utility people be formed, who could jointly prepare a more acceptable bill and a bill which would protect the interest of the general public, the State Department of Highways and the Utilities.

By: Don Hall

DEPARTMENT OF COMMERCE

JUDICIARY COMMITTEE REPORT

on

AS FOR HOUSE BILL NO. 733

This bill seeks to alleviate problems the Department of Highways is having in dealing with highway encroachments, including those of public utilities and private individuals and including situations involving new construction as well as maintenance and use of existing highways. Presently there is no statute covering encroachments other than those of a utility or other than those involved in new construction. By defining "encroachment" and providing for notice of removal after accomplishment, and summary removal, the bill gives the department the authority to order the removal or relocation of an encroachment and, if the owner does not comply with the order or if the encroachment obstructs traffic, to remove the encroachment itself.

Both the original bill and the committee substitute provide for the reimbursement of the department when it has to remove the encroachment after the owner has failed to comply with the order. The reimbursement consists of the expenses of removal, costs incurred because of the noncompliance, and the cost of a court action. Both bills also provide for a penalty of $10 for each day of noncompliance after service of the notice. These encroachment and reimbursement provisions do not affect the right of a property owner to receive just compensation for land that is taken in an exercise of the right of eminent domain.

The committee substitute adds a provision (based on California Streets and Highways Code, sec. 670(b)) allowing for the issuance of revocable, written permits for encroachments. This authority would normally be used where the encroachment does not interfere with the construction, maintenance, or use of the highway, and it must be in accordance with regulations of the department. This bill also changes the 15-day notice provision in the original bill to a 30-day provision. In addition, the committee substitute deletes the department's enforcement-action provision and the criminal penalty provisions in the original bill because they are unnecessary in light of the civil penalty and the removal authority and reimbursement of the department. However, purposeful obstruction of traffic is prohibited by AS 28.35.160, with a criminal penalty specified in AS 28.35.190 and 28.35.230. Proposed AS 19.25.250 and 19.25.270 in this bill are derived from California Streets and Highways Code, secs. 731 and 732, respectively.

Harry W. Judkins, Chairman

FORM 6A-11

HB338

MEMORANDUM

State of Alaska

TO: Edgar A. Spruce, Jr.
Claims Engineer
Department of Highways
Juneau

DATE : January 6, 1970

FROM: Richard P. Kerns RPK
Assistant Attorney General
Chief, Highways Section
Anchorage

SUBJECT: Encroachment Legislation

Enclosed is a copy of our proposed form of encroachment legislation along with a copy of a memo to me from Donna Spragg.

We consider some of the important aspects of our revised proposed legislation to be that it provides for the authorization of encroachments by agreement or permit. We also did not see any purpose in having provision for an action to abate where we provide for summary removal.

Also, it is our thought that with the summary removal aspects of the proposed legislation, there is no real purpose served by including a misdemeanor provision.

RPK:sm

Encls.

RECEIVED
JAN 30 1970
HEADQUARTERS UTILITIES SECTION
JUNEAU, ALASKA

FORM SA 18

MEMORANDUM

State of Alaska

TO: Richard P. Kerns
Chief, Highway Section
Anchorage AGO

DATE : January 6, 1970

FROM: Donna Spragg
Assistant Attorney General
AGO Anchorage

SUBJECT: Encroachment Legislation

As you suggested, the original House Bill No. 338 is patterned after the California statutes governing encroachments on highways.

However, a California Statute (Streets and Highways Code Section 670(b)) allows for the issuance of written permits authorizing the permittee to "place, change or remove an encroachment". The Alaska legislation as originally introduced does not include any such section providing for permits.

The California statute (Streets and Highways Code Sections 670, 724) provides that the maintenance of an unauthorized encroachment is a misdemeanor. The Alaska legislation as originally introduced also called for a misdemeanor penalty.

The California Statute (Streets and Highways Code Section 721) also called for summary removal when an encroachment was not removed before the expiration of 5 days from the service of notice. The California section also calls for summary removal when an encroachment obstructs or prevents the use of the highway by the public. The original Alaska legislation (see proposed Sec. 19.25.220) has similar provisions.

The California Statute (Streets and Highways Code Section 722) provides that the department may remove an encroachment upon the failure of the owner to comply with a notice or demand of the department. A similar section is found in proposed Sec. 19.25.230 of House Bill No. 338.

California Streets and Highway Code Section 723 also allows an action for abatement when an owner disputes or denies the existence of an encroachment or refuses to remove or permit the removal of the encroachment. (See House Bill 338, Sec. 19.25.240 for a similar section.)

No cases were found in the Annotated California Code construing the above statutes.

Attached is another proposed committee substitute for House Bill No. 338. This bill modifies the current proposed legislation:

1. By providing for permits for the construction and maintenance of encroachments. Apparently the drafter of the original House Bill 338 considered that the statute covering utility encroachment was sufficient authorization for encroachment permits. However, I believe our draft clarifies the question of permits and ties in with the regulations which may be found in Title 17 of the Alaska Administrative Code Section 201.

2. By eliminating the provision making maintenance of an unauthorized encroachment a misdemeanor. This provision seems superfluous.

3. By eliminating the authority of the department to summarily remove an encroachment which is not removed after notice. This provision also seems superfluous since the department has this authority under the attached revised section 19.25.250, entitled "Removal After Noncompliance: Removal Expense".

4. By eliminating the section calling for abatement of an encroachment as a nuisance. Here again, this section seems superfluous since the department already has the power to remove an encroachment as noted above.

I know that you will want to consider the sections of the proposed bill in relation to the original bill. I will be pleased to discuss this matter with you at your convenience.

DS/smk
encl. as stated.

Introduced: 3/28/69
Referred: State Affairs
and Judiciary

IN THE HOUSE

BY THE RULES COMMITTEE
BY REQUEST

CS FOR HOUSE BILL NO. 338

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the protection and use of state highways and roads; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

"Section 1. AS 19.25.020(a) is amended to read:

(a) If, incident to the construction of a highway project on a federal-aid primary or secondary system, or the interstate system including its extensions in an urban area, the department determines and orders that a utility facility located in, over, along, or under a road right-of-way must be changed, relocated, or removed, the utility owning or in charge of the facility shall change, relocate or remove it <u>within a reasonable time set by the department</u>. <u>If the utility does not change, relocate or remove a utility facility within the time set by the department, the facility specified in the order shall be considered an unauthorized encroachment subject to the provisions of secs. 220 - 250 of this chapter</u> [AS SOON AS POSSIBLE IN ACCORDANCE WITH THE ORDER].

"Sec. 2. AS 19.05.130 is amended by adding a new paragraph to read:

(13) "encroachment" includes a tower, pole, pole line, pipe, pipeline, driveway, private road, fence, billboard, stand or building, or structure or object of any kind or character not particularly mentioned in this section, which is placed in, under or over a portion of the highway.

*Sec. 3. AS 19.25 is amended by adding new sections to read:

ARTICLE 4. ENCROACHMENTS IN HIGHWAYS.

Sec. 19.25.200. ENCROACHMENT PERMITS. An encroachment may be constructed, placed, changed or maintained across or along a highway only in accordance with regulations prescribed by the department. No encroachment may be constructed, maintained, or changed until it is authorized by a written permit issued by the department.

Sec. 10.25.210. RELOCATION OR REMOVAL OF ENCROACHMENT. If, incident to the construction or maintenance of a state highway, the department determines and orders that a encroachment previously authorized by written permit must be changed, relocated, or removed, the owner of the encroachment shall change, relocate or remove it within a reasonable time set by the department. If the owner does not change, relocate or remove an encroachment within the time set by the department, the encroachment shall be considered an unauthorized encroachment subject to the provisions of Secs. 220 - 250 of this chapter.

Sec. 19.25.220. REMOVAL OF ENCROACHMENTS. If an unauthorized encroachment exists in, under or over a state highway, the department may require the removal of the encroachment in the manner provided in secs. 220 - 250 of this chapter.

Sec. 19.25.230. NOTICE OF REMOVAL. Except as otherwise provided in secs. 200 210 and 240 of this chapter, notice shall be given to the owner, occupant or person in possession of the encroachment, or to any other person causing or permitting the encroachment to exist, by serving upon such person a notice containing a demand for the immediate removal of the encroachment. The notice shall describe the encroachment complained of with reasonable certainty as to its character and location. In lieu of service upon the person, service of the notice may be made by registered mail and by posting, for a period of 10 days, a copy of the notice on the encroachment described in the notice.

Sec. 19.25.240. SUMMARY REMOVAL. The department may immediately remove from a state highway an encroachment which obstructs or prevents the use of the highway by the public.

Sec. 19.25.250. REMOVAL AFTER NONCOMPLIANCE. REMOVAL EXPENSE. The department may remove an encroachment upon the failure of the owner to comply with a notice or demand of the department under the provisions of secs. 20, 210 and 230 of this chapter, and shall have an action to recover the expenses of removal, costs incurred by the state for a claim filed with the department by a highway construction contractor for costs due to delay because an encroachment was not changed, removed, or relocated in accordance with the order of the department, costs and expenses of suit and the sum of $10 for each day the encroachment remains after the expiration of 10 days from the date of service of the notice or demand.

*Sec. 4. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

G

HB 339

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

March 23, 1970

M E M O R A N D U M

TO: Barry W. Jackson, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson AHP
Revisor of Statutes

SUBJECT: SCSCSHB 339 am (putative fathers)

The Senate Judiciary Committee's substitute returned to the original form of HB 339 -- a simple repealer of AS 11.35.110, the section that prohibits the mother of a deserted or abandoned illegitimate child from verifying a complaint against a putative father in a criminal, nonsupport action. The House Judiciary Committee's substitute, offered April 25, 1969, amended rather than repealed AS 11.35.110; the amendment specifically allowed the mother to verify the complaint.

I believe the legal effect of both approaches is the same. AS 11.35.100, which is not touched in either version of the bill, states, "Sections 10 - 90 of this chapter apply to an illegitimate child and its putative father." Section 50 of that chapter designates who may make a complaint; it says, "by the deserted wife, or on her behalf, or on behalf of the minor child, by anyone having personal cognizance of the facts...." The mother of an "illegitimate" child would not be a "deserted wife", but she surely would be someone "having personal cognizance of the facts". If she can make the complaint she can "verify" it. Thus the mother of an "illegitimate" child could verify the complaint against the putative father were it not for the prohibition in AS 11.35.110. After repealing that prohibition there would seem to be no reason why she could not verify the complaint. Perhaps the House Judiciary Committee, in proposing its substitute, thought that the intent would be more clearly expressed by specifically including the mother; however, I think that is already done by sec. 100; I don't remember the committee discussion, and there is no explanatory committee report.

In a floor amendment offered by Terry Miller, the Senate changed the bill title to simply refer to the section number being repealed. Both as a matter of law and of determining legislative intent, I don't think this changes the effect of the bill.

AHP/sm

HB 344

Post Office Box 8-603
Anchorage, Alaska 99504
February 26, 1970

Honorable Barry W. Jackson
Alaska State House of Representatives
Pouch V State Capitol Building
Juneau, Alaska 99801

Dear Representative Jackson:

The Nancy Lake Recreation Area, containing over 21,000 acres with approximately 100 lakes, was formed by the session laws of 1966. Four years later, with no access open to the public, the Parks and Recreation Department is requesting an additional 2,000 acres including Rainbow Lake.

There is one subdivision of 55 lots already on this lake, with cabins and improvements on about half of these lots. There are 20 cabins and homes already built and the other four property owners plan to subdivide their property on Rainbow Lake. The Department of Fish and Game advises that it is not feasible to restock this lake and the trout are already fewer in number and smaller, due to increasing fishing pressure. The shallow areas in this lake restrict the potential of boating activity. The shoreline is over 95 per cent privately owned, therefore it can not be used for hiking or riding trails. This lake is too small to serve the future plans of the private property owners and the Parks and Recreation Department. The conjested condition would result in pollution and loss of property value to the private property owners as well as a loss of tax revenue to the Matanuska Susitna Borough.

The Parks and Recreation Department has not held any local public hearings regarding their request for additional acreage, and they have not submitted any practical long range use plan for the Rainbow Lake Area.

House Bill 344, which is in legislative process, would straighten out the northern boundary of the Nancy Lake Recreation Area. Approximately 700 Alaskan voters have signed a petition supporting HB 344, to this date. The Matanuska Susitna Borough has passed a resolution supporting HB 344. Representative Kerttula informed me the Parks and Recreation Department had assured him they would not take Rainbow Lake into the recreation area. Disregarding all the opposition, the Parks and Recreation Department continues to insist on encroaching on private property owners and the borough tax base.

February 26, 1969

If Rainbow Lake is included in the recreation area what would prevent the Parks and Recreation Department from taking in Long Lake, Shirley Lake, Crystal Lake and othersthat are already subdivided and rapidly developing. The people are watching, very closely, to see if the Legislators and the Governor are supporting the people or if one department is dominating the Governor, the Legislature, and the people.

I would appreciate your reply at your earliest convenience. Please inform me as to your stand regarding HB 344.

Sincerely,

R. C. Tuer

Matanuska-Susitna Borough, Inc.

BOX B, PALMER, ALASKA 99645 • PHONE 745-3246

BOROUGH ASSEMBLY

February 23, 1970

Honorable Jalmar Kerttula
Speaker, House of Representatives
Juneau, Alaska

Dear Mr. Speaker:

Several residents and property owners in the Nancy Lake/ Rainbow Lake area have appeared before the Planning and Zoning Commission and before the Borough Assembly requesting support of HB 344. Upon recommendation of the Planning and Zoning Commission, the Assembly has adopted a resolution urging passage of this bill which suggests altering Nancy Lake Recreation Area boundaries.

Mr. Vroman indicated that, in the future, the Borough may feel that Borough lands could be exchanged with the State, if the State still wishes to acquire additional lands for golf course and park entrance as indicated by the State Parks and Recreation Department. However, at the present time, the Borough wishes to retain the areas proposed for the two above uses.

For your information, we are enclosing a copy of the Resolution adopted by the Assembly and request that HB 344 be given favorable consideration in the House.

Thank you for your assistance to residents of this area.

Yours respectfully,

Evelyn Thompson

Borough Clerk

Same letter to:

Senator Jan Koslosky
Mr. Bill Ray, Finance Committee
Mr. Joe McGill, Resources Committee
Senator Brad Phillips, President of Senate

CC: Mr. R. C. Tuer
Box 8603
Anchorage

MATANUSKA-SUSITNA BOROUGH
ASSEMBLY

Resolution Serial No. 70-5

A RESOLUTION OF THE ASSEMBLY OF THE MATANUSKA-SUSITNA BOROUGH URGING THE CURRENT LEGISLATURE, STATE OF ALASKA, ADOPT HB 344 CHANGING THE NORTH BOUNDARY OF NANCY LAKE RECREATION AREA.

WHEREAS, the established Nancy Lake recreation area is proposed for development by the State of Alaska, and

WHEREAS, residents and property owners in the Matanuska-Susitna Borough; and particularly in the Nancy Lake area, feel that the north boundary of the park should extend as described in HB 344, and

WHEREAS, residents and property owners have appeared before the Planning and Zoning Commission, and the Borough Assembly, and the Planning and Zoning Commission has recommended to the Borough Assembly that it urge the passage of HB 344,

NOW, THEREFORE, BE IT RESOLVED that the Assembly of the Matanuska-Susitna Borough urge the current legislature, State of Alaska, adopt HB 344 changing the north boundary of Nancy Lake recreation area, and

BE IT FURTHER RESOLVED that copies of this resolution be forwarded to local legislators and appropriate committees of the Legislature.

PASSED AND APPROVED by the Matanuska-Susitna Borough Assembly this 18 day of February, 1970.

Harold Newcomb
Assembly President

ATTEST:

Evelyn Thompson
Borough Clerk

Robert H. Vroman
Borough Chairman

(SEAL)

Post Office Box 8-603
Anchorage, Alaska 99504
February 6, 1970

Honorable Jalmar Kerttula
Alaska State Representative
Pouch V
State Capitol Building
Juneau, Alaska 99801

Dear Representative Kerttula:

You assured me the Parks and Recreation Dept. agreed not to push into the Rainbow Lake Area. As you can see by the enclosed maps they are now trying to include Rainbow Lake in the Nancy Lake Recreation Area.

Mr. Ted Smith now agrees the canoe trail planned to connect the park with Rainbow Lake, Long Lake and Willow Creek is not feasible. The shoreline of this lake is already over 95 per cent privately owned, therefore it can not be used for riding and hiking trails as Mr. Smith recommended. The shallow areas restrict the potential boating activity on the lake. The trout are getting smaller and fewer in number and the Fish and Game Department advises that it is not feasible to restock the lake.

This lake is too small to serve the future plans of the private property owners and the recreation area too. I firmly believe that Rainbow Lake would add very little value to the recreation area but it does have a future potential of providing a large number of permanent home sites and improving the tax base of the Matanuska Susitna Borough. At present this borough has one of the poorest tax bases in the state. If the Parks and Recreation Department expands north of the township line into the area that is already rapidly developing through private interests it will seriously harm the future tax base of this borough.

In regard to the recreation department loosing federal funds based on the original size of the park the areas south and west of the present boundary could be extended in some areas with no conflict of interest. I seriously doubt that the Federal Government would increase the funding for the additional 2,000acres requested, due to the tight money in Washington and the improved financial situation in Alaska.

The present boundary of the Nancy Lake Recreation Area is very irregular, encouraging trespassing and is a fire hazard to private property. The addition proposed by the State of Alaska would be even more irregular and difficult to enforce.

The present park boundary does infringe and include some of our private property, therefore legally it must be changed.

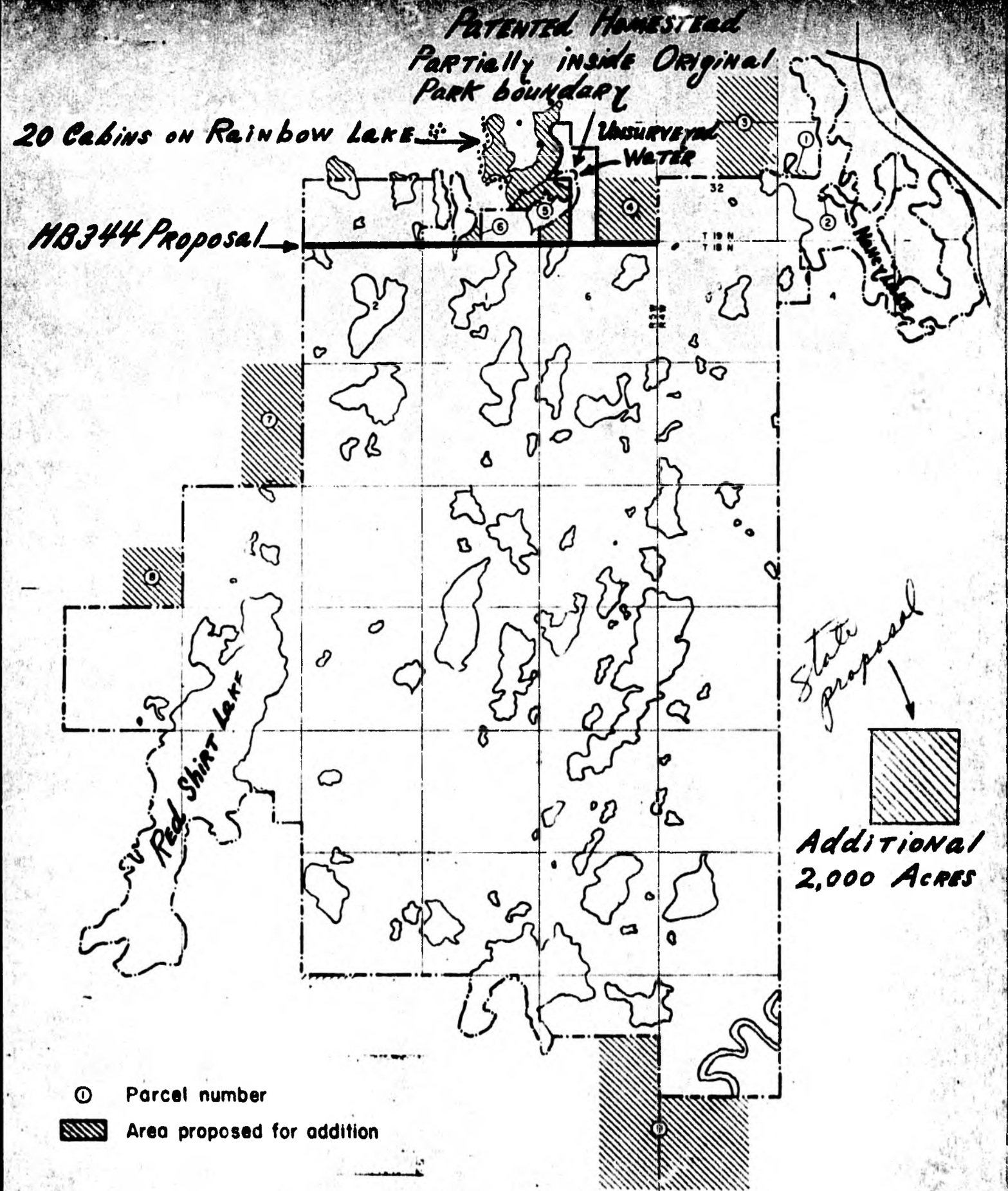
If Rainbow Lake were included in the park it would be a serious mistake because this would constitute a stalemate. The lake would be of very little value to the recreation area or the private property owners, due to overcrowded conditions, which eventually causes pollution and poor resale value.

Recreation areas are a necessity and an asset to the area, if properly planned. If not they can be detrimental to the future development of the area.

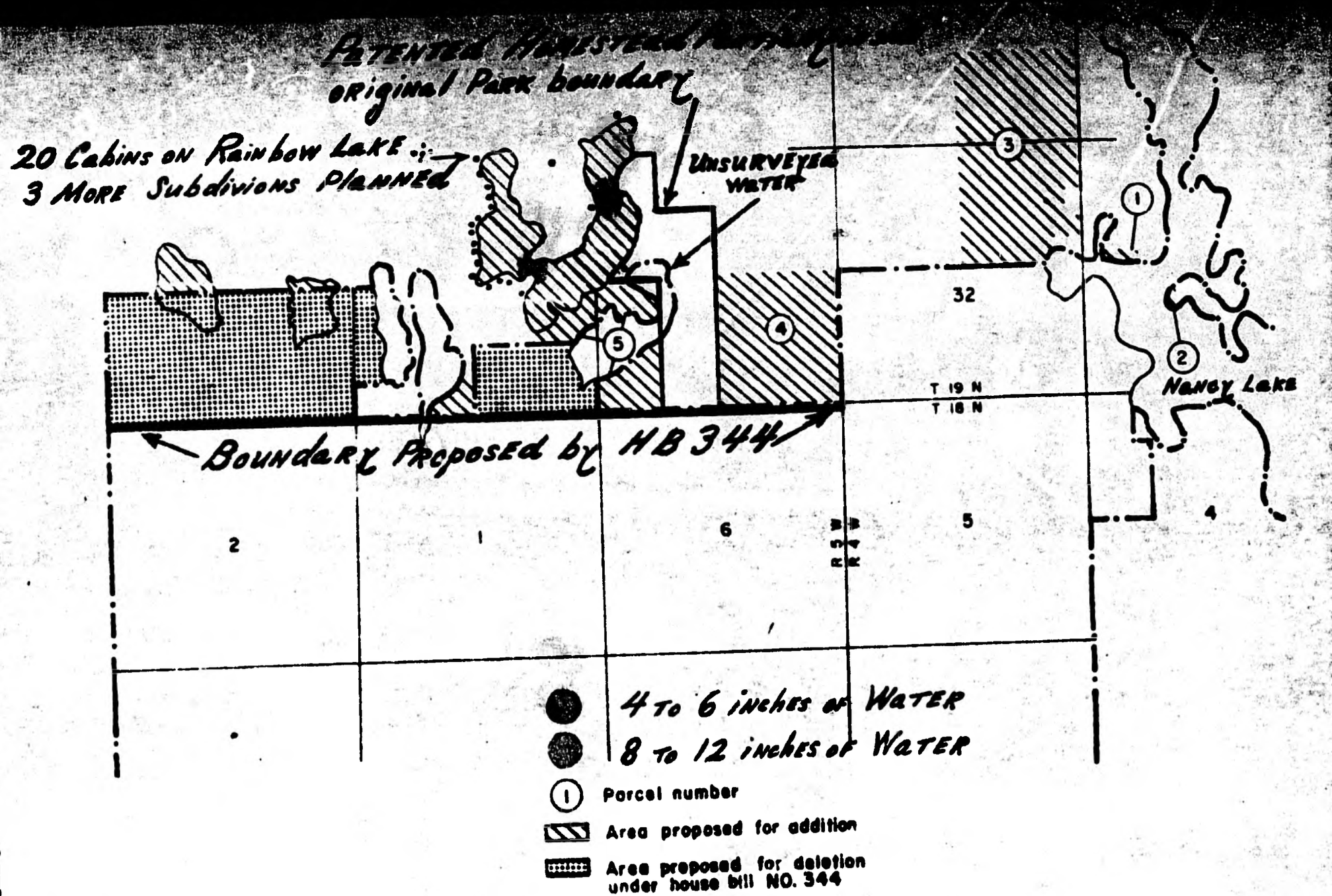
Again I request that you give House Bill 344 serious consideration and your full support.

Sincerely,

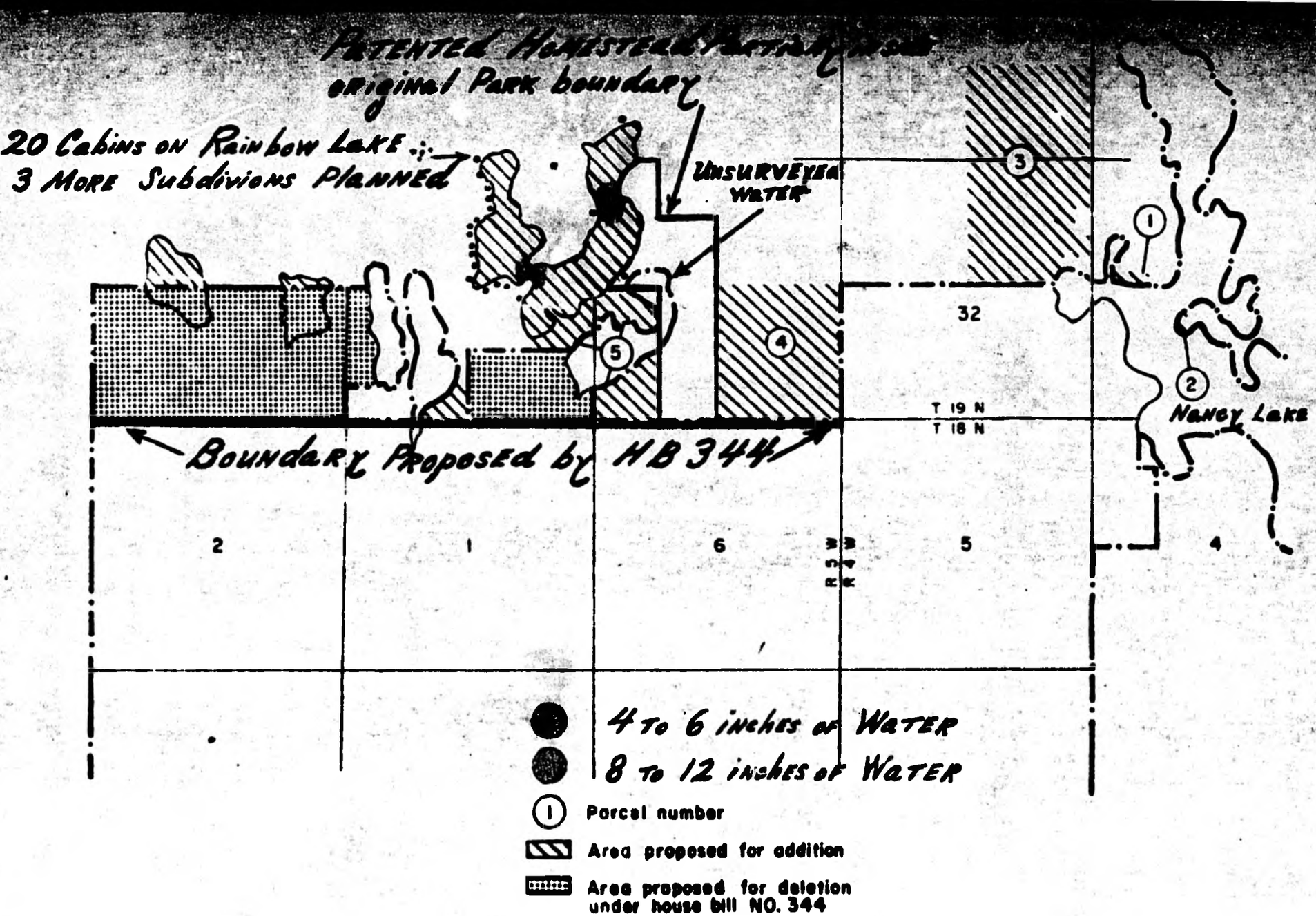
R. C. Tuer



BOUNDARY REVISIONS
NANCY LAKE RECREATION AREA



BOUNDARY REVISIONS
NANCY LAKE RECREATION AREA
(North Boundary)



BOUNDARY REVISIONS
NANCY LAKE RECREATION AREA
(North Boundary)

R. C. TUER
P. O. BOX 8-603
ANCHORAGE, ALASKA

February 27, 2969

Honorable Selmar Kerttula
Alaska State Representative
Pouch V
State Capitol Building
Juneau, Alaska 99801

Dear Representative Kerttula:

Enclosed you will find a copy of the letter that I wrote August 11, 1967, to Mr. Roscoe Bell who was the Director, Division of Lands, at that time. As of this date no action has been taken to correct the errors in the Nancy Lake Recreation Area boundaries as passed by the Alaska State Legislature, Sessions Laws 1966, Chapter #61.

Enclosed you will find a copy of the original plat map of May 2[illegible], 1917, and a B.L.M. aerial photogrammatric map U.S. Department of Interior, Geological Survey 1958. You will notice in Section 31 T. 19N, R 4W, there is quite a discrepency between these two maps. Mr. Homer R. Robinson, former Alaska Director of the B.L.M., informed me the original plat map shall stand as sutmitted if it is accepted by the B.L.M. Surveyor General.

Our homestead Patent #1234958 issued January 31, 1964, inc[illegible] one (1) and two (2) which is one-half (1/2) mile of the east shore of Rainbow Lake and the southeast one-fourth (1/4) of the NW¼, and the east ½ of the SW¼ in Section 31, T. 19N, R4W, Seward Meridian. This is the property inside the penned line that is drawn on the enclosed aerial photo[illegible].

The B.L.M. claims there is 1[illegible]1.88 acres of land in this original homestead; therefore, I had to pay the B.L.M. for the 1.88 acres over 160 acres. Rainbow Lake is surveyed, only a small part of Lake #1 is surveyed, and Lakes #2, 3 & 4 are completely unsurveyed.

You will notice in the Sessions Laws of 196[illegible], Chapter #[illegible], the Nancy Lake Recreation Area boundary meanders completely around Lakes #1 (1) and two (2). Not only is Lake #2 over 90% private Property; in addition the original plat which according to B.L.M. law is the official plat map,

this lake is not a body of water but actually terra firma. Because the Nancy Lake Recreation Area cannot legally meander a lake that is classified as terra firma under an original homestead patent, and additional reasons that I mentioned in my letter to Mr. Bell, I believe this boundary should be corrected.

This situation will prevent improvement or subdividing of private property and in turn, will have an adverse effect on the Matanuska Valley Borough. The situation will naturally become more complicated in the future when the property value increases.

I have discussed this matter many times with Mr. Smith, who is in charge of Parks and Recreation, Anchorage office. These discussions with Mr. Smith started approximately three years ago when the Nancy Lake Recreation Area was in the planning stage. He agreed there are a number of errors in the Nancy Lake Recreation Area boundaries that should be corrected. To my knowledge, the Alaska Division of Lands has taken no action whatsoever to correct these errors, although the Department is well aware of these errors.

I am definitely in favor of long range recreation planning and The Nancy Lake Recreation Area as a whole, if the planning is done properly. I am also aware of the fact that the boundary in question was created by the State Legislature in 1966. I, therefore, request that a bill be submitted to amend the north boundary of the Nancy Lake Recreation Area to extend due west on the township line between townships 18 and 19 where the present boundary intercepts this same township line. This boundary would be much easier to define, maintain and patrol as well as resolving a legal aspect that could become quite complicated. I firmly believe this boundary amendment would serve the best interests of all parties concerned, including the State of Alaska.

Sincerely,

R. C. Tuer

B. L. M Laws Relating to Surveys

plat shall be recorded in books to be kept for that purpose; and a copy thereof shall be kept open at the public survey office for public information, and other copies shall be sent to the places of the sale and to the Bureau of Land Management. (R. S. sec. 2395; Mar. 3, 1925, 43 Stat. 1144; 43 U. S. C. sec. 751).

Boundaries and contents of public lands, how ascertained.

The boundaries and contents of the several sections, half sections, and quarter sections of the public lands shall be ascertained in conformity with the following principles:

First. All the corners marked in the surveys returned by the Director shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate, and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

Second. The boundary lines, actually run and marked in the surveys returned by the Director, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines as returned shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships, where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the Director, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part. (R. S. sec. 2396; Mar. 3, 1925, 43 Stat. 1144; 43 U. S. C. sec. 752).

Lines of division of half-quarter sections, how run.

In every case of the division of a quarter section the line for the division thereof shall run north and south, and the corners and contents of half-quarter sections which may thereafter be sold shall be ascertained in the manner and on the principles directed and prescribed by the section preceding, and fractional sections containing one hundred and sixty acres or upwards shall in like manner, as nearly as practicable, be subdivided into half-quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Interior, and in every case of a division of a half-quarter section, the line for the division thereof shall run east and west, and the corners and contents of quarter-quarter sections, which may thereafter be sold, shall be ascertained, as nearly as may be, in the manner and on the principles directed and prescribed by the section preceding; and fractional sections containing fewer or more than one hundred and sixty acres shall in like manner, as nearly as may be practicable, be subdivided into quarter-quarter sections, under such rules and regulations as may be prescribed by the Secretary of the Interior (R. S. sec. 2397; 43 U. S. C. sec. 753).

Rivers and streams.

All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall be common to both. (R. S. sec. 2476; 43 U. S. C. sec. 931).

Alaska Water Rights Act

Sec. 46.15.060. EXISTING RIGHTS. A water right acquired by law before the effective date of this chapter or a beneficial use of water on the effective date of this chapter, or made within five years before the effective date, or made in conjunction with works under construction on the effective date, under a lawful common law or customary appropriation or use, is a lawful appropriation under this chapter. The appropriation is subject to applicable provisions of this chapter and rules and regulations adopted under this chapter.

Our homestead Patent #1334958 was issued Jan. 31, 1964, the State water rights act was not effective until 1966

Sec. 46.15.070. NOTICES, OBJECTIONS. (a) Upon receipt of an application, the commissioner shall prepare a notice containing the location and extent of the proposed appropriation, the name and address of the applicant and other information he considers pertinent. The notice shall state that within 15 days of publication or service of notice, persons may file with the director written objections, stating the name and address of the objector, and any facts tending to show that rights of the objector or the public interest would be adversely affected by the proposed appropriation.

(b) The commissioner shall publish the notice at the applicant's expense in one issue of a newspaper of general distribution in the area of the state in which the water is to be appropriated. The commissioner shall also have notice served personally or by certified mail upon an appropriator of water or applicant for or holder of a permit who, according to the records of the division of lands may be affected by the proposed appropriation and may serve notice upon any governmental agency, political subdivision or person, provided, however, that notice shall be served upon the

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

Post Office Box 8-603
Anchorage, Alaska
August 11, 1967

Director Division of Lands
344 [redacted]
Anchorage, [redacted] 99501

Dear Mr. Bell:

The present north boundary of the Nancy Lake Recreation Area is very irregular in as much as it does not follow the section lines or half section lines in general as the east, west and south boundary lines do at present. This irregular north boundary could make it quite expensive and difficult to define, patrol and enforce this boundary.

The boundary of the recreation area, as approved by the legislature meanders the unnamed lake in the southeast quarter of Section 36 and the southwest quarter of Section 31. Only part of this lake is surveyed according to the original plat map of 1917, therefore part of the lake is considered [redacted], on which I hold patent. At the time I filed for patent I requested a resurvey, but received no cooperation from either the Bureau of Land Management or the Alaska State Division of Lands.

The question is how can the State of Alaska patrol or enforce a boundary that meanders a lake that is only partially surveyed when part of that lake is private terra firma? Who would be responsible for trespassing damages or fire damages to private property if the State of Alaska insists on such an irregular and poorly defined boundary.

The Nancy Lake Recreation Area would include approximately 27 lakes, comprising approximately 5000 acres of water area excluding this unnamed lake in question. This lake contains no fish and could not be poisoned for restocking, and I firmly believe that it would be more of a detriment than an asset to the recreation area.

[redacted] a good logical suggestion based on a point to point line to define the [redacted] mile exclusive fisheries zone. This same principle should be applied to the Nancy Lake Recreation Area boundary. There is at present, according to your office, a number of errors in the boundary of the recreation are as passed by the legislature. I request that your office request the legislature to include in the corrections a straight line north boundary, using the south section lines of Section 31; Township 19North; Range 4 West; and the south section lines of Sections 36 and 35 as the north boundary of the recreation area. According to the master development plan submitted by Huddleston and Associates of Denver, this would not conflict in any manner with the development of the Nancy Lake Recreation Area.

I would appreciate a letter from your office regarding this matter at your earliest convenience. I would also like to know if the boundaries of the [redacted] to be fenced, or how does your office intend to define and mark [redacted]

Sincerely,

R. C. Tuer

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

1-27-70

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 346

This bill, proposing a statutory change comparable to the constitutional change proposed in HJR 51, would become law if the constitutional amendment proposed in that resolution is approved by the voters. Upon the effective date of both measures, no one would be disenfranchised for reasons of inability to read or speak English.

Barry W. Jackson, Chairman

HB 360

MEMORANDUM State of Alaska

TO: The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska

DATE : April 8, 1969

FROM: R. D. Stevenson
Chief, Excise Tax Section
Department of Revenue
Alaska Office Building
Juneau, Alaska

SUBJECT: House Bill No. 360, An Act relating to coin-operated devices and providing for an effective date

Reference is made to the attached copy of Schedule of Revenue, Five Year Projection and Cash Flow for the Fiscal Year Ending June 30, 1970 and a copy of a memorandum covering coin-operated device receipts issued during the calendar year 1968. This information was transmitted to the Department of Administration for inclusion in the document entitled "State of Alaska - Revenue Sources - 1968-1974" and is shown on pages 26-27 and 52, copies of which are attached.

Chapter 135, SLA 1966 provided for a phase-out of class 2 coin-operated devices (so-called pinball machines) on June 30, 1969. Revenue estimates were necessarily prepared based on this premise.

House Bill No. 360 provides for an extension until June 30, 1972 (from June 30, 1969) for the phase-out of class 2 coin-operated devices. During the calendar year 1968 there were 297 receipts issued for class 2 coin-operated devices with fees (excluding penalty and interest) collected in amount of $34,626.00.

EFFECT ON TREASURY:

1. If the bill were passed, refunds in amount of $17,300 shown on the attached Cash Flow for the Fiscal Year Ending June 30, 1970 would not be made in July of 1969 as would be the case if the bill were not passed for the reason that if the phase-out date of June 30, 1969 is not changed, taxpayers who were issued full year 1969 licenses for class 2 devices would be entitled to refund for one half of the fee paid.

2. Revenue estimates for the fiscal years ending on June 30, 1970; June 30, 1971 and June 30, 1972 would be revised upwards as follows:

Fiscal Year Ending	Original Estimate	Revised Estimate	Gain in Revenue
June 30, 1970	$ 31,000.00	$ 82,900.00	$ 51,900.00
June 30, 1971	48,000.00	82,600.00	34,600.00
June 30, 1972	48,000.00	65,300.00	17,300.00
Totals	$127,000.00	$230,800.00	$103,800.00

Shared revenue to boroughs and cities of first, second and third class pursuant to the provisions of AS 43.35.050 would increase during the three fiscal years involved if the bill were passed. The statute provides that 50 per cent of the gross revenue from this source, excluding distributors fees and penalties and less the amount expended by the state in collection shall be refunded to such political subdivisions.

RDS:se
Attachments

SA-15

State o laska
Department of Administration
Budget & Management Division
(Rev 8-68)

SCHEDULE OF R NUE
FIVE YEAR PROJ CTION
and
CASH FLOW FOR THE FISCAL YEAR ENDING JUNE 30, 1970

	Code
Department REVENUE	04
Division	
Program	

Receipt Title Amusement & Gaming Device License Receipt Code 226 Fund 100

ACTUAL	ESTIMATED						
FY 1968	FY 1969 Budget Estimate	FY 1969 Revised Estimate	FY 1970 Revised Estimate	FY 1971 Revised Estimate	FY 1972 Revised Estimate	FY 1973 Revised Estimate	FY 1974 Estimate
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
$ 33,604	$ 87,000	$ 84,000	$ 31,000	$ 48,000	$ 43,000	$ 50,000	$ 50,000

FY 1969-70 CASH FLOW BY MONTH (Block 4 above)

July	August	September	October	November	December
MINUS $ 17,300	$ 500	$ 500	$ 100	$ 300	$ 3,000

January	February	March	April	May	June	Total
$ 10,000	$ 30,000	$ 1,900	$ 700	$ 700	$ 600	$ 31,000

Citation: AS 43.35.010-090, as amended by CH. 135, SLA 1966

Program: Revenues are deposited in the general fund. Subsequently, fifty per cent of the amount of the tax, less administrative costs, collected within an organized borough or cities of the first, second or third class, is refunded.

Rate:

Class 1 coin-operated device (so-called amusement device)	$ 48.00 annually on a calendar year basis
Class 2 coin-operated device (so-called pinball machine)	$120.00 annually on a calendar year basis
Class 3 coin-operated device (so-called slot machine)	$240.00 annually on a calendar year basis
Annual distributors fees	$ 50.00 annually on a calendar year basis
Transfer fee	$ 5.00

The statutes provide for a monthly sliding scale on devices placed into operation after the first of the year.

SA-12
State of Alaska
Department of Administration
Budget & Management Div.
(Rev. 5-68)

STATEMENT OF PROGRAM

For the Fiscal Year Ending June 30, 1970

		Code
Department	REVENUE	04
Division		
Program		

Page 2-SA-15, AMUSEMENT & GAMING DEVICE-Receipt Code 226, Fund 100

Basis for Estimates: No Class 3 coin-operated device licenses have been issued during FY 1966-67 or 1967-68 as the operation of so-called slot machines in states that do not have legalized gambling is illegal according to Federal statutes. Chapter 135, SLA 1966 provides for a phase-out of Class 2 coin-operated devices (so-called pinball machines) on June 30, 1969. It is anticipated that in the period December 1968 through February of 1969 that $34,600 will be received for full year 1969 calendar year licenses for Class 2 coin-operated devices. Providing that the phase-out date of June 30, 1969 is not changed, taxpayers who were issued full year 1969 licenses for Class 2 devices would be entitled to refund for one-half of the fee paid, or $17,300 in July of 1969, or in the beginning of the fiscal year 1969-70. Receipts from Class 1 devices are estimated at $47,300 for FY 1970. For Fiscal Years 1971, 1972, 1973 and 1974 revenues are restricted to receipts from Class 1 coin-operated devices. Gross revenues before refunding to political subdivisions for the four preceding fiscal years are as follows:

Fiscal Year	Gross Revenues
1967-68	$ 83,604
1966-67	86,773
1965-66	50,251
1964-65	64,739

FORM SA-1B
12-65M 8/67

MEMORANDUM

State of Alaska

TO: R. D. Stevenson, Chief
Excise Tax Section

DATE : October 22, 1968

FROM: Marilla Gemmer, Supervisor
Delinquent Accounts

SUBJECT: Coin Operated Devices
Receipts issued & Fees collected

Figures shown below are for the year 1968 for the period of December 11, 1967 to October 21, 1968, inclusive:

No. of Receipts Issued	Class	Total Fees Collected	Total Fees Incl. P & I
1051	I	$47,800.00	$48,560.40
297	II	34,626.00	35,344.00
8	Distributors Fees	400.00	423.50
2	Transfer Fees	10.00	10.00
Total Fees Collected for all Classifications		$82,836.00	$84,337.90

Revenue Code

224 Motor Freight Carrier Permits (Continued)

Allocation:
Revenue from Motor Freight Carrier permits are paid to the General Fund.

Citation:
AS 42.10.240, AS 42.15.055 as amended by Ch. 143, SLA 1966.

Basis for Estimate:
Revenue estimates are based on only carrier certified by the Alaska Transportation Commission. Larger collection in the past were due to the indiscriminate collection of weight fee regardless of whether or not the carriers were certified.

The 1968-69 fiscal year and subsequent years are viewed downward to reflect the expected collections.

Revenue Code

226 Amusement and Gaming Device License

Rate:

Amusement Devices	$ 48.00
Pinball Machine	120.00
Coin Operated Devices (Strict element of Chance)	240.00
Annual Distributor's Fee	50.00
Transfer Fee	5.00

Licenses are issued on a calendar year basis.

Allocation:
Revenues are deposited in the General Fund. Subsequently, fifty per cent of the amount of the tax, less administrative costs, collected within an organized borough or cities of the first, second or third class, is refunded.

Citation:
AS 43.35.010-090 as amended by Ch. 135, SLA 1966.

Basis for Estimate:
No class 3 coin-operated device licenses have been issued during FY 1966-67 or 1967-68 as the operation of so-called slot machines in states that do not have legalized gambling is illegal according to Federal status. Chapter 135, SLA 1966 provides for a phase-out of class 2 coin-operated devices (so-called pinball machines) on June 30 1969.

Revenue Code

226 Amusement and Gaming Device License (Continued)

It is anticipated that in the period December 1968 through February 1969 that $34,600 will be received for full year 1969 calendar year licenses for Class 2 coin-operated devices. Providing that the phase-out date of June 30, 1969 is not changed, taxpayers who were issued full year 1969 licenses for Class 2 devices would be entitled to refund for one-half of the fee paid, or $17,300 in July of 1969, or in the beginning of the fiscal year 1969-70. Receipts from Class 1 devices are estimated at $47,300 for FY 1970. For fiscal years 1971, 1972, 1973 and 1974 revenues are restricted to receipts from Class 1 coin-operated devices.

Revenue Code

270-282 Commercial Fishing Licenses

Rate:

Commercial fishing licenses are divided into licenses on individuals and licenses on vessels and gear.

	Resident	Non-Res	Revenue Code
Vessel Licenses	$10.00	$ 30.00	270
Gear Licenses are as follows:			
Troll Line Licenses	15.00	45.00	271
Set or Long Line Licenses	25.00	50.00	272
Drift Gill Net Licenses:			
1st 100 fathoms, or fraction	10.00	30.00	273
Each additional 50 fathoms or fraction	5.00	15.00	273
Set or Stake Gill Net Licenses:			
1st 50 fathoms, or fraction, & each additional 50 fathoms or fraction	5.00	15.00	274
Beach or Drag Seine Licenses:			
1st 100 fathoms, or fraction	10.00	30.00	275
Each additional 50 fathoms or fraction	5.00	15.00	275
Purse Seine & Hand Seine Licenses:			
1st 100 fathoms or fraction	40.00	120.00	276
Each additional 50 fathoms or fraction	10.00	30.00	276
Beam Trawl Licenses:	50.00	150.00	277
Otter Trawl Licenses:	50.00	150.00	278
Shellfish Pot Licenses:			
1st 100 pots	15.00	45.00	279
Each additional 100 pots or less	15.00	45.00	279
Clam Digger Licenses:	5.00	15.00	280
Fisherman Licenses:	10.00	30.00	281-82
Commercial Fish - Scallop Dredge	50.00	150.00	283

SECTION II

DETAIL OF STATE REVENUES
FISCAL YEARS 1968-74

CODE	REVENUE SOURCE	ACTUAL F.Y. 1968	ESTIMATED F.Y. 1969 Budget Estimate	F.Y. 1969 Revised Estimate	F.Y. 1970 Revised Estimate	F.Y. 1971 Revised Estimate	F.Y. 1972 Revised Estimate	F.Y. 1973 Revised Estimate	F.Y. 1974 Estimate
			GENERAL FUND - UNRESTRICTED REVENUE (con't)						
BUSINESS LICENSES, FEES AND PERMITS									
201	Corporation Licenses and Fees	$ 116,365	$ 106,700	$ 120,000	$ 122,000	$ 124,000	$ 126,000	$ 128,000	$ 130,000
202	Insurance Licenses and Fees	142,354	124,000	145,000	148,000	151,000	154,000	158,000	161,000
	Sub-Total	$ 258,719	$ 230,700	$ 265,000	$ 270,000	$ 275,000	$ 280,000	$ 286,000	$ 291,000
Regulatory Boards									
203	Accountant License and Fees	$ 8,230	$ 7,300	$ 1,500	$ 8,500	$ 2,700	$ 9,700	$ 3,900	$ 10,900
204	Barbers License and Fees	4,756	4,200	6,500	2,000	7,500	2,000	8,900	2,000
205	Basic Sciences and Fees	1,565	1,400	1,600	1,900	2,200	2,500	2,800	3,100
206	Chiropractor License and Fees	100	400	800	100	900	100	1,000	100
207	Dentist License and Fees	687	4,000	8,300	2,800	10,700	2,800	12,500	3,500
208	Electrical Contractor License and Fees	2,350	14,000	17,100	2,500	20,000	3,300	25,100	4,200
209	Veterinary Licenses and Fees	110	600	1,400	300	1,700	300	2,100	300
210	Medical License and Fees	4,978	9,500	10,000	5,000	10,300	5,000	10,700	5,000
211	Hairdressers License and Fees	12,585	16,400	6,700	22,000	6,700	28,700	6,700	35,400
212	Nurses License and Fees	16,777	16,400	24,600	10,000	25,400	10,000	26,200	10,000
213	Optometrists License and Fees	160	2,000	2,300	400	3,000	400	3,300	400
214	Pharmacists License and Fees	5,332	1,400	1,000	10,000	1,000	11,000	1,000	12,000
216	Real Estate License and Fees	33,959	18,200	14,000	48,900	14,000	68,400	14,000	89,900
217	Embalmers License	1,225	1,200	1,200	1,200	1,200	1,200	1,200	1,200
218	Security Registration Fees	22,264	25,000	25,000	25,000	25,000	25,00	25,000	25,000
219	Small Loan Company License and Fees	3,900	3,100	3,400	3,400	3,400	3,400	3,400	3,400
220	Motor Vehicle Dealer Registration Fees	3,075	3,300	3,300	3,300	3,300	3,300	3,400	3,400
222	Psychologist License and Fees	285	1,200	300	600	200	700	200	1,000
223	Aircraft Registration Fees	38,171	28,000	38,000	39,000	40,000	41,000	42,000	43,000
224	Motor Freight Carrier Permits	56,440	182,200	52,400	52,400	57,400	57,400	62,400	62,400
225	Athletic Licenses and Fees	80		100	100	100	100	100	100
226	Amusement and Gaming Device License	81,604	87,000	86,000	31,000	48,000	48,000	50,000	50,000
227	Lottery Permits and Fees	3,860	4,400	4,000	4,200	4,400	4,600	4,800	5,000
228	Construction Contractor Certificates and Fees			50,000	57,500	65,000	72,500	80,000	87,500
229	Employment Agency Application Fees	50	100	100	100	100	100	100	100
230	Branding Domestic Animal Fees	73			200				
231	Log Brand Registration Fees	145	200	200	200	200	200	200	200
232	Trademark Registration and Certificates	330	400	400	400	400	400	400	400
233	Collection Agency Fees			5,500	900	5,700	900	6,900	900
235	Radio and Telephone Charges			6,400	6,400	6,400	6,400	6,400	6,400
236	Boiler Inspection Fees and Permits			30,000	50,000	50,000	50,000	50,000	50,000
237	Engineers and Architects Fees and Permits			22,000	23,000	24,000	25,000	26,000	27,000
	Sub-Total	$ 305,091	$ 432,100	$ 422,100	$ 413,300	$ 440,900	$ 484,400	$ 480,500	$ 543,800

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

JUNEAU
ALASKA 99801

MEMORANDUM

February 13, 1969

Mr. Jackson:

Your request for a bill to anticipate the expiration of some pinball machine law was not very specific. A bill distinguishing between machines used for gambling and those which are not is attached, along with the relevant explanatory pages from this office's January 1966 Legislative Oversight report. You will note that this bill does not prevent that automatic expiration.

Sec. 1, Ch. 135 SLA 1966 amended AS 43.35.090(2), the definition of "coin-operated device class 2", by inserting the words "but free plays shall not be construed as a thing of value". As you know, AS 43 is the taxation title, and AS 43.35 taxes coin-operated devices and punchboards but does not legalize gambling (see AS 43.35.070 and 43.35.140). I believe the intent of Ch. 135 SLA 1966 was to counter the effect of State v. Pinball Machines, Alaska, 404 P 2d 923 (1965), which held that free plays constituted a thing of value, which in turn made the use of any pinball machines that awarded free plays "gambling", the result of which was to justify the seizure and destruction of the machines under AS 11.45.040. The attached pages analyze that court opinion.

Sec. 3, Ch. 135 SLA 1966 stated, "This Act shall not remain in existence beyond June 30, 1969." The result of this expiration will be to leave AS 43.35.090(2) as it was before the 1966 amendment. Since that amendment does not seem to me to have been the best way to counter the effect of State v. Pinball Machines, I doubt that much will be lost by allowing the expiration to go into effect, if your attached bill passes. If you disagree, we could easily add a section to the bill, repealing Sec. 3, Ch. 135 SLA 1966. (Or is it possible that you would only want to repeal that expiration clause?)

Arthur H. Peterson
Revisor of Statutes

of the Code can begin without delay. In other words, instead of being authorized to merely create a plan of revision, as provided in HB 256, it is recommended that the Legislative Council be given authority to begin work immediately with each department and agency on a revision of its regulations. It is also recommended that the Council be assigned the responsibility of rewriting the instructions on drafting techniques and prescribing a uniform system of indexing, numbering and arrangement of text to be used in lieu of those instructions and requirements now contained in Title 1 of the Administrative Code. Each of these tasks it is believed can be performed by the Council within its present staff structure.

Under the staff's proposed additions to HB 256, the interim powers and responsibilities vested in the Legislative Council would terminate when the revision of the Code is accomplished. At that time the Council would then submit to the Legislature the method it recommends for the future promulgation, publication, and distribution of administrative regulations.

A bill to effectuate the recommended proposal is contained in Appendix 7.

III. REVIEW OF STATE SUPREME COURT DECISIONS

This part of the report contains analyses of four recent state supreme court opinions and the Council's recommendations based on these analyses.

A. STATE v. PINBALL MACHINES [Sup. Ct. Op. No. 298 - August 19, 1965]

1. Fact Situation. Various pinball machines in the cities of Anchorage and Fairbanks were seized as gambling implements under the authority of AS 11.45.040. Essentially, the machines featured a coin insertion to activate the machine, the shooting of balls by a player, the dropping of balls into holes, the lighting of numbers on a bingo-type card, the varying of odds by a mechanism within the machine and the winning of free games by chance. No pay-off in money or things of monetary value was found to have been made to winning players. Winners only acquired the right to continue playing the game without paying additional money until the number of free games won were used up.

2. Statutes Involved. The only statute involved in these cases that is pertinent to the legislative problem to be discussed is AS 11.45.040 which states:

> The commissioner of public safety, a member of the division of state police, or a police or peace officer designated by the commissioner shall seize and destroy a gambling implement.

3. Superior Court Decisions. The superior court at Fairbanks held that a pinball machine is a gambling implement per se, while the superior court at Anchorage held that it is not.

4. Supreme Court Decision. The Supreme Court agreed with the superior court in Fairbanks and held that pinball machines are gambling implements which are subject to seizure and destruction under the law. According to the court, the essential elements of gambling are price, chance and prize, and whenever some tangible thing is "used or mainly designed or suited for gambling" it is a gambling implement. In applying these criteria to pinball machines the court noted that since a person must insert money into a pinball machine to activate it, the element of price is present and because the number of free games one may win is uncertain, the element of chance is also present. Moreover, a prize was won, even though the free games accumulated had no real monetary value, because, said the court:

> It is not the essence of gambling that the element of prize have a monetary value. If that which one seeks to attain, regardless of whether it has value in money, may be attained by chance after the payment of a price, then one is gambling.

5. Legislative Problem. This case indicates that there is a need for the legislature to either define what it considers to be a "gambling implement" or to at least make clear its position regarding pinball machines as gambling implements.

Under the court's present criteria almost any game which a person pays to play or see can fall into the catagory of gambling because of the presence of price, chance and prize. In fact, a literal application of the definition adopted in this case would require the conclusion that even bubble gum machines, which have little trinkets interspersed among the gum, are gambling instruments

when used by someone who inserts his penny with the hope of attaining one of the trinkets.

Therefore, the Legislative Council recommends that legislative action be taken to narrow the court's definition of a "gambling implement" which has been established in this case.

Research indicates that there are certain mechanical features in a pinball machine used for gambling purposes, in the more conventional sense of "gambling", which are unnecessary if a machine is used only for amusement. The features peculiar to pinball machines actually used for making pay-offs are:

1 - A capability of awarding as many as 1,000 free games. Bona fide amusement devices never award more free games than can, within reason, be actually played off -- 25 at the maximum and more usually 10 or 5;

2 - A button connected to the free-game circuit which allows free games to be "knocked off" or "run off" without being played;

3 - A device to record the number of free games "knocked off." This is a crucial and expensive feature of gambling machines that is totally useless on a machine used only for amusement. To understand the significance of this feature, it is important to note that typically the pinball machine is not owned by the location owner, but by an operator who owns a number of machines which he may move about from location to location. The operator gets his machines, usually on credit, from a distributor who has purchased them from the manufacturer. The recording of "knocked off" games makes possible an accounting between the operator and the location owner; the location owner is given a cash credit for the number of free games he, in turn, paid off to the player - usually a cash pay-off.

4 - A provision for mulitple coin insertion for increasing the odds on winning free games. If the machine were being played purely for "amusement," the insertion of more coins to play one game would not be necessary since it adds nothing to the skill required in playing the game; and

5 - Special electro-mechanical devices which allow the machines

to be adjusted manually or automatically to raise or lower the frequency of winning free games. One such device is known as a "reflex unit." It operates constantly to adjust the odds--unbeknownst to the player--to protect the "house." After a series of pay-offs the unit begins to disconnect circuits in the odds-fixing mechanism to reduce the chance of increasing the odds with each coin; after a period of slow play the unit reverses and reopens circuits to make it progressively easier to win a greater number of games again.

Since the mechanical makeup of pinball machines used for gambling purposes can be distinguished from those used solely for amusement it is believed that the latter should be excluded from the provisions of AS 11.45.040 unless actually used in the making of pay-offs. Defining "gambling implement" in this way appears to be more in keeping with the legislative intent of AS 11.45.040 than use of the broader definition now sanctioned by the court. A bill to effectuate the recommended proposal is contained in Appendix 5.

B. WADE v. DWORKIN [Sup. Ct. Op. No. 306 - November 4, 1965]

1. Fact Situation. The Secretary of State denied an application for a recount of votes for the House of Representatives' race of November, 1964, in the sixteenth election district on the ground that the application was not received within the time set by law for filing such applications.

The state canvass of the election in question was completed and certified to the Secretary of State on November 19, 1964. The application, which had been signed by ten qualified voters of the sixteenth election district (one of whom was the appellee, Lazer Dworkin), was mailed on November 23, 1964, (four days after the canvass) and received by the Secretary of State on November 25th, which was six days after certification of the state canvass (one of those six days being an intervening Sunday).

2. Statutes Involved. This case involved the following statutes:

(a) AS 15.20.430, which states in part

A defeated candidate or 10 qualified voters who believe there has been a mistake made by an election official or by the canvassing board in counting the votes in an

File

April 18, 1969
1426 O. St.
Anchorage, #99501

Rep. Berry Jackson
Chairman Judiciary Committee
House of Representatives
Juneau, Alaska

Dear Mr. Jackson,

Enclosed is a letter that I have submitted to the Anchorage Times. I hope that after you have read same that you will find it worthwhile to show to your nine member committee, I sincerely appreciate your stand in this matter.

I know that myself along with the rest of the people of Alaska who are for good clean government will applaud what ever you do to defeat this pinball bill #360.

Yours truly,

Chuck Dix

Chuck Dix Anchorage,

C O P Y

LET'S TILT HB. #360

Dear Editor,

I have just read with appalling disgust the article in the Times dated April 10, entitled "PINBALL MEASURE QUIETLY DROPPED INTO HOUSE HOPPER." 1. This is an attempt to force the extension of an illegal business on the residents of Alaska. 2. This illegal bill was drawn up by and with the full knowledge of ONE and maybe more of the lawmakers of the State of Alaska. 3. It defies the wishes of the majority of the residents of Alaska as statewide gambling was defeated at the poles a few years ago by a large margin. 4. It defies the Alaska Supreme Court which said that pinball machines were illegal and could not be licensed in the Sate of Alaska. 5. It breaks the pinballs boys' agreement that if the law makers would just give them an extension to get their money out of their investment THEY, THE PINBALL CROWD would be happy. This was done by the 1966 legislature. This extension will expire June 30, 1969, WE HOPE.

How can the law makers of Alaska justify even considering such an illegal bill in the first place, when they have already gone out into left field in allowing an illegal business to operate for 3 years. The one or more who are responsible for this bill should be made public and an explanation demanded how as LAW MAKERS they are able to produce illegal bills such as HB #360. The 1969 legislature can only erase this blight that was forced upon them by the introduction of this bill by once and for all "TILTING HB #360." I say a vote of thanks to the Anchorage Times for bringing this piece of GARBAGE out into the open.

Chuck Dix

Chuck Dix
Anchorage

C O P Y

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / POUCH K, STATE CAPITOL — JUNEAU 99801

April 14, 1969

The Honorable Barry W. Jackson
Alaska State Representative
House of Representatives
Juneau, Alaska

Dear Mr. Jackson:

House Bill 360, now before the Legislature, will extend the expiration date of 135 SLA 1966. In light of this, you have asked for an opinion on the effect that 135 SLA 1966 has upon the legality of operating pinball machines in the State of Alaska.

135 SLA 1966 amended AS 43.35.090(2) by inserting the words "but free plays shall not be construed as a thing of value." Sections 2 and 3 of the Act provide:

> It is the intention of the legislature that this bill shall in no way be considered an attempt or intent to liberalize or to exempt the state from the limitations imposed by 15 U.S.C. secs. 1171-1178.
>
> This Act shall not remain in existence beyond June 30, 1969.

The legislative intent for enacting SB 282 (135 SLA 1966) is found in the "Report of House Judiciary Committee on Senate Bill No. 282, 1966 House Journal 870, where the majority of the committee stated:

> The proponents of this bill feel that the statement in the bill that free plays shall not be construed as a thing of value will indicate a legislative intent that pinball machines are not gambling implements by eliminating the 'prize' which is one of the three essential elements of gambling.
>
> This may or may not be so. (Emphasis added)

It must be noted from the above text of the majority committee report, that whether or not the proponents desired goal would be accomplished was in some doubt.

The above cited committee report fully recognised the problem in amending the taxation statutes to attempt to define a phrase in a criminal statute.

Thus, the determinative issue to be resolved in deciding whether or not the proponents of SB 282 accomplished their goals, is whether or not a taxation statute (AS 43.35) and specifically a definitional section in that statute, defining "coin-operated device class 2" will be considered by a court when attempting to define a phrase used in a criminal statute, specifically the phrase "gambling implements" as used in AS 11.45.040.

AS 43.34.010 in part provides:

> A person who maintains for use or permits the use on premises under his control of a coin-operated . . . class 2 . . . shall first pay a tax as follows: . . . (2) $120 a year for each <u>coin-operated device class 2</u>. . . . (Emphasis added)

For a definition of "coin-operated device class 2" it is necessary to look to AS 43.35.090, the section in question, which in part states:

> <u>In this chapter</u>
>
> * * *
>
> (2) "coin-operated device class 2" means a pinball machine, including a bingo type coin-operated device, horse race machine or other apparatus or device which operates by means of insertion of a coin, token, or similar object and which, by embodying the elements of chance or skill, awards free plays and which contains a device for releasing free plays and a meter for registering or recording the plays so released, but free plays shall not be construed as a thing of value, or with a provision for multiple coin insertion for increasing the odds; class 2 does not include

> bona fide vending machines in which gaming or amusement features are not incorporated; (Emphasis added)

It could be argued that by stating "in this chapter" the above definitional section would not be used to define any terms outside of AS 43.35, but only used to define "coin-operated device class 2" as that phrase is used in AS 43.35.010. It should also be noted that AS 43.34.090 (2) is a definition of a "coin-operated device class 2" and not a definition of a "gambling implement."

The issue at hand was well settled by the Alaska Supreme Court in State v. Pinball Machines, 404 P.2d 923 (1965). The Court held

> . . . it is too well settled for argument that a business expressly condemned and made unlawful by statute is not made lawful by the fact that a tax is imposed with respect to the operation of such business. (p. 927)

In other words, a business that is unlawful (operation of a gambling implement) is not made lawful because of a tax imposed on the maintenance for use of the gambling implement.

The Court then held:

> AS 43.34.090(2) which contains the definition of a class 2 coin-operated device, is nothing more than that--a definition of that which must exist before the tax becomes applicable. Such a definition of a term cannot logically be construed as a legislative statement on the uses and purposes to which a pinball machine may be put.
>
> As part of the same statute which defines a class 2 coin-operated device, AS 43.35.070 states that:
>
> > This chapter does not legalize gambling or the possession of a gambling device.
>
> . . . .
>
> The above quoted statutory provision makes it clear that the use or possession of a

> pinball machine is not made lawful by the mere fact that such a machine is defined by law for tax purposes. (Emphasis added) (Supra, p. 928)

AS 43.35.070 referred to in the Court's opinion makes it clear that whatever is provided or stated in the future or past in AS 43.35, it is not meant to legalize gambling or possession of gambling devices. It could be argued, therefore, that regardless of the legislative intent in an amendment to AS 43.35.090(2), AS 43.34.070 restricts the use of that section and any of its amendments to the definition of a "coin-operated device class 2" as used in AS 43.34.010.

In view of the reasoning expounded by Alaska's Supreme Court in the above cited case, it is the opinion of this office that 135 SLA 1966 probably did not legalize "free play" pinball machines, even though a few arguments could be made to the effect that it did.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By B. Richard Edwards
B. Richard Edwards
Assistant Attorney General

GKE:BRE:jt

Alaska State Legislature

REPRESENTATIVE
BARRY JACKSON

P. O. BOX 348
FAIRBANKS, ALASKA 99701

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99801

HB 360

297 machines in 1918

TREND

614	1962
462	1963
327	1964
311	1965
	1966
	1967
297	1968

draft HB 363

Judiciary Committee Report

on

House Bill 363

This bill modifies the procedural requirements for execution upon the assets of a judgment debtor, where no attorney has appeared or where judgment was obtained by default. In such cases many people, particularly the indigent or unlearned, are completely unaware that state and federal law exempt a basic minimum of property from execution to satisfy a judgment. Existing law, however, also permits execution without any notification to the judgment debtor of those rights.

This defeats the established policy of this State, which is intended to enable judgment debtors to retain minimal income and property for their support. A more effective procedure is needed to insure the use of existing exemption rights by indigents and those unaware of their rights.

First, the bill prohibits property from being sold or otherwise disposed of pursuant to a writ of execution for a period of 15 days. This waiting period will not unduly burden the judgment creditor in that assets capable of movement or seizure will be protected by the Court.

Second, it provides for a prompt hearing on exemptions claimed, if possible within three days after the judgment debtor has received notice.

Third, the debtor in such cases must receive a notice specifying the property seized or to be sold, which notice must be filed in Court with proof of service. The notice must contain an explanation, capable of being understood by a layman, of the various exemptions which exist and a form on which the claimed exemptions may be asserted.

The bill provides that the Alaska Supreme Court prescribe the proper forms to be used. Attached to this Report are sample forms, noted with approval by the Committee, and it is urged that such forms be adopted by the Court to the extent consistent with existing style and form of pleadings and other papers prescribed by the Court.

SAMPLE NOTICE FORM

IN THE _____ COURT OF THE STATE OF ALASKA

_____ JUDICIAL DISTRICT

Plaintiff,

v.

Defendant.

No. _____

A Writ of Execution has been issued against you. The following property claimed to be your property has been seized:

_____

_____

_____

_____

A copy of the Writ of Execution is attached to this notice.

Final sale or disposition of this property will be sought fifteen (15) days after you receive this notice.

Certain of your property may be exempt from execution under Alaska or Federal law. These exemptions are explained below. If the execution is directed against exempt property, you may prevent loss of this property by following these steps within fifteen (15) days:

1. Fill out the attached "Assertion of Exemption" form, indicating which of the property stated in the Writ of Execution you claim as exempt, and sign the form.

2. Mail or deliver the form to the clerk of the

Court _____, room _____,

_____, Alaska.

3. Mail or deliver copies of the form to the plaintiff or his attorney. (See above).

4. Mail or deliver a copy of the form to any person having possession of any property you claim as exempt. For instance, your employer, if you claim that your wages are exempt.

If these steps are followed within fifteen (15) days of the date you received this notice, the property you claim as exempt will not be disposed of. You will then be notified that a hearing will be held to determine whether the property is exempt.

Explanation of Exemptions:

The form is used only to claim an exemption as to property stated in the Writ of Execution.

If the property stated in the writ of execution includes any of the following items, fill out the forms and deliver or mail copies as explained above.

The first item on the form, A.1., should be checked and filled in if the writ of execution states that your wages, or other money owed to you, is to be attached. A single person may keep $200 after taxes, in any thirty (30) day period, the head of household may keep $350 after taxes. Therefore, add all the money you have earned, even if you haven't been paid, <u>from all sources</u> in the last thirty (30) days.

Items A.2., A.3., A.4. and A.5. refer to exemptions of other personal property. If the writ of execution specifies any of these items, check the appropriate places on the form.

Item B. is for exemption of money paid to you as child support under a court order. If the writ of execution is against any money you have recieved for child support, under a court order, whether you have the money or it is in a bank, this item should be checked.

Item D. is your homestead exemption. If the writ of exeuction states that the place where you live, and which you or a member of your family owns, is to be attached, this item should be checked.

Item E. should be checked if the writ of execution is directed to any money you have received as unemployment benefits in Alaska. This may only be used if the money has been kept separate from your other money.

Item F. should be checked if the writ of execution is directed to money you have received as an award for Workmen's Compensation in Alaska, even if you have put it in the bank.

Item G. includes various exemptions you are allowed under Federal law. If the writ of execution states that any money is to be attached and you got the money from a Federal pension, soldier's bonus, railroad retirement or soldier's savings, this item should be checked.

ATTORNEY FOR PLAINTIFF

SAMPLE EXEMPTION FORM

IN THE _____ COURT OF THE STATE OF ALASKA

_____JUDICIAL DISTRICT

Plaintiff,

v.

Defendant.

No. _____

ASSERTION OF EXEMPTION

Notice of execution was received by me _____

_____on _____

_____, 19___. Of the property specified in the notice for which execution is sought, exemption is claimed to the following extent, and by the following authority:

A. A.S. 9.35.080

( ) 1. In the past 30 days I have earned $_____, after taxes, from all sources. I therefore claim as exempt the sum of $_____. (In a thirty day period, you are entitled to $200 as a single person, $350 as head of a household. It doesn't matter if you haven't been paid yet.)

( ) 2. Books, pictures and musical instruments up to $300.00 in value.

( ) 3. Clothing for the use of the family, or watches and jewelry to $200.00 in value.

( ) 4. Tools, equipment or vehicles used in earning a living, up to $1800.00 in value.

( ) 5. Furniture, household goods, utensils or animals used by family, to $12000.00 in value.

B. A.S. 9.35.085

( ) The sum of $_____ which was paid to me under order of court as child support. The child support case is No. _____.

C. A.S. 9.35.087

( ) A liquor license owned by me.

D. A.S. 9.35.090

( ) The home owned by a member of the family, to the value of $8000.00, consisting of up to 160 acres if outside a city or town, or up to 1/4 acre if within a city or town.

E. A.S. 23.20.405

( ) The sum of $_____ received by me as a benefit under the Alaska Employment Security Act, (unemployment payments), which sum has been kept separate from any other funds.

F. A.S. 23.30.160

( ) The sum of $_____ received by me as a payment of Compensation under the Alaska Workmen's Compensation Act.

G. Federal exemptions.

( ) Under Federal law, the sum of $_____,
exempt as _____.
(Exemptions allowed are pension money - 38 USC 454a; soldier's bonus - 38 USC 618, 686c; homestead 43 USC 175; railroad retirement - 45 USC 228 a-y; soldier's savings - 10 USC 906.)

The claim which gave rise to this execution notice is not based on the purchase price of any property claimed as exempt under Items A(2), A(3), A(4) or A(5).

The above statements of indicated exemptions are correct and valid to the best of my knowledge.

DATED at _____, Alaska, this _____ day of _____, 19 ____.

_____

HB 373

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

April 20, 1970

The Honorable Barry Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Re: CSHB 373 - An Act Relating to Political Campaigns

Dear Representative Jackson:

Pursuant to a request by Commissioner Tom Downes, Department of Administration, I am setting forth below a fiscal note concerning the cost to the state treasury of CSHB 373.

We are unable to ascertain exactly the cost on the state treasury of CSHB 373. However, it is our opinion that it could cost the state $3,193,000 during the fiscal year 1970-71, and the cost could be much larger. The figure of $3,193,000 is arrived at by multiplying the estimated 127,720 returns by $25.

We wish to point out the following problems raised by section 4 of CSHB 373 beginning on line 21 of page 9 of the bill.

1. The bill provides that contributions to political candidates will be credited against one's taxes. They would not be an itemized deduction. A person who receives a credit against the tax for taxes withheld from wages results in dollars taken from the state treasury. Since the bill does not provide that the credit is limited by the amount of tax one might owe, we assume that the person will be entitled to a refund of $25 regardless of whether there is any tax due. For example, a person may have income of $10,000 but exemptions and credits totaling $11,000. Accordingly he would have no tax liability even though taxes might have been withheld. However, section 4 of CSHB 373 provides that he will have a credit if he makes a political contribution. Accordingly, the taxpayer would look for a refund of the $25 along with any tax that might have been withheld to which he might be entitled to have refunded.

2. AS 43.20.030(e) provides in part as follows:

> "When a refund is allowed to a taxpayer, it shall be paid out of the general fund by a warrant issued under a voucher approved by the department."

It is one thing to refund an overpayment of tax and another thing to make a payment out of the state treasury of $25 per person which is not a refund of tax. The latter payment would appear to be a payment which must be appropriated by the legislature and such expenditures would have to be for a public purpose. Is a candidate's expenditures a public purpose?

3. The estimated cost to the state of $3,193,000 is based upon the estimated number of returns that will be filed for the calendar year 1970. Over half of these returns are joint returns. Section 4 of CSHB 373 does not indicate whether only one spouse could take a credit. We assume that both spouses would be entitled to take the credit. If so the cost to the treasury would be $4,789,500 if all taxpayers having a return took a credit of $25 each for contributions made.

4. There is some question from section 4 of CSHB 373 whether the person filing a return is limited to a credit of only $25 regardless of the amount contributed and the number of candidates to whom contributions were made. This should be made clear. (For instance a taxpayer could make $25 contribution to each of 50 candidates. Is he limited to a credit of $25 or is he entitled to a credit of $1,500?)

5. Although the intent of the drafters of CSHB 373 may have been to provide a taxpayer with a credit for contributions made, we wish to point out that the bill provides a method whereby a large contributor can contribute to several candidates and at the expense of the state treasury rather than his own. This could be done by a person loaning funds to many of his friends to contribute to candidates. The friends could claim a refund through the credit and pay him back part or all of the amounts advanced when the refunds are recieved.

If section 4 of CSHB 373 is to remain in the bill it is suggested that it be revised to make clear the following factors.

a. The total amount of credit which may be received by a taxpayer.

b. Whether a taxpayer is entitled to a refund of the credit even though he owes the state no taxes for the year. That is would the funds come out of the state treasury.

c. Whether taxpayers filing joint returns are limited to the same credit as a single taxpayer or married taxpayers filing separate returns receive or whether they are entitled to twice that amount.

d. It is suggested that section 4 of CSHB 373 be set up as a separate section or a subsection of AS 43.20.180 rather than be mixed with the withholding of taxes from wages as it now is.

If you have any questions please advise.

Very truly yours,

Vernon L. Snow

Vernon L. Snow
Deputy Commissioner

VLS/ge
Enclosure: Copy of CSHB 373
cc: Commissioner Tom Downes w/enclosure
John Beard w/enclosure
Vance Phillips w/enclosure
Bill Ray w/enclosure
Charles Pyles; R. D. Stevenson w/enclosure

FORM SA-1B

MEMORANDUM State of Alaska

TO:

Representative Barry Jackson
House Judiciary Committee
Alaska State Legislature

DATE : April 14, 1970

FROM:

SUBJECT: CS for HB 373

Thelma Cutler
Director of Elections

Enclosed is a copy of a memo and the fiscal note which I had prepared for the CS for HB 373.

I would be happy to appear before your committee to answer any additional questions that you may have.

FORM 5A-1B
125.5M 8/67

MEMORANDUM

State of Alaska

TO: Robert W. Ward
Secretary of State

DATE : March 4, 1970

FROM: Thelma Cutler
Director of Elections

SUBJECT: Voter Pamphlet

Yesterday you requested that I develop some information and cost estimates on the preparation of a voter pamphlet as outlined in CSHB 373. The following figures are very rough estimates, made with the help of Jack Cucker, Miner Publishing Company and Bill James of the Southeast Alaska Empire:

The Empire has given us a figure of $50,000.00 per 100M copies including stitching and turning based on approximately 70 pages (7" x 10-1/2"). Additional costs would be postage on a bulk mailing approximately $4,000.00. Machine time and materials for labels, $1,000.00 and rental of a label application machine (if at all available), $500.00.

Possible return to the state on cost per page assuming all candidates pick the minimum of one page would be $4,400.00.

The following outlines the minimum quantity per district necessary plus combines districts so that five variations of the pamphlet could be mailed statewide:

District	Pamphlet	Quantity
1	1	5,000
2		2,500
3		3,000
4		6,000
5		1,750
6	2	2,250
7		2,750
9		1,200
10		4,750
11		2,500
12		1,100
8	3	35,000

District	Pamphlet	Quantity
13	4	1,500
14		2,500
15		2,500
17		2,000
18		2,250
19		1,250
16	5	15,000

Estimates of pages to be included in the pamphlet:

Amount	Candidates
6	3 each political parties
4	2 measures
16	Bonding
1	Table of contents and index
2	Governor
2	Secretary of State
2	U. S. Senators
2	U. S. Representatives
4-6	State Senator
10-14	Representative
2	Cover
10	Pages of measures text and voter information (election district map and absentee voting information and request form).

SA-13
State of Alaska
Dept. of Administration
Budget & Management Div.
(Rev. 8/69)

DETAIL OF PERSONAL SERVICES

For the Fiscal Year Ending June 30, 1971

Department
Division
Program

CLASSIFICATION TITLE (1)	PCN (2)	Pay Rge (3)	Mo. Sal. (4)	68-69 Annual Amount (5)	69-70 Auth. No. Pos (6)	69-70 Auth. No. Mo. (7)	69-70 Auth. Annual Amount (8)	1970-1971 ESTIMATED Dept. Request No. Pos. (9)	Dept. Request No. Mo. (10)	Dept. Request Annual Amount (11)	Increase (Decrease) (12)	Gov. Allowance No. Pos. (13)	Gov. Allowance No. Mo. (14)	Gov. Allowance Annual Amount (15)	Legis. Allow. No. Pos. (16)	Legis. Allow. No. Mo. (17)	Legis. Allow. Annual Amount (18)
1 Junior - Tech.																	
2 Clerk V		11	685					1	3	2040	2040						
3																	
4 Benefits																	
5 8%											122						
6																	
7																	
8																	
9											2162						
10																	
11																	
12																	
13																	
14																	
15																	
16																	
17																	
18																	
19																	
20																	
21																	
22																	
23																	
24																	
25																	
26																	
Outstanding Enc. (Col. 5)																	
SUMMARY																	
Permanent-Full-time Positions																	
Permanent-Part-time Positions																	
Temporary (Full Time Equivalent)																	
No. Man Months																	
TOTAL ANNUAL AMOUNT																	

The Legislature of the State of Alaska
FISCAL NOTE

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST
___THE HOUSE FINANCE COMMITTEE STAFF
___THE SENATE FINANCE COMMITTEE STAFF
___THE DIVISION OF BUDGET & MANAGEMENT
___RETAIN A COPY FOR YOUR FILES

Subject CSHB 373 SB ____
requested by Judiciary committee
referred to ____ date of request ____
completion date requested ____ date received ____

EXPENDITURE DETAIL	FY 1971	FY	FY
100 PERSONAL SERVICES	$ 2.162.00	$	$
200 TRAVEL			
300 CONTRACTUAL SERVICES	55,000.00		
400 COMMODITIES			
500 EQUIPMENT	500.00		
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
TOTAL	$ 57,662.00	$	$
FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	5,000.00		
Man Months			
Permanent Positions			
Temporary Positions	Three		

FISCAL ANALYSIS

The cost analysis on CSHB 373 is for the Division of Elections, Office of the Governor, and does not contain any estimates for loss of revenue to the state or additional man hours required by the Department of Revenue.

1 Clerk V for 3 months (temporary)	$ 2,162.00
100M printing (voter pamphlet)	50,000,00
Postage	4,000.00
Machine time & materials for labels	1,000.00
Rental of label application machine (if available)	500.00

Judiciary Committee Report

on

CS for HOUSE BILL NO. 373

This bill represents an effort to reduce and equalize the cost of conducting a campaign for the legislature in Alaska. A subsidiary aim is to reduce the influence of special interest groups.

The first area of the bill limits the amount a candidate can spend for media advertising and limits the amount of a contribution from any one person to less than $500.

The next portion of the bill provides for the publication, at State expense, of a Candidate Pamphlet, in which each candidate for office is allocated a page to tell his story. Each voter would receive a copy of the pamphlet at no cost, and this should substantially eliminate the necessity for the publication of brochures, position papers, and similar material. The bill also provides for the publication of a voter pamphlet, which may be combined with the candidate pamphlet, giving the pros and cons on each initiative, referendum, or other issue to be voted on at the particular election.

Finally, the bill provides that each state income tax payer may take a tax credit for any amount up to $25 contributed to candidates for office in Alaska. The intention here is to encourage widespread small contributions to political campaigns, rather than leaving the candidate dependent upon a few "fat cats". Various provisions of the bill have been modeled on similar provisions of federal law, or the laws of other states.

Barry W. Jackson
Chairman
House Judiciary Committee

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

JUNEAU
ALASKA 99801

March 3, 1970

Barry,

The CS for HB 373 is attached. On the first page, I made that first section applicable to special elections, too. (They would only be held for a senate vacancy; see AS 15.40.380.) On the last page, sec. 4 does not apply to judicial office; I seem to recall that this was the committee's wish, but I'm not sure why (other than the fact that the judges don't usually "campaign" for themselves).

Art

File
HB 406

939 Riverview Drive
Fairbanks, Alaska
February 6, 1970

Senator Barry Jackson
Juneau, Alaska

Dear Mr. Jackson,

Since drinking alcohol, and voting, and being pharmacist, or a State Trooper are such different activities, they have very different implications and requirements of preparation, and judgment.

It therefore does not seem logical to assume that 19 is the best age to choose for all these. Reference is made particularly to State Troopers being 19. It would seem very unlikely that they would have sufficient experience by that time to back up the good judgment and finesse expected as prerequisite of a Trooper.

I would appreciate your forwarding copy of proposed bill if available.

Thanking you, I am

Sincerely,

Louise C. Hollister

(Mrs.) Louise Hollister

Certain catchy phrases in the language sometimes seem to demand more attention than their logic deserves.

HB 406

ALASKA STATE LEGISLATURE

LEGISLATIVE COUNCIL

BOX 2199-JUNEAU

File

March 10, 1970

Barry,

The final draft of the Jud. CS for HB 406 is attached, as is a committee report and sectional analysis. A review of the "Law and Age" study shows the following points not covered in the bill:

District judges and magistrates (21) -- AS 22.15.160;

Alaska Employment Security Act -- def. of "employment" (21) -- AS 23.20.525(c)(10);

Real Estate Commission (26) -- AS 08.88.041;

Fraternal benefit society benefits (21) -- AS 21.84.210.

You may or may not wish to include amendment of these provisions in the bill.

Do not Bring

A.
Art

P. S. You will also find attached a work copy of the bill showing changes the Jud. CS makes in the H, W & E CS.

Q.

3/10/70

JUDICIARY COMMITTEE REPORT

ON

CS FOR HOUSE BILL NO. 406

This bill emanates from the December 1966 report prepared by the Legislative Affairs Agency, entitled "The Law and Age in Alaska". In suggesting a review and revision of many of the laws relating to age, the author of that report states: "Special attention should be given to the areas where a distinction is made between a minor and an adult. One glaring oversight recurs in those laws which simply overlook the fact that in Alaska the age of majority is age 19 (AS 25.20.010) and that the state constitution (Art. V, Sec. 1) establishes age 19 as the voting age. AS 25.20.010 is derived from Sec. 20-1-1, ACLA 1949, as amended in 1959. Prior to 1959 the legal age was age 21. Consequently, the pre-1959 legislation which has not been revised to reflect the new standard is inconsistent with it. Moreover, some of the post-1959 legislation appears to be based on the erroneous assumption that age 21 was still the determining age."

The bill attempts to remove the legal uncertainties and inconsistencies leading to anomalies such as the following one mentioned by the author of that report: "In Alaska, a 20-year old borough assemblyman or city councilman who may incorporate a cooperative, devise by will, convey land, and donate his eyes to a hospital, must have the written consent of his parents to get married." The bill attempts to accomplish this clarification by making all specifications of age which appear to be based on the adult/minor distinction a consistent 19, and by deleting age specifications considered to be unnecessary. The age requirements for the governor (Alaska Constitution, Art. III, Sec. 2), the secretary of state (Ak. Const., Art. III, Sec. 7), legislators (Ak. Const., Art. II, Sec. 2; AS 24.05.030), and district judges and magistrates (AS 22.15.160) are not changed by the bill. The differences between the committee substitute proposed by the Judiciary Committee and the one proposed by the Health, Welfare and Education Committee are set out below.

Sectional analysis.

Sections 1 and 2 deal with the citizen consent required for the issuance of a liquor license. Since 19-year olds may vote and sign petitions for initiative and referendum, etc., it is appropriate that they be permitted to register their opinion as to the issuance of a liquor license.

Section 3 provides for persons 19 and 20 years old to share in the responsibility of jury duty.

Section 4 allows persons 19 and 20 years old to incorporate business corporations. They are presently allowed to incorporate cooperatives (see AS 10.15.335).

Sections 5, 6, 7 and 8 lower the age requirement for, respectively, special police officers who meet other requirements, insurance brokers and agents, insurance adjusters, and persons authorized to serve subpoenas.

Section 9 allows men who have reached the age of majority to get married without their parents' consent. The Judiciary Committee substitute provides equal treatment for women on this point, by raising the age from 18 to 19.

Sections 10 and 11 make the poll tax provisions in the chapters dealing, respectively, with first and second class cities apply to persons 19 and 20 years old as well as older persons.

Sections 12 - 17 correct provisions relating to the handling of minors by the court and the Department of Health and Welfare. These provisions presently contain phrases such as "the day the minor becomes 21", which are ambiguous. Under existing law a person is no longer a "minor" when he reaches 19 years of age, and the statutes being amended in these sections could be simply overlooking that fact; however, the statutes could mean that supervision over the person who was a minor when originally dealt with by the court may continue for two years after he reaches his adulthood. The bill removes this ambiguity by specifying age 19 and providing for an additional year of supervision when approved by the court for persons who have not responded to treatment during their minority. Section 12 of the Judiciary Committee substitute corrects a typographical error which occurred in the earlier substitute: on page 3, line 14, the "19" should be underlined. In Section 17, a reference to "a child in need of supervision" has been included to take into account the provisions of FCCSSB 76, which was adopted by the Senate on February 26, 1970 and by the House on March 6, 1970.

Sections 18 - 24 deal with the sale of alcoholic beverages by and to persons 19 and 20 years old, thus bringing these statutes in line with the duties and responsibilities imposed upon and assumed by persons of that age. The Judiciary Committee substitute changes sections 20 and 24 to make them conform to CSHB 586, which passed the House on March 5, 1970, as well as to other amendments in this CSHB 406.

Section 25 repeals minimum occupational age requirements which are unnecessary, as follows: law (AS 08.08.130(2)), basic sciences (AS 08.16.140(1)), chiropractic (AS 08.20.120(1)), dentistry (AS 08.36.110(1)), physical therapy (AS 08.84.030(1)), real estate brokers and associate brokers (AS 08.88.211(a)(3)), and veterinary medicine (AS 08.98.170(2)). The Judiciary Committee substitute adds a repealer of three subsections (AS 21.42.080(b), (c) and (d)) dealing with insurance contracts; these three subsections refer to "a minor of the age of 19 years or more": since there are no minors over age 19, these three subsections should not have been enacted (as they were, in the 1966 revision of AS 21).

Barry W. Jackson, Chairman

HB-398

March 11, 1970

Mr. Nissel A. Rose
Attorney at Law
913 West Sixth Avenue
Anchorage, Alaska 99501

Dear Mr. Rose:

Thank you for your letter of March 4 regarding HB-398 (administrative adjudication hearings).

Upon consideration of that letter, the House Judiciary Committee has decided to defer action on HB-398 and is asking the Legislative Affairs Agency to correspond with you and the Department of Law in the preparation of a somewhat more comprehensive revision of the adjudication provisions of the APA.

The staff work on this will have to be done between legislative sessions. Presumably, a new bill could be ready for introduction next session.

Sincerely,

Barry W. Jackson, Chairman
House Judiciary Committee

cc: John M. Elliott, Exec. Dir.
Legislative Affairs Agency

Thomas M. Wardell
Deputy Attorney General

BWJ/mm

NISSEL A. ROSE
ATTORNEY AT LAW

913 W. 6TH AVENUE
ANCHORAGE, ALASKA 99501
PHONE: 272.1181

Xerox 10 copies for Mar 9

March 4, 1970

Honorable Barry W. Jackson, Chairman
House Judiciary Committee
Box 5
Juneau, Alaska 99801

Dear Mr. Jackson:

Thank you for your letter of February 25, 1970, concerning House Bill No. 398 "An Act relating to administrative adjudication hearings under the Administrative Procedure Act". As of the time of this writing, neither the Administrative Law Committee of the Alaska Bar Association or a member of it has prepared to take on the task of research and preparation of the bill as suggested by your letter. You indicate that neither the members of the Judiciary Committee nor the committee's staff counsel would have the time to research and prepare such a bill. The problem of time is just as much a pressing one for the members of the Alaska Bar Association who must attend to their law practice. Our Administrative Law Committee has expressed a willingness to cooperate with the Lesiglature, or any of its committees, or the Legislative Affairs Agency, but not to undertake the task of actually drafting the legislation. Our committee met on various occasions in 1969 and submitted reports which were forwarded to the Bar Association and to the Legislature and, again on January 24, 1970, relative to House Bill 398. Every member present had read HB 398 and over a half hour of discussion was taken up at the outset of that meeting before it was finally decided simply to set HB 398 aside and make positive recommendations for action.

AS 44.62.360 provides for verification whereas this outmoded and cumbersome tool has been discarded in nearly all of our court practice. Counsel is guided by the cannons of ethics concerning the filing of any pleadings on behalf of a client, and there ought to be no requirement for having the client come into the office for the purpose of signing a verification. The accusation may be filed by a third party, but under (3), may be by a public officer acting in his official capacity or by an employee of the agency. The memorandum of March 17, 1969, states that the bill proposes distinction based upon who initiates the proceedings, but AS 44.62.360(3) still provides for a public officer or an

employee of the agency making an accusation. That is not too different from the statement of issues provided by AS 44.62.370 inasmuchas an agency cannot act except through a public officer or an employee.

HB 398 provides for a hearing requested by the applicant under AS 44.62.375. That hearing appears to be in the nature of an appeal from a denial or a determination, revocation, suspension, limitation or condition. The procedure apparently ignores proceedings such as those held before the Public Service Commission or the Alaska Transportation Commission where notice to interested parties and hearing precede action by the agency.

The accusation prosecuted by a third party is remindful of private prosecution in a criminal matter when the District Attorney's Office refuses or is unable to act. The difference appears to be that when a third party feels that action ought to be taken against an applicant or the holder of some authority or right, the expense and responsibility of prosecuting the action seems to be placed upon the third party rather than upon the agency charged with enforcement. It seems that once an agency has been made aware of violations or irregularities, perhaps under sworn statement, it should then be incumbent upon the agency to initiate either investigation or prosecution, otherwise, the prosecution and enforcement become the job and responsibility of the public and not of the agency charged with it.

The service of process provided by AS 44.62.380(c) is vague and dangerous for the protection of the rights of persons affected in that it provides that the accusation and all accompanying information may be sent to the respondent by any means selected by the agency.

When summary action is contemplated under AS 44.62.385 it ought to be in the nature of a Temporary Restraining Order accompanied with an Order to Show Cause why the action should not be continued in effect, as provided by the rules of Civil Procedure for Temporary Restraining Orders.

AS 44.62.390(a) should make it possible for the agency to grant additional time for good cause shown.

The above are not in any way exhaustive comments on the contents of HB 398, but are merely some of the comments raised in the Administrative Law Committee meeting which led to the conclusion that passage of HB 398 would result in an unsatisfactory patch-up job. Instead, it was the committee's unanimous feeling that a comprehensive revamping of the statute must be undertaken.

I regret that the press of business does not permit me to expend the time for a more detailed analysis and commentary of HB 398 at this time.

Very truly yours,

Nissel A. Rose, Chairman
Administrative Law Committee
Alaska Bar Association

NAR:ct
cc: Warren Christianson, President
Mrs. LaFollette, Executive Director
Alaska Bar Association
Tom Wardell, Deputy Attorney General
Shirle Debenham
Members of Administrative Law Committee

February 25, 1970

Mr. Nissel A. Rose
Attorney at Law
913 West Sixth Avenue
Anchorage, Alaska 99501

Dear Mr. Rose:

Your January 29 letter to Stanley Cornelius, with the accompanying report of the January 24, 1970 meeting of the Administrative Law Committee of the Alaska Bar Association, has been distributed to the members of the House Judiciary Committee. The report indicates that your committee considered House Bill No. 398, "An Act relating to administrative adjudication hearings under the Administrative Procedure Act," as not being sufficient revamping of the APA.

While your point is well taken, House Bill 398 deals with a problem that seems to be especially acute. This Bill proposes technical changes that appear to be one reasonable solution to the confusion surrounding and the inadequacy of the APA provisions for "accusations" and "statements of issues". We invite your analytical and critical remarks concerning the various provisions of this Bill.

With regard to the comprehensive revamping you suggest, we have noted the 23 points mentioned in your report and we would suggest that your Administrative Law Committee prepare a bill embodying your suggestions, submitting it to me or to the Legislative Affairs Agency. Neither the members of the Judiciary Committee, nor the committee's staff counsel would have time to research and prepare such a bill during the legislative session. That is the sort of project that is best accomplished between sessions. As you know, certain members of the staff of the Legislative Affairs Agency have been working on a long-term project revising the Alaska Administrative Code and the Administrative Procedure Act; I know that they would welcome your comments and suggestions regarding any aspect of that project. Hopefully, an appropriate bill can be introduced in the First Session of the Seventh State Legislature.

We appreciate the assistance of you and your committee. Thank you.

Sincerely,

Barry W. Jackson, Chairman
House Judiciary Committee

BWJ:mm

file Re HB 398

NISSEL A. ROSE
ATTORNEY AT LAW

913 W. 6TH AVENUE
ANCHORAGE, ALASKA 99501
PHONE: 272-1181

29 January 1970

The Honorable Stanley Cornelius
House of Representatives
Juneau, Alaska 99801

Dear Stan:

The enclosed report of the Administrative Law Committee includes our recommendations concerning the adjudicatory aspects of a revised A.P.A. You had asked me for suggested changes to be made. Now you have them. May I hear from you at your earliest convenience?

Sincerely,

Mike

Nissel A. Rose

NAR:sfc

Enclosure

REPORT OF THE CHAIRMAN OF THE
ADMINISTRATIVE LAW COMMITTEE

The Administrative Law Committee met regularly on call at the Harbor House on Saturday, January 24, 1970, at 10:00 a.m. The meeting was adjourned at 12:50 p.m. Present were the following: Nissel A. Rose, Chairman, Robert A. Hahn Jr., Andrew E. Hoge and Herbert A. Ross. Mr. Pree had previously advised that he would be unable to attend.

The committee members had been previously furnished by correspondence with the January 2 letter from Thomas M. Wardell, copy of the December 24, 1969 letter from Arthur H. Peterson to Thomas M. Wardell, copy of the March 17, 1969 memorandum from Arthur H. Peterson and Joel F. Bennett to the Legislative Council, and House Bill 398 "An Act Relating to Administrative Adjudication Hearings Under the Administrative Procedure Act."

The committee members were all of the impression or belief that House Bill 398 amounted basically to patching up the existing Administrative Procedures Act instead of revamping it. After a number of analytical, critical remarks concerning various provisions and aspects of House Bill 398, the committee preferred to recommend action along the lines discussed in our previous meetings and reports of 1969 and in the resolution adopted by the Alaska Bar Association Convention at Nome in 1969. The following are recommendations of the committee for items to be included in a revised APA to be adopted in the future:

1. All agencies should be brought under provisions of the Administrative Procedures Act as revised, inasmuch as possible without exception. In this respect, procedures should be established to provide for the various types of administrative matters coming before the panoply of agencies. The present and past tendency of exempting more and more agencies from the applicability of the APA creates a multiplicity of procedures, a lack of uniformity of policies and defeats the original purpose of adopting an APA.

2. All adversary hearings should be presided over by a hearing officer duly qualified as an attorney admitted to practice in Alaska, even when a matter is to be considered by agency head or heads in the first instance, unless the agency member, or one of them, qualifies in all respects as a hearing officer, that is to say an attorney admitted to practice in Alaska, with expertise in the particular administrative field involved.

3. Hearing officers should be removed physically and jurisdictionally from the agencies at whose hearings they

will preside. This feature is similar to the California Plan. For administrative purposes, the hearing officers could be housed under an administrative procedures division of the Department of Revenue since that agency does not hold administrative hearings.

4. Agency staff (as opposed to agency heads such as commissioners) should be made a party to all adversary hearings, participating therein to the extent deemed necessary by the staff. When so participating, the staff would be represented by counsel.

5. Staff counsel who has advised the staff relative to a pending matter or participated therein in any manner must not advise the agency or participate in agency deliberations concerning such matters. When the agency requires legal advise, such should be provided by other counsel appointed for the purpose.

6. Jurisdiction and authority of hearing officers should be clearly delineated, particularly authority to issue subpoenae and subpoenae duces tecum, and means to enforce his lawful orders.

7. A hearing officer should be required to render proposed decisions within a stated limited time such as 90 days from the time a matter is ripe for decision, failure to comply being enforceable by mandatory injunctive proceedings in court.

8. Hearing officers'/proposed decisions should become agency actions if not opposed or appealed by a party or changed by the agency, sua sponte, within 30 days from the date of promulgation.

9. For good cause shown, either on application by a party, or because the agency considers it necessary, an agency may consider a matter directly in the first instance, the hearing thereon to be presided over by a hearing officer or qualified member of the agency as provided above.

10. No ex-parte communications should be allowed concerning any pending adversary matter with either the hearing officer or with any agency member without prior notice to the other parties.

11. Throughout these recommendations, the term "agency member" refers to a person such as the head of an agency or a commissioner, in other words, any person who is required to participate in the final decision making.

12. Final administrative determination of any pending adversary matter must be rendered by an agency not later than 6 months from the time when the matter is ripe

for decision making; failure to comply being cause for suspension of pay of the agency members concerned.

13. For those agencies which may be required to issue emergency permits, such should be issuable for not more than 10 days, and renewable for not more than an additional 10 days, for a maximum of 20 days. Such emergency permits should be issued only to meet actual emergencies such as fires, disasters, or the like, emergency permits being distinguished from temporary authority.

14. Temporary authority (such as permit, license, certificate of public convenience and necessity, or any other means of obtaining a right) may be granted without hearing in the first instance, provided that public notice, including notice to interested parties, be provided within 10 days from the date of such application and that opportunity for hearing, even on short notice if necessary, be provided.

15. Hearing officers and agencies should have a choice of a number of means to enforce their orders such as the following:

Imposition of

A. Civil sanctions up to $100.00.
B. Consider adversely against the party concerned evidentiary matter which has been ordered produced but has not been so produced.
C. Dismissal of the party's case.
D. Enforcement of orders through mandatory injunctive proceedings and contempt in court.

16. Grant agencies and hearing officers the power to assess costs in limited instances. An example of such an instance is as follows: Applicant appeared at hearing but is not adequately prepared and seeks continuance of the matter so as to make a better presentation. Other parties are present and ready to go. The grant of applicant's request for continuance could be made subject to his payment of costs to the other parties for the wasted appearance. Such could include witness fees, travel costs for witnesses, and the like. It would then be up to the party seeking the continuance to decide between dismissal on the one hand and continuance with payment of costs on the other hand.

17. All proceedings should be recorded magnetically or through any other means adequate for the purpose, so that a transcript can be made therefrom. Transcripts should be provided at the request of any party, the requesting party to pay for the costs of the original to be provided to the agency and of his own copy. Other parties may obtain copies at their cost.

18. Interlocutory appeal or review from any hearing officer action may be had by any party on application within 10 days from such action. Such matters should receive

priority, with agency action thereon to be on the record only and without oral argument and agency determination being made not later than 20 days from the date of the action appealed from, unless additional time is granted by the agency, total time elapsed not to exceed 30 days in any event. Failure to so appeal or seek review should not prevent the raising of the issue before the agency upon conclusion of the case before the hearing officer.

19. Rules of administrative procedure, to include administrative rules of evidence such as the uniform rules or the model code, should be adopted to be applicable to all agencies. Additional implementing procedures may be promulgated by an agency where necessary in the manner provided for the adoption of rules by the APA.

20. Liberal discovery should be allowed.

21. A form of modified procedure should be allowed whereby direct testimony would be provided in writing, distributed to the parties and filed in the record, subject to cross examination at the time of the hearing. This procedure could shorten hearing time considerably.

22. An agency may proceed to a hearing on an Order of Investigation in a manner consistant with these rules and in a manner consistent with this chapter. As with the rules of civil procedure, rules and procedures provided hereunder may be relaxed or dispensed with by a hearing officer or agency where it shall be manifest that a strict adherence to them will work injustice.

In addition to the foregoing, the committee considered the advisability of less formal proceedings in the initial consideration of rates and tariffs handled through a duly qualified rate specialist rather than a hearing officer. No conclusions were reached on this subject, but further recommendations will be made at a future time.

Respectfully submitted,

Nissel A. Rose

cc: All Committee Members

Alaska Bar Association

Warren Christianson

STATE OF ALASKA
THE LEGISLATURE

Jackson work copy

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

LEGISLATIVE AFFAIRS AGENCY

March 17, 1969

M E M O R A N D U M

TO: The Legislative Council

FROM: Arthur H. Peterson, Revisor of Statutes
and
Joel F. Bennett, Legislative Counsel

SUBJECT: An Act relating to administrative adjudication hearings under the Administrative Procedure Act. — HB 398

Section 3 is the heart of this bill. It provides clearly for an administrative hearing when requested by an applicant whose application for a right, etc., is denied, or whose existing right, etc., is revoked or suspended. Sections 1 and 2 are the basic companion provisions, and most of the other changes proposed by the bill merely conform the rest of the APA to the new provisions in sections 1 - 3.

Presently the sections of the APA relating to the initiation of hearings are awkward and confusing. There is a distinction between an "accusation" (AS 44.62.360) and a "statement of issues" (AS - 44.62.370) on the basis that the former deals with revoking, suspending, limiting or conditioning a right, etc., while the latter deals with granting, issuing or renewing a right, etc. This distinction is not realistic (in addition to being confusing) because an "accusation" is as appropriate to issuance as it is to revocation, and a "statement of issues" is as appropriate to revocation as it is to issuance. So the bill proposes a distinction based upon who initiates the proceeding (with a third party filing an accusation, and an agency serving a statement of issues) rather than upon the results of the agency action.

In addition, the existing AS 44.62.370(c) allows for a hearing to be requested by the person applying for a right, etc., but does so only in a backhanded manner which is further confused by referring to him as the "respondent". This term and the statement of issues may be appropriate in some cases but are not in others. The bill clarifies this

Section 5 proposes a new provision to protect a person while he is pursuing his administrative and judicial remedies. Section 7 is partly clean-up and partly a change giving a person the opportunity to file an answer to a new charge against him. The first part of section 9 seeks to broaden the APA administrative adjudication notice provision in order to more appropriately handle the variety of proceedings required to be conducted in accordance with the APA.

NO.4

HB

To Gail
1-23-70

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 414

The present penalty for simple assault and battery is a fine of not more than $500 or imprisonment for not more than six months or both. Recognizing that in the lawful performance of their duties peace officers subject themselves, on behalf of the public, to greater dangers than other citizens, and thus need the protection of a somewhat greater statutory deterrent, this bill increases the penalty for assault and battery on a peace officer to a maximum fine of $1,000 (with a minimum of $100) or maximum imprisonment of one year or both fine and imprisonment. This modification of the penalty for the lesser included offense of simple assault and battery applies, however, only when the officer is acting in the line of duty and gives evidence that he is a peace officer; the bill states that a badge, identification card or uniform is sufficient evidence to identify a peace officer for the purpose of this statute.

Barry W. Jackson, Chairman

FORM SA-1B

HB-430

MEMORANDUM State of Alaska

TO: Honorable Barry Jackson, Chairman
House Judiciary Committee

THRU: Mel J. Personett, Commissioner
Department of Public Safety

DATE : January 21, 1970

FROM: Captain R. L. Burton RLB
Commander, Southeast Region
Alaska State Troopers

SUBJECT: Legislation
House Bill 430
Our File - 150

I have been asked to comment on House Bill 430 which would transfer the responsibility for Search and Rescue to the Department of Public Safety from the District Court System.

From a practical standpoint, I feel this is the only way to proceed.

This is more necessarily a police function due to the investigation required to determine the circumstances surrounding a disappearance and the deaths which often occur in cases of this type. Inquiry by the courts should be done as a judiciary proceeding based upon the investigation by the police. The way it is presently done requires the courts to participate in a non-judicial function and they have to take action in a matter that should be a responsibility of the executive branch.

This I feel creates a conflict of executive and judicial functions, i.e., when a case results into an inquiry by the use of a coroner's jury.

From an investigative standpoint, this present system quite often creates obstacles. As an example, a disappearance is reported to a magistrate in one of the outlying villages and the magistrate orders a local group of volunteers to conduct the search. This group may search for several days and in the end find either that there is no trace of the victim or recover the body.

At this time, it has happened that the police are required to start an investigation which has at best left a cold set of facts, or the police are never notified except when we read about the case in the newspaper.

This has happened particularly with the Coast Guard who have conducted searches, canceled the search, did not notify the police, and did not file a copy of their investigation with the court. There are actual cases of people who are missing and presumed dead of whom the court nor vital statistics have any record. What this does to the relatives and estates left by the deceased is certainly something that should not occur in today's society.

don't worry about this

I feel that Section 120 should be amended to require that all persons and agencies should be required to report the need for a search and the findings of their search efforts to the Commissioner even though this agency does not actively participate in the search. Note

The State Troopers do not have the equipment or manpower to physically conduct every search nor do I feel is this the intent of the law. However, I do feel that we should receive this information from agencies such as the Coast Guard. I feel that although their searches often take place in large open areas of water that this is still in the State of Alaska and the people are our citizens and we have a responsibility to take care of these matters and at least see that some record is made of a person's disappearance.

Presently we are attempting to operate along these guidelines but due to the rotation of personnel in the Coast Guard verbal agreements with one commander are quickly forgotten when he leaves.

We are presently responsible for payment of rescue funds to civilian groups but have very little control of the money expended or the equipment purchased.

I would also like to see a section added to the Bill which would give the Commissioner power to promulgate rules and regulations necessary to carry out the functions required in search and rescue (i.e. all non-expendable property purchased during a rescue mission would become the property of the state, property is to be inventoried and warehoused for use on future searches, etc.).

The rules and regulations should be under the Alaska Administrative Code and have the effect of law with appropriate penalty provisions.

cc: Honorable Bruce Monroe
Residing District Judge

Honorable Bill Ray
Representative

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 430

This bill simply transfers the responsibility for relief and rescue operations from the district court to the Department of Public Safety. (Section 5 makes an additional, minor change in order to conform to this basic change.) It is believed that the existing statute unnecessarily imposes a non-judicial burden on the court, and that conflicts between administrative and judicial functions would be removed by this transfer of responsibility. The present system also poses problems for the police when a person's disappearance and death necessitate an investigation. Moreover, the Department of Public Safety has the staff and facilities to conduct these operations, which the court does not.

The Judiciary Committee amendment gives the department authority to promulgate regulations reasonably necessary to handle the relief and rescue responsibility, and declares that the violation of one of these regulations is a misdemeanor. It is anticipated that these regulations will be somewhat broader in scope than the ones promulgated under AS 18.60.130 for the guidance of the commissioner's designee in authorizing rescue parties and their expenses.

Barry Jackson, Chairman

1/28/70

A M E N D M E N T

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: HOUSE BILL NO. 430

Page 2, between lines 23 and 24: Insert

* Sec. 5. AS 18.60.160 is amended to read:

Sec. 18.60.160. VIOLATION [FAILURE TO REPORT] A MISDEMEANOR. A person who fails to report a disappearance under sec. 150 of this chapter, or who violates a regulation promulgated under sec. 175 of this chapter, is guilty of a misdemeanor.

Page 2, Line 24: Change "Sec. 5" to read "Sec. 6"

Page 3, Line 9: Insert

* Sec. 7. AS 18.60 is amended by adding a new subsection to read:

Sec. 18.60.175. REGULATIONS. The Department of Public Safety shall promulgate regulations necessary to carry out the duties assigned by secs. 120 - 170 of this chapter, specifically including regulations dealing with the handling of nonexpendable property purchased during a search or rescue mission. These regulations shall be promulgated in accordance with the Administrative Procedure Act (AS 44.62).

File

HB 432

Alaska Court System

State of Alaska

ROBERT H. REYNOLDS
ADMINISTRATIVE DIRECTOR
RAYMOND W. GREGORY
ASSISTANT ADMINISTRATIVE DIRECTOR
ERNEST Z. REHBOCK
LEGAL ASSISTANT

OFFICE OF ADMINISTRATIVE DIRECTOR
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

March 6, 1969

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Capitol Building
Juneau, Alaska 99801

Dear Representative Jackson:

When District Judge Bruce Monroe was in Anchorage last week he indicated to Chief Justice Nesbett that he had been requested to testify before the House Judiciary Committee concerning various proposals affecting the district courts, among which was that of increasing the civil jurisdiction of these courts from $3,000 to $10,000. The Chief Justice has requested that I state his position on the latter.

I enclose herewith a copy of a letter from Chief Justice Nesbett to Senator Ted Stevens, who was House Majority Leader last session. The various statistics and other comments made at that time are just as appropriate today.

In the closing paragraph of the Chief Justice's letter he pointed out that the present program of improving the caliber of our district judges has not been fulfilled. This is also true today, as the Judicial Council and the Governor were unable to secure sufficient qualified applicants to fill all of the vacant positions on January 1, the date when such would have otherwise been possible.

It should be pointed out that the caseloads of the presently constituted district courts are misleading as a gauge of the amount of work they do. In addition to cases filed in their courts, they serve as coroners and public administrators. They are also charged with the responsibility of supervising or actually performing the duties of recorder of public records. They are

further charged with maintaining and supervising vital statistics for the state of Alaska, and most of them from time to time hear Superior Court cases of all types in the capacities of special and standing masters of the Superior Court. The aforesaid administrative and judicial functions are not readily apparent in the statistical reports.

On the other hand, the case records of the Superior Court reflect almost all of the volume of work they perform. As the Chief Justice pointed out, it would therefore seem that if the object of raising the jurisdictional limits of the district courts was for the purpose of relieving the Superior Courts, it would be well to consider whether it is not a better policy to allot the more important jurisdictions to the more capable and experienced judges, and to increase the number of Superior Court judges where appropriate and where the caseload statistically demonstrates the need.

Sincerely,

Robert H. Reynolds

Robert H. Reynolds
Administrative Director

RHR:pga

Supreme Court
State of Alaska
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE

January 19, 1968

Hon. Ted Stevens
House Majority Leader
Alaska State House of Representatives
Capitol Bldg.
Juneau, Alaska 995801

Dear Representative Stevens:

This is a follow-up on our telephone conversation concerning HB 229 which would increase the jurisdiction of district judges from $3,000 to $10,000.

In order to determine the impact this legislation would have on district court calendars, a detailed analysis of the prayers of all complaints filed in the superior court in Anchorage for the months of January, June and November of 1967 was made. These figures were then related to the total filings in that court for 1967 to obtain approximately representative figures for that year.

The final figures obtained indicate that if HB 229 were enacted it would result in an annual increase in the case load of the district court at Anchorage of 448 cases. If the cases involving less than $3,000 which are annually filed in the superior court, even though they might have been filed in the district court instead, are added, the above figure would be increased by 136 cases to 584 cases.

As of December 1, 1967 the total of the cases pending in the district court in Anchorage was 1490. The total of pending cases on January 31, 1967 was 1536. While it is obvious that the total of pending cases has been reduced by 46 over the period of a year, what is not obvious is the increased calendaring and trial effort made in that court throughout the year in order to cope with the backlog and keep the rate of disposition even with the rate of filing. Adding an additional 558 more important and difficult cases to the present backlog of the district court would appear to aggravate rather than alleviate the overall court calendaring problem for it would

increase the number of pending cases per judge in the district court to approximately 500 per judge (there are only 4 available judges since 1 judge spends full time in city court) and at the same time decrease the number of pending cases per judge in the superior court to approximately 450. It is believed that approximately the same ratio would hold for Fairbanks.

Also to be considered is the fact that the superior courts of Ketchikan, Juneau and Nome are not in need of additional judicial assistance. The district courts in those cities are already far busier than the superior courts since they handle all minor cases for the city, borough and the state as well as arraignments, coroner duties, recording, etc. etc.

Another factor to be considered is the fact that, by and large our district court judges, outside of Anchorage and Fairbanks, are not suited because of a lack of either education or experience, or both, to handle the more important and complicated civil cases. For example, three of our district judges have had no formal legal training (Nome, Juneau and Bethel), four, including those just mentioned, are not members of the Alaska Bar. Many others are still very inexperienced (Ketchikan, Juneau, Sitka and Kodiak).

I strongly urge that HB 229 not be given serious consideration, at least until the present program of improving the calibre of our district judges has been fulfilled. Even then it would be well to consider whether it is not a better policy to allot the more important jurisdictions to the more capable and experienced judges and increase the number of superior court judges where appropriate.

Sincerely yours,

Buell A. Nesbett

Buell A. Nesbett
Chief Justice

cc: Rep. Tom Fink
Rep. Gene Guess
Robert H. Reynolds

H-432

Alaska Judicial Council
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

February 4, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Alaska House of Representatives
Pouch V, State Capitol
Juneau, Alaska 99801

RE: House Bill No. 432, An Act Relating to Jurisdictional Amount in the District Court ($7,500)

Dear Representative Jackson:

Pursuant to your request of Thursday, January 29, 1970, I am hereby outlining the Alaska Judicial Council's position on the above numbered House bill.

At the morning meeting of the Judicial Council on January 29, 1970, the Alaska Judicial Council passed the following motion:

> The Alaska Judicial Council hereby endorses, in principle, the proposition of raising the monetary jurisdiction of the District Court in Alaska from $3,000 to $7,500, as provided in House Bill No. 432 now pending in the Legislature of the State of Alaska; provided, that such jurisdiction should be concurrent with that of the Superior Court.

It was brought to the Council's attention that there was support in some quarters for exclusive jurisdiction of amounts up to $7,500 in the District Court. If an exclusive jurisdictional feature were incorporated into the law, such would tend to diminish the flexibility necessary for the Alaska Court System because of the remote Court locations.

The Council considered that, with the necessary addition of Superior Court Judges now being considered by the Legislature, some such Judges might be located in areas not served by resident District Court Judges. In such situations, it is believed in the public interest that the Superior Court Judges might entertain cases involving less than $7,500.

Furthermore, it was the Council's opinion that the Superior Court should have the authority to transfer such cases between the Courts, either up or down, whenever such might appear expeditious and in the interest of the administration of justice.

Sincerely,

Robert H. Reynolds

Robert H. Reynolds
Secretary
Alaska Judicial Council

RHR/grg

cc: The Honorable Terry Miller,
Chairman, Senate Judiciary Committee

The Honorable John H. Dimond,
Acting Chief Justice, Supreme Court

All Members, Alaska Judicial Council



Barry Jackson
Ed Orbeck
W. Kay

District Court
State of Alaska
FOURTH JUDICIAL DISTRICT
604 BARNETTE STREET, ROOM 313
FAIRBANKS, ALASKA
99701

January 29, 1970

Mr. Edmund Orbeck
House of Representatives
Alaska State Legislature
Juneau, Alaska 99801

Re: HB 432

Dear Ed:

The action proposed in HB 432 seems to be a substantial step in a positive direction. Whether the jurisdictional amount should be $7,500.00 or $10,000.00 (thus letting the normal whiplash auto injury case be tried in the district court), is a policy best left to the Bar Association and the Legislature.

Because of the tremendous number of cases that bounce from the district court to superior court and back again, sometimes five or six times, it occurs to me that the wording in section 22.15.030 could be cleared up quite a bit. Assuming for the moment a $7,500.00 jurisdictional limit, might I suggest that section 22.15.030, except for subsections 5 and 7, and section 22.15.050 be eliminated and substitute in their place wording to the following effect:

> "(1) All proceedings at law or in equity where the amount in controvery or value of any specific item sought to be recovered does not exceed $7,500.00. In a forcible detainer case the total sum alleged to be due as rental and damages shall be deemed to be the amount in controversy."

I would hope that a proposal such as this would greatly simplify our jurisdictional problems. In any event, I forward same in case it is of any use.

Many thanks for taking the time to consider my thoughts.

Sincerely,

Arthur Lyle Robson
District Judge

ALR/bls

HB 442

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

February 2, 1970

The Honorable Barry Jackson, Chairman House Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Re: Inheritance Tax -

Dear Representative Jackson:

Pursuant to your request I am setting forth below a few of the problems involved in the existing Alaska State Inheritance Tax Act.

The existing inheritance and transfer tax statute (AS 43.30) was passed in 1919 and has had very little change since that date. At the time it was passed there were very few inheritance or estate taxes on the books of governments in the United States. This probably accounts for some of the vagueness and indefiniteness of the act. The act's vagueness makes the tax inequitable in its application and a nightmare to both the Department of Revenue and to attorneys and accountants who try to understand it.

The Act as it has been administered in past years has been applied prinicpally to property probated in court. However, the literal reading of the statute would apply to almost all types of transfers. Applying it to probate proceedings while allowing revocable trusts, insurance and joint tenancy property to escape the tax causes gross inequities. Attempts to apply it to other types of transfers causes an endless number of administrative problems and can result in harsh results since the state exemption is only a maximum of $10,000 as compared to a $60,000 or larger exclusion under the Federal estate tax law.

At the present time there is a case pending in the Superior Court in Anchorage which if decided adversely to the State would result in exclusion from the inheritance tax base of real property sold under contracts of sale. The effect of this would be to reduce the small amount of tax presently collected.

During the fiscal year ended June 30, 1969 only the sum of $106,633.11 was collected from the inheritance and transfer tax.

The Department of Revenue has been under strong pressure from attorneys and accountants to change our law or set out more definite guidelines. Because of the indefiniteness of the law we do not feel that it is practicable to attempt to lay out any significant regulations which will bring stability in the area.

The existing law should either be completely repealed as was recommended in House Bill 442 or an entire new Act should be adopted.

If a new act is passed in lieu of the present law, it is recommended that the approach used by the State of Florida be used. The State of Florida has adopted the Federal estate tax concept with the amount of tax being equal to the Federal estate tax credit. If this act were adopted the State would have received during the fiscal year ending June 30, 1969 approximately $6,969. This would have resulted in a decrease of State revenues of approximately $100,000.

If the Florida approach is adopted practictioners would then file with the Department of Revenue a copy of the Federal estate tax return and pay to the estate the amount of the estate tax credit allowed under the Federal return.

By way of summary it is imperative that the present Inheritance and Transfer Tax chapter be repealed and a new Act adopted.

Very truly yours,

Vernon L. Snow

Vernon L. Snow
Deputy Commissioner

VLS/gc

Form SA-2
100M 7/67 @1

STATE OF ALASKA

Inter-Department Route Slip

TO:
DEPT: House Representatives

ATTN: Barry Jackson

☐ Approval	☐ Note & Return
☐ Signature	☐ Initial & Return
☐ Comment	☐ Return As Requested
☐ Contact Me	☐ Return For Approval
☐ Prepare Reply	☐ Necessary Action
☐ For Your File	☐ Your Information

Remarks:

From:
Dept: Revenue **Date** 2-23-70

By: C. Lofgren

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

February 23, 1970

The Honorable Barry Jackson
Chairman, House Judiciary Committee
Alaska State Senate
Juneau, Alaska 99801

Re: House Bill 442

Dear Mr. Jackson:

Enclosed herewith is a copy of a letter from Lewis J. Conrad, District Director, Internal Revenue Service dated February 4, 1970. It states that in 1968 and 1969 the Federal estate taxes in Alaska were $291,000 and $284,000, respectively. By the records of the Anchorage District Office the returns filed run from 10 to 20 per year.

Using the 1968 collections of $291,000 in Federal estate tax and an average of 15 returns per year the average size of the taxable estate is $95,500 with an average tax of approximately $19,400.

The allowable estate tax credit for taxes paid to a state having an inheritance or estate tax on a taxable estate of $95,500 is $488. Multiplying that figure by 15 returns equals $7,320. This figure approximates the figure of $6,969 computed by our inheritance tax section from actual returns filed for the fiscal year ending June 30, 1969.

Based on the attached Federal estate tax schedule a taxable estate of $1,040,000 would result in a Federal estate tax credit of $38,800. (It should be noted that this is based upon a taxable estate of $1,040,000 and any marital deductions or other deductions would have been taken).

Very truly yours,

Vernon L. Snow
Deputy Commissioner

VLS/ge
Enclosure as noted
cc: Representative Bill Ray
John Beard

US Treasury Department

Internal Revenue Service
P. O. Box 1500, Anchorage, Alaska 99501

February 4, 1970

RECEIVED
FEB 5 1970
DEPARTMENT OF REVENUE
STATE OF ALASKA
JUNEAU

Mr. Vernon Snow
Deputy Commissioner
State Department of Revenue
Pouch SA
Juneau, Alaska

Dear Mr. Snow:

The Commissioner's Annual Report shows that for 1968 $231,000 was collected in Federal estate taxes in Alaska. Comparative figure for 1969 was $284,000. By our records the number of returns filed will run from ten to twenty a year.

I hope this information is of some benefit to you.

Very truly yours,

Lewis J. Conrad

Lewis J. Conrad
District Director

TABLE A

COMPUTATION OF GROSS ESTATE TAX

Taxable estate equal to or more than— (1)	Taxable estate less than— (2)	Tax on amount in column (1) (3)	Rate of tax on excess over amount in column (1) (4)
			(*Percent*)
0	$5,000	0	3
$5,000	10,000	$150	7
10,000	20,000	500	11
20,000	30,000	1,600	14
30,000	40,000	3,000	18
40,000	50,000	4,800	22
50,000	60,000	7,000	25
60,000	100,000	9,500	28
100,000	250,000	20,700	30
250,000	500,000	65,700	32
500,000	750,000	145,700	35
750,000	1,000,000	233,200	37
1,000,000	1,250,000	325,700	39
1,250,000	1,500,000	423,200	42
1,500,000	2,000,000	528,200	45
2,000,000	2,500,000	753,200	49
2,500,000	3,000,000	998,200	53
3,000,000	3,500,000	1,263,200	56
3,500,000	4,000,000	1,543,200	59
4,000,000	5,000,000	1,838,200	63
5,000,000	6,000,000	2,468,200	67
6,000,000	7,000,000	3,138,200	70
7,000,000	8,000,000	3,838,200	73
8,000,000	10,000,000	4,568,200	76
10,000,000	----------	6,088,200	77

TABLE B

COMPUTATION OF MAXIMUM CREDIT FOR STATE DEATH TAXES

Taxable estate equal to or more than— (1)	Taxable estate less than— (2)	Credit on amount in column (1) (3)	Rate of credit on excess over amount in column (1) (4)
			(*Percent*)
0	$40,000	0	None
$40,000	90,000	0	0.8
90,000	140,000	$400	1.6
140,000	240,000	1,200	2.4
240,000	440,000	3,600	3.2
440,000	640,000	10,000	4.0
640,000	840,000	18,000	4.8
840,000	1,040,000	27,600	5.6
1,040,000	1,540,000	38,800	6.4
1,540,000	2,040,000	70,800	7.2
2,040,000	2,540,000	106,800	8.0
2,540,000	3,040,000	146,800	8.8
3,040,000	3,540,000	190,800	9.6
3,540,000	4,040,000	238,800	10.4
4,040,000	5,040,000	290,800	11.2
5,040,000	6,040,000	402,800	12.0
6,040,000	7,040,000	522,800	12.8
7,040,000	8,040,000	650,800	13.6
8,040,000	9,040,000	786,800	14.4
9,040,000	10,040,000	930,800	15.2
10,040,000	----------	1,082,800	16.0

ESTATE OF .....

U.S. GOVERNMENT PRINTING OFFICE 1950—16—77730-1

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

February 27, 1970

The Honorable Barry Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Re: CSHB 442 - Inheritance Tax

Dear Representative Jackson:

It is understood that some consideration is being given to deleting Section 2 (page 22, lines 3-9) of CSHB 442. Our views and reasons why that section is needed are set forth below.

It is important in repealing a law imposing an inheritance tax or estate tax that it is clear what the effective date is and how the estates of persons already deceased are to be taxed. For example, decedents A and B may both die on January 1, 1965. A's estate is probated and an inheritance tax of $10,000 is paid to the state in 1965. The probate of B's estate was not started for several years and it is not yet closed and the inheritance tax has not been paid. Under CSHB 442 the Federal estate tax credit (the new tax) might be $1,000. Is B's estate to benefit $9,000 because of tardiness in probating and paying the estate tax? Using the date of death rather than diligence or tardiness in closing the estate is generally considered the fairest method.

Section 2 on page 22 of CSHB 442 also removes a second related question by removing any doubt whether the new act applies to estates of decedents who died before the effective date of the new act, but have not paid the inheritance tax. Are those estates completely exempt from tax? Since the point of incidence of an estate tax is the time of death, a strong argument could be made that since the old act is repealed it does apply and that the new act applies only to cases where the person dies after its effective date. Unless section 2 is included that group of cases may escape taxation completely.

The legislature may have definite reasons for using a particular effective date and may exclude certain periods from the tax. Whatever is decided in this regard it is suggested that the legislature's desire be made clear in order that the State and the taxpayer know what the law is.

Very truly yours,

Vernon L. Snow

Vernon L. Snow
Deputy Commissioner

VLS/ge
Enclosure: Copy of page 22 of CSHB 442
cc: John Beard

Sec. 43.30.430. SHORT TITLE. This chapter may be cited as the Estate Tax Law of Alaska.

* Sec. 3. The provisions of this chapter apply to estates of decedents dying after 12:01 a.m., Pacific Standard time, on the day after the effective date of this Act, and estates of decedents dying before 12:01 a.m., Pacific Standard time on the day after the effective date of this Act shall be taxed in accordance with the statutes and laws of this state in force before that date, which statutes and laws shall remain in force after the effective date of this Act for this purpose.

* Sec. 4. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

HB-458

FISHER & HORNADAY
ATTORNEYS AT LAW

JAMES E. FISHER
JAMES C. HORNADAY

KENAI PROFESSIONAL BUILDING - P. O. BOX 397
KENAI, ALASKA 99611

TELEPHONE
283-7565

13 February, 1969

Senator Terry Miller
Chairman, Senate Judiciary Committee
Pouch V
Juneau, Alaska 99801

Representative Barry W. Jackson
Chairman, House Judiciary Committee
Pouch V
Juneau, Alaska 99801

RE: Public Defender Legislation

Dear Senator Miller and Representative Jackson:

This is to advise you that the Kenai Peninsula Bar Association has designated as its official representatives the following persons who may have an opportunity to appear before your respective or joint committees on the subject of the "Public Defender" legislation:

James C. Hornaday	week commencing 17th day of February
J. D. Nordale	week commencing 24th day of February

This is to advise you that the designated members are representatives of the Kenai Peninsula Bar Association and authorized to act in our behalf as they deem appropriate at any committee hearings or other conferences held by the Alaska State Legislature.

Thank you for any consideration you may be able to extend to Mr. Hornaday and Mr. Nordale.

Yours truly,

James E. Fisher

JAMES E. FISHER, President
Kenai Peninsula Bar Association

cc: Executive Director, Alaska Bar Association
President Peter LaBate, Anchorage Bar Association

A M E N D M E N T

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: House Bill No. 458

Page 1, Line 10: Change "$46,100" to read "$51,100".

HB 478

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER / POUCH M—JUNEAU 99801

March 16, 1970

The Honorable Jalmar M. Kerttula
Speaker
House of Representatives

Dear Mr. Speaker:

House Bill 478, "an Act relating to mining leases", we believe is a good bill and should be strongly supported by those people interested in the State of Alaska. As the law now stands we have practically no means of preventing a mining leasee from setting on lease property forever without making a serious attempt to develop it. House Bill 478 would therefore serve to stimulate development on mining leases which is what we need to cure a rather sick industry in the State.

As background material, our present regulations require payment of $100 per year or equivalent development work for a mining leasehold as an annual rental. A mining lease is of a maximum of 40 acres. Therefore a minimum rental or work is $2.50 per acre. Work credits can be applied on one leasehold against a group of contiguous leases, therefore for a very small and yearly investment considerable acreage can be retained. If the period of a lease is for a ten year period, a leaseholder, if a lease were of any significance to him, would plan his exploration activity to bring it into production prior to his termination. We feel the new wording in the law would adequately protect a leasee from unreasonable termination of the lease once it was in production.

Under the present law one operator, for a minimum investment of $1.00 per acre, can corner the market on off-shore mining leases and thus cut down the competition to a point where there would be no development unless he considered it of a benefit to himself.

Very truly yours,

Dale Wallington

Dale Wallington
Deputy Commissioner

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER / POUCH M—JUNEAU 99801

March 31, 1970

Representative Barry W. Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Mr. Jackson:

Prior to discussing the Department't support for House Bill 478 entitled "An Act relating to mining leasing", I would like to clarify for the benefit of the Committee several terms which may come up during the discussion of this bill. Section 38.05.205 concerns itself with the leasing of State lands on which locatable minerals are found. Locatable minerals in contrast to leasable minerals are primarily the metallic ores. Leasable minerals as spelled out in Title 38 are coal, phosphates, oil shale, sodium, sulphur, potassium and oil and gas.

Mining claims in contrast to a mining lease permits the rights to deposit of minerals on State land by discovery location and filing on State lands which, on January 3, 1959, were subject to location under the Mining Laws of the United States. A mining claim may be converted to a mining lease at any time the claimant desires by simply making an application to the Department for a mining lease. Mining leases on State lands for locatable minerals are similar to mining claims in that prior discovery, location, and filing initiates a prior right to the mineral deposits.

In contrast to claims and leases, mining permits are at the present time issued only on submerged lands of the State on the basis of the first qualified applicant. Such a permit gives the applicant the exclusive right to prospect for deposits of minerals on the tide and submerged lands of the State. Permits on submerged land may be converted to a noncompetitive mining lease following discovery.

The Department favors the amendment to Section 38.05.205 because we believe it will encourage development on State mining leases. As the statutes now

read, we have practically no means of preventing a mining lessee from holding lease property forever without making a serious attempt to develop it. However, the Department does feel that ten years may be too short a time for the development of a mining lease because of the many intangible factors involved in producing these natural resources. In our opinion, a period of twenty years for mining leases on locatable minerals would be much more feasible.

Very truly yours,

Dale Wallington

Dale Wallington
Deputy Commissioner

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER / POUCH M—JUNEAU 99801

April 13, 1970

The Hon. Barry Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Mr. Jackson:

After doing additional research, I do not feel that HB-478 is worthy of your time and attention. The amount of acreage affected by the mining leasing law under the present statutes or under HB-478 is so minor that it presents no problem under the present law.

The State has selected very little land in the higher elevations where minerals normally occur and, therefore, these areas have not been classified for surface use. The mineral leasing law only affects those lands which have been classified for a surface use such as agriculture, forestry, public recreation, etc. The great majority of the State lands in the locatable mineral areas can be staked as claims and the rights, therefore, are protected without patent or lease. Only after the claim was brought into the advanced stages of production would it be feasible to go to the leasing system.

Very truly yours,

Dale Wallington

Dale Wallington
Deputy Commissioner

FORM 9A-2
100M 6-66

STATE OF ALASKA
Inter-Department Route Slip

TO:
DEPT.: Legislative Affairs
ATTN.: House Judiciary Comm.

☐ Approval	☐ Note & Return
☐ Signature	☐ Initial & Return
☐ Comment	☐ Return As Requested
☐ Contact Me	☐ Return For Approval
☐ Prepare Reply	☐ Necessary Action
☐ For Your File	☐ Your Information

Remarks:

From: Office of the Commissioner
Health and Welfare Bldg.
Dept.: Pouch "H"
Juneau, Alaska 99801
Date 2/10/70

By: [signature]

To File HB48
Wdg Kay

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF HEALTH AND WELFARE

OFFICE OF THE COMMISSIONER / POUCH H — JUNEAU 99801

MEMORANDUM

TO: Chairman, House Judiciary Committee
Chairman, House State Affairs Committee
Chairman, House Finance Committee

FROM: J. W. Betit, Commissioner
Department of Health and Welfare

SUBJECT: House Bill 483 - Fiscal Note

DATE: February 9, 1970

Attached is Fiscal Note relating to House Bill 483.

JWB/JFM/cyb
Attachment
cc: Chairman, Senate Finance Committee
Budget Mgt., Dept. of Admin.

The Legislature of the State of Alaska
FISCAL NOTE
First Session - Sixth State Legislature

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST, POUCH V
___THE LEGISLATIVE FINANCE COMMITTEES' STAFF, POUCH Y
___THE DIVISION OF BUDGET & MANAGEMENT, POUCH C
___RETAIN A COPY FOR YOUR FILES

subject HB 483 SB
requested by Bronson
referred to Judiciary date of request 1-19-70
completion date requested date received

EXPENDITURE DETAIL	FY	FY	FY
100 PERSONAL SERVICES	$602,000	$	$
200 TRAVEL	6,800		
300 CONTRACTUAL SERVICES	101,200		
400 COMMODITIES	160,000		
500 EQUIPMENT	10,000		
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE	15,000		
900	5,000		
TOTAL	$900,000	$	$

FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	900,000		
Man Months	408		
Permanent Positions	34		
Temporary Positions			

FISCAL ANALYSIS The proposed facility is envisioned as containing approximately 45,000 square feet of floor area. Such a facility should provide adequate housing for approximately 125 prisoners.

The personnel services required to staff such a facility would be based on the need to have 4.8 staff for each security post within the facility. A security post is defined as that post which requires staffing on 7 day a week 24 hour a day basis. This would require a minimum of 15 Correctional Officer I male and 7 Correctional Officer I female. These persons would be supervised by 5 Correctional Officer II's acting as shift supervisors. The administration segment of the institution would require a Superintendent and an Assistant Superintendent. The housekeeping functions would be supervised by a Cook and a Maintenance Mechanic III. A Secretary would provide necessary clerical support within the institution. Program would be handled by a Probation Officer II and an Education Specialist. Such a compliment would provide a facility similar to the regional facilities now operated by the State in Fairbanks and Juneau.

The remaining figures presented in the budget are extracted from known operating cost of the facility as envisioned and represent an approximate 10% increase over operating costs of the similar type facility in the Fairbanks area. No note is made as to the possiblity of debt retirement connected with the capitalization of such a facility. Past experience indicates $250,000 per year would be a realistic figure for debt retirement of a $3,000,000 plant.

DATE 1-29-70 SIGNATURE Thomas R. Branton

NAME & TITLE Thomas R. Branton, Administrative Officer

HB 485

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

PUBLIC DEFENDER AGENCY
Pouch AE, Juneau, Alaska
99801

January 26, 1970

The Honorable Barry W. Jackson
Alaska House of Representatives
Juneau, Alaska 99801

Re: House Bill No. 485

Dear Representative Jackson:

House Bill No. 485 is an act creating an Alaska Commission on Judicial, Legislative and Executive Remuneration. Proposed AS 44.19.895 states that among the duties of the commission are determining the appropriate salary levels for Legislators; Justices and Judges of all courts; and the Governor, Secretary of State, Commissioners and Deputy Commissioners of the principal administrative departments, and Directors of the major divisions of these departments. The question arises if the commission should not be empowered to determine the appropriate salary level for the Public Defender.

The Public Defender Agency is within the office of the Governor, however it is not a principal department nor is the Public Defender a director of a major division of a principal department. Your consideration of including the Public Defender as one of the state officials whose salary is determined by the commission is requested.

Very truly yours,

Victor D. Carlson

VICTOR D. CARLSON
Public Defender

VDC:rj

Pub Defender

March 5, 1969

Hon. Chaney Croft, Member
House of Representatives
State Capitol Building
Juneau, Alaska 99801

Dear Representative Croft:

Your letter of March 1, 1969 was received, and in it you referred to a proposed budget for public defender legislation which I prepared at the request of Senator Terry Miller, Chairman of the Senate Judiciary Committee.

Before answering your specific questions, I must explain that the budget which I prepared for Senator Miller was a very rough estimate, prepared in haste due to immediately pending committee hearings. Since that time I have done a more detailed analysis of the various cost factors of the bill and can more adequately answer your questions and those of the respective judiciary and finance committees.

In my original program for personnel, which was not completely arbitrary, I estimated that nine attorneys would be required. They were to be located as follows: 2 in Juneau, 1 in Ketchikan, 3 in Anchorage, 2 in Fairbanks and one, the Chief Public Defender, not located in the submitted draft.

This was based upon the number of court appointed attorneys in the various locations during the calendar year 1968. They

were as follows:

Anchorage District and Superior	184 appointments
Juneau District and Superior	74 appointments
Fairbanks District and Superior	83 appointments
Nome District and Superior	19 appointments
Ketchikan District and Superior	39 appointments

The above represents a total of 418 appointments of counsel for indigent defendants. It is estimated that this will increase with the caseload at an average of 22% per annum, and should cover only those types of cases in which court now appoints counsel. By that we mean that the court appoints counsel normally in felony cases both for preliminary hearings and trials. Occasionally the court will appoint counsel in serious misdemeanor cases but this constitutes less than 5% of the total appointments.

In answer to your question as to whether the recovery factor of the bill would be important, we can only say that our experience in recovery has been almost nonexistent. The National Legal Aid and Defenders Program has also reported that this feature in public defender acts has been most ineffective.

As I intend to send a copy of this letter to both Senator Miller and Representative Barry Jackson, I might as well further clarify my estimate of rental of facilities for these agencies, inasmuch as I apparently overestimated this cost figure by a substantial amount.

Assuming that the Chief Public Defender's Office will require 700 square feet and that a maximum rental should be no more than 55¢ per square foot, his space should come to $4,600.00 rather than the $8,500.00 estimated. Assuming that the Anchorage office will need 1,000 square feet at 55¢ per square foot, this figure will come to $6,600.00 as opposed to the $16,000.00 estimate. Assuming that the Juneau office will require 750 square feet at 45¢ per square foot this facility should cost $4,000.00 as opposed to the $9,000.00 estimate. Assuming that the Ketchikan office will require 350 square feet at 45¢ per square foot, this item would be approximately $2,000.00 as opposed to the estimated $6,000.00. If the Fairbanks facility were to require 750 square feet at 55¢ per square foot, this cost would be approximately $5,000.00 as opposed to the $10,000.00 estimate. If it is necessary to have a facility at Nome then it should be figured roughly at the same cost rate as Ketchikan. It would, therefore, seem that I had overestimated the rental items in the proposed budget by some $22,500.00. I would point out however, that if the office were expanded to provide representation to indigent misdemeanor defendants, then for every additional attorney and secretary there would be required an additional 250 square feet.

The aforesaid items are my own opinions gathered from my own somewhat limited research. However, I would not believe that they are very far off.

It is hoped that these additional figures will be of some benefit to you and the appropriate committees studying the public defender bills.

Sincerely,

Robert H. Reynolds
Administrative Director

RHR:np

cc: Senator Terry Miller
Representative Barry Jackson
Senator Vance Phillips
Representative Bill Ray

HB 485

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

PUBLIC DEFENDER AGENCY
Pouch AE, Juneau, Alaska
99801

January 23, 1970

The Honorable Barry W. Jacksor
Chairman, Judiciary Committee
Alaska House of Representatives
Juneau, Alaska 99801

Re: Public Defender Agency,
Supplemental appropriation.

Dear Representative Jackson:

This letter is the report your committee requested January 22, 1970, concerning the bills for compensation of court appointed attorneys which are obligations of the agency pursuant to AS 18.85.130. The agency has requested a supplemental appropriation of $46,100, $15,000 of which is designated to pay court appointed counsel. The agency submitted its request for a supplemental appropriation on November 5, 1969.

On the enclosure is the list of outstanding bills, amounts, and to the best of my ability a listing of the dates the bills were received.

From the $260,000 appropriation to the agency in the 1969-70 budget the following amounts for court appointed counsel have been paid: $10,931.94 for appointments before July 1, 1969 and $9,466.02 for appointments after July 1, 1969, for a total of $20,397.96.

To date bills have been received but not paid in the amount of $10,268.90 for appointments before July 1, 1969, and in the amount of $5,744.50 for appointments after July 1, 1969 for a total amount owed of $16,013.40.

The total of the bills which had been received but not paid when the request for a supplemental appropriation was submitted was $3,343.93.

There are bills which have not been submitted, and it is impossible to estimate the exact amount which is outstanding.

If there is additional information which you or the members of your committee request, I shall try to furnish it promptly.

Very truly yours,

Victor D. Carlson

VICTOR D. CARLSON
Public Defender

VDC:rj
Enc.

UNPAID BILLS FROM COURT APPOINTED COUNSEL
AS OF JANUARY 23, 1970
Public Defender Agency

Date Rec'd	Attorney	Date Appt'd*	Client	Place**	Amount
10/30	Doogan	b	Ritter	J	$ 250.00
10/30	Rice, et al	b	Bargas	F	312.50
10/30	Rowland	b	Seal	A	680.00
11/4	McVeigh	b	Brown	A	237.50
11/4	Benkert	b	Wedermyre	A	283.50
11/4	Wohlforth	b	Hentges	A	295.43
11/7	Buckalew	b	Kalmakoff	A	54.17
11/7	R. Erwin	b	Fields	A	1,077.58
11/7	Fenton	b	Born	F	130.00
11/20	Reasor	b	Lyon	A	55.00
11/20	Yeager	b	Malcolm	F	75.00
11/20	R. Cole	b	Youmans	F	100.50
11/20	Merdes	b	Bickers	F	95.00
11/21	Johnston	b	Mead	A	180.00
11/21	Christie	b	James	A	69.00
11/21	Christie	b	Scott	A	136.50
11/21	Burr	b	Bushey	A	20.00
11/21	Johnston	b	Balaguer #1	A	25.00
11/28	Biss	b	Lawrence	A	121.67
11/28	Hagans	b	Foster	A	21.25
12/4	Kennelly	b	Nichols	N	220.00
12/4	Walton	b	Kogler	A	970.00
12/10	Phillips	b	Grant	F	52.50
12/10	Johnston	b	Balaguer #2	A	72.50
12/13	Thorsness	b	Lokanin	A	540.75
12/23	Whiting	b	Nukapigak #1	F	100.00
12/26	Josephson	b	Andrews	A	290.00
12/29	Dickson	b	McAvoy	A	55.05
12/29	Wilson	b	Ramer	A	1,057.50
12/29	Johnston	b	Taylor	A	887.50
12/31	Houston	b	Outlaw	A	136.25
12/31	Moore	b	Roberts	A	286.75
12/31	Biss	b	Philo	A	28.75
12/31	Simpson	b	Alexander	A	30.00
1/8	Smith	b	Quick	K	18.30
1/8	Smith	b	Kahklen	K	148.33
1/8	Smith	b	Blackburn	K	101.66
1/8	Reasor	b	Lyon	A	55.00
1/8	Brundin	b	Wilson	A	450.94
1/14	Ellis	b	Bednar	K	12.91
1/14	Ellis	b	Brown	K	201.00
1/14	Ellis	b	Parrish	K	12.91
1/14	Ellis	b	Bernhard	K	164.90
1/19	Ziegler	b	Williams	K	85.00
1/19	Ziegler	b	Wiles	K	70.80
			TOTAL BEFORE JULY 1		$10,268.90

UNPAID BILLS FROM COURT APPOINTED COUNSEL
AS OF JANUARY 23, 1970
Public Defender Agency

Approx. Date Rec'd	Attorney	Date Appt'd*	Client	Place**	Amount
9/15	Stahla	a	Butler	K	$ 1,285.00
12/4	Kennally	a	Ezukameow	N	280.00
12/7	Stahla	a	Melton	K	1,041.25
12/11	Friedman	a	Paquette	A	288.75
12/20	Bradley	a	McKee	J	280.00
12/22	Blanton	a	Martinez	J	787.50
12/23	Whiting	a	Nukapigak #2	F	320.00
1/8	Faulkneretal	a	Hollen	J	200.00
1/14	Ellis	a	Wardel	K	24.50
1/10	E. Williams	a	Kittrell	A	472.50
1/15	Gross	a	Chilton	J	472.50
1/19	Ziegler	a	DeWitt	K	292.50
			TOTAL AFTER JULY 1		$5,744.50
			TOTAL UMPAID		$16,013.40

* "a" Means appointed after July 1, 1969
"b" Means appointed before July 1, 1969

** "K" is Ketchikan
"J" is Juneau
"N" is Nome
"F" is Fairbanks
"A" is Anchorage

JUDICIARY COMMITTEE REPORT

ON

CS HOUSE BILL NO. 485

This bill establishes a nine-man commission whose members are appointed by the executive, legislative, and judicial bodies to review and recommend the salaries for the top officials in each of the three branches of government. The bill calls for the nine-man commission to be appointed within thirty days of the enactment of this bill and that said commission is to report to the Governor by November 10. The Governor may then make changes in the recommendation but the final recommendation shall be made public twenty days after receipt of the commission's report. The salary recommendations of the commission become law unless the House and Senate by a concurrent resolution turn down the commission's report within the first thirty days of the session.

This bill sets up a commission similar to and largely modeled upon the federal commission on federal pay scales.

In addition to this report, the commission shall make a report to the Governor and the Legislature as to its recommendations for pension and retirement programs for legislative, executive, and judicial officers. The pension and retirement recommendations are only advisory and would require action on the part of the Legislature and Governor to become law.

Barry W. Jackson, Chairman

4/2/70

HOUSE JOURNAL

Judiciary Committee Report

on

HOUSE BILL NO. 493

As required by the U. S. Supreme Court's decision in Shapiro v. Thompson, 394 US 618, 89 S Ct 1322, 22 L ed 2d 600 (1969), this bill deletes in five welfare provisions the requirement that the recipient must have resided in the state for a period of time before applying for assistance. The bill inserts in its place a requirement that the applicant intend to continue residing in the state.

Barry W. Jackson
Chairman
House Judiciary Committee

2/20/70

JUDICIARY COMMITTEE REPORT

ON

CS FOR HOUSE BILL NO. 494

This bill seeks to fill a gap in the existing law. There is presently a section dealing with simple assault and battery, and a section dealing with assault with a dangerous weapon, but no provision for the type of assault committed with extreme force but without what would usually be considered a dangerous weapon, such as shoes on a person's feet.

The original bill added the word "instrument" in the assault-with-a-dangerous-weapon section, and put the aggravated-assault provision in that section. The committee substitute leaves the word "instrument" in that section, deletes some language (distinguishing between jails and penitentiaries) which is inappropriate in the Alaska Statutes, leaves in that section the provision for a maximum penalty of 10 years imprisonment, deletes the minimum sentence, and proposes a new and separate section dealing with aggravated assault. The new section makes aggravated assault a felony, and, following traditional legal concepts, provides for a maximum penalty somewhat less than that for the more serious offense of assault with a dangerous weapon -- five years. Simple assault will still be a misdemeanor.

Barry W. Jackson, Chairman

HB 496

Judiciary Committee Report

on

CS HOUSE BILL NO. 496

The committee substitute provides that if any death, accidental or otherwise, occurs while perpetrating or attempting to perpetrate any of the crimes enumerated in Section B of the bill, any person involved in the perpetration of or in the attempt to perpetrate the crime will be guilty of first degree murder.

The original bill is more restrictive in that the death must have been caused by the person charged with first degree murder.

Harry W. Jackson
Chairman
House Judiciary Committee

Cleaning
Glazing
Repairing

Largest Resident
Raw Fur Buyers

Alaska
Parkas

File
#18497

DAVID GREEN & SONS, INC.

130 FOURTH AVENUE
ANCHORAGE, ALASKA 99501
TELEPHONE: BR 5-4774

Furs OF DISTINCTION

March 5th, 1970

Representative Genie Chance
Juneau,
Alaska

Dear Genie:

Enclosed is a bill and letter which are self-explanatory. What is our country coming to when people who have a conflict of interest, which is so obvious in this case, have the temerity to introduce laws of this sort? I really think it's scandalous. I think Mr. Borer, if anything, should be recalled. No wonder, the young people are creating havoc in our country today. They want a new deal and an honest deal. I know and trust that you will take this matter and consider it in a fair and judicious manner and see that this bill should not even get of the ground, let alon be even considered. Several hundred business people in this city alone, have already contracted for this credit card. Not only do they carry Bankamericard, but American Express, Standard Oil, Texaco and many others. You name them, everyone has credit cards. Who is this brilliant Statesman of the twentieth century introducing such an irresponsible bill? No wonder our country is in ferment and in some respects in rebellion, when people of Mr. Borer's character can introduce such obvious conflict of interest bills. By the tone of this letter, you can see I am really angered and in some ways saddend, that this man is permitted to legislate.

I hope that you will pass this around to several good thinking people who are fair minded as well.

Best regards and keep up the good work.

Regards, Dave

David Green

P.S. By the way, I am disappointed that the abortion

bill did not pass. At least they should have left it up to the judgement of the people. No wonder Mr. Begich did not get elected to the Congress. Remind me not to vote for him in the future and or support him. I did not realize until now, who Mr. Begich really was (very little).

February 11, 1970

ALASKA BANKAMERICARD CENTER, INC.
P. O. Box 4-U, Anchorage, Alaska 99503 - Phone 279-5544

TO: All Alaska BankAmericard Merchant Members

FROM: E. O. Hansen

I am sending you a copy of House Bill # 497, introduced by Representative Richard Borer, of Cordova. Representative Borer is the Chairman of the Board and President of the First Bank of Cordova. Regrettably, the First Bank of Cordova is not on the BankAmericard plan, although they had certainly been invited to join. In any event, particular note should be made of the discriminatory bill, which, if passed, would be detrimental to every retailer in Alaska wanting to offer a charge account plan to his customers. The bill just recently left the committee after deleting the word "bank" as a facility advancing funds or discounting against merchant's accumulated receivables. This bill, while it is probably designed to reduce the competitive pressures by those offering strong charge account programs for the benefit of their own retailing establishments or member merchants, would put credit out of your business reach. Credit has become an inseparable part of our merchandising economy–the consumer needs it now more than ever, considering the credit crunch. For the number of benefactors of this special interest bill, probably fewer institutions then you can count on the fingers of one hand, they want to reduce, through such a proposal, the level of the economy down to their own low competitive level; they have struck out at any kind of credit or credit facility available to the Alaska consumer public through its local merchants.

I showed the unamended bill to several bankers and local retailers, after having received my copy. Their immediate and unanimous reaction was "ridiculous", "discriminatory", and even "ludicrous". Regardless of whatever you choose to term it, it actually got out of one committee with a "do pass", with one minor amendment designed to affect every credit grantor, be it a retailer, a national or local card plan, a bank accepting a pledge of your receivables. But most adversly effected will be the retailer, the Alaska retailer, and the Alaska consumer, both in serious need of credit. Every kind of credit has its price, be it called a discount, interest rate, a service charge, or a fee. Those rates are changed by the local, national, and world wide competitive forces of supply and demand. If the available rate is legislated against, the supply simply diminishes.

We urge that you contact your legislators in Juneau and emphasize that this bill and bills of its type are not in the interests of Alaska business or the consumer public.

K9-8

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

PUBLIC DEFENDER AGENCY

Pouch AE, Juneau, Alaska

January 26, 1970

PERSONAL

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Alaska House of Representatives
Juneau, Alaska 99801

Re: House Bill No. 522

Dear Representative Jackson:

The subject bill would expand the composition of the Governor's Planning Council in the administration of Criminal Justice to include a justice of the supreme court or a judge of the superior court. Among the components of the system which administers criminal justice is defense counsel. Your consideration of amending AS 44.19.738(b) to include the Public Defender is requested.

Thanking for your consideration of this matter, I am

Very truly yours,

Victor D. Carlson

VICTOR D. CARLSON
Public Defender

VDC:rj

HB 533

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

February 26, 1970

M E M O R A N D U M

TO: House Judiciary Committee

FROM: Hayden Kaden, Legislative Counsel HK

SUBJECT: Constitutionality of HB 533

It is my opinion, based on a very limited amount of research, that there are possible constitutional problems which could be raised in regard to this bill. The issue here is whether the effect of this bill is to place qualifications on the holding of legislative office in addition to those qualifications provided for under Art.II of the Alaska Constitution.

"The holding of public office is a privilege which is extended upon such conditions as the people in their sovereign capacity may decide. Ordinarily, holding public office is not an inalienable right guaranteed by the United States or Alaska Constitutions. However, the state legislature may not change the qualifications for a public office where the state constitution has not specifically provided that the legislature has the power to change or add to the qualifications. In such cases eligibility for these offices is a constitutional right." (1963 Opinions of the Attorney General No. 6.) There is no authority in the Alaska Constitution for the legislature to change the qualifications for holding legislative office.

The cases researched seem to give effect to the legal maxim: "expressio unius est exclusio alterius." (The mention of one thing implies the exclusion of another thing.)

Although I came across no cases directly in point with the statutory provisions in HB 533, there is one case which dealt with a similar statutory provision. In Burroughs et al. v. Lyles, 181 SW 2d 570, the court determined that a statute providing that no person elected or appointed to an executive or administrative public office for a term of more than two years may be eligible for nomination or election to another office the term of which begins before the expiration of the term of the original office unless he first resigns was void as imposing an additional test of eligibility than is prescribed by the constitution.

The Burroughs case like all of those researched deals with the qualifications to hold office. "Qualification" seems to mean the same as and

is used interchangeably with "eligibility". The implication being that all that is spoken to is the seeking of office and not the qualification or eligibility to continue to hold office. However, it is doubtful that this implication is one which would distinguish the situation under HB 533 from that under Burroughs.

Art. II, sec. 2 of the Alaska Constitution sets out the qualifications for a legislator: "A member of the legislature shall be a qualified voter who has been a resident of Alaska for at least three years and of the district from which elected for at least one year, immediately preceding his filing for office. A senator shall be at least twenty-five years of age and a representative at least twenty-one years of age." Sec. 5 of the same article sets out disqualifications for legislative office: "No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention."

Because the Constitution has set out the qualifications and disqualifications of legislators and has not provided for legislative change or addition to these qualifications and disqualifications, none may be made by the legislature. The issue then revolves around whether providing for the automatic resignation of a legislator who files for statewide office is an additional qualification or disqualification. Because I found no cases directly in point, I could not resolve this issue satisfactorily. It is my personal opinion that this is an additional qualification, i.e., in order to serve a complete term a legislator may not be a statewide candidate; or it is an additional disqualification, i.e., a legislator is disqualified from continuing to hold office by filing for statewide office.

Under the present operation of the constitution, no legislator may hold any other office or position of profit under the United States or State. Therefore if elected to a statewide office, a legislator must resign his legislative seat. Sec. 5, art. II provides further that sec. 5 does not prevent any person from seeking or holding a statewide office. The implication is that a legislator may seek statewide office while holding his legislative office without having to resign if he loses the statewide election.

Another approach to a resolution of the issue is to determine the intent of the Constitutional Convention in drafting sec. 5, art. II of the Alaska Constitution. The original language for sec. 5, relevant to the issue at hand, as proposed by the Legislative Branch Committee was as follows: "No legislator or other elective or appointive officer of this state shall file or run for election to any other state office until his services have been terminated, but a member of one house of the legislature may be nominated and elected to the other house."

(Part 6, Alaska Constitutional Convention Proceedings, Committee Proposal No. 5, p. 2.) This language clearly provides that a legislator must resign before he can run for any other state office. On the floor of the convention, the sentence was further amended to add "or the Congress of the United States" after the word "office". The discussion on the floor on the section showed clearly that the intent of the body was to prohibit a legislator from retaining his seat while running for statewide office. (pp. 1581 - 1587, Alaska Constitutional Convention Proceedings)

Unfortunately, the language quoted above, which would have disposed of the issue at hand, was left out of the final draft of the Constitution. We are left to conjecture as to the reason for this. I could find no discussion on the deletion of the wording. This could mean several things, including the following: (1) an oversight occurred on the part of the convention; (2) the language was removed by the style and drafting committee because it was felt that the language as it presently reads does the same thing as the original proposed language; or (3) it was intentionally deleted because the convention had second thoughts on the whole matter and decided to allow legislators to run for statewide office while holding their legislative seats. I believe that (2) could not have been what happened since no reasonable reading of sec. 5 could be held to prohibit a legislator from running for statewide office and retaining his seat.

Therefore, in regard to the constitutional issues raised in this memorandum, I have been unable to resolve them satisfactorily either way. Without more extensive research, I feel unable to either conjecture or speculate on a satisfactory disposition of the constitutional issues raised by HB 533.

HK:ic

Court _____, room _____,

_____, Alaska.

3. Mail or deliver copies of the form to the plaintiff or his attorney. (See above).

4. Mail or deliver a copy of the form to any person having possession of any property you claim as exempt. For instance, your employer, if you claim that your wages are exempt.

If these steps are followed within fifteen (15) days of the date you received this notice, the property you claim as exempt will not be disposed of. You will then be notified that a hearing will be held to determine whether the property is exempt.

Explanation of Exemptions:

The form is used only to claim an exemption as to property stated in the Writ of Execution.

If the property stated in the writ of execution includes any of the following items, fill out the forms and deliver or mail copies as explained above.

The first item on the form, A.1., should be checked and filled in if the writ of execution states that your wages, or other money owed to you, is to be attached. A single person may keep $200 after taxes, in any thirty (30) day period, the head of household may keep $350 after taxes. Therefore, add all the money you have earned, even if you haven't been paid, <u>from all sources</u> in the last thirty (30) days.

HB 571

To Mar 10
Special Item

District Court

State of Alaska

FOURTH JUDICIAL DISTRICT
604 BARNETTE STREET, ROOM 313
FAIRBANKS, ALASKA
99701

March 6, 1970

Mr. Barry W. Jackson, Chairman
House Judiciary Committee
Juneau, Alaska 99801

Re: H.B. 571 - Requiring jury instruction in district court

Dear Barry:

The purpose of H.B. 571 is excellent; you've known my opinion about instructing juries for a long time.

But the rules referred to have not been the "Magistrate Rules" since about 1967, they are the "District Court Rules", despite the failure of the Michie Company to show the change except spottily. See, for instance, Rule 7 of the District Court Rules regarding sentence appeals, and Order No. 101 of the Supreme Court promulgating Rule 7. "District Court" should be substituted for"Magistrate" throughout the bill.

I believe that magistrates should not be empowered to instruct. The magistrates need have no education or training for their jobs, and at best, three or four of them could instruct adequately. The rest would do incredibly bad jobs. If the defendant consents to trial before a magistrate, the magistrate may try the case, with a jury. (AS 22.15.120)

I would like to hear recordings of how the consents are obtained. One hears about the magistrate who places the defendant under oath, questions him about the charge, then enters a plea based on those answers. One hears about the magistrate who clears the courtroom of the defendant's friends before taking up the case against him--and other stories, probably not fabrications.

What I am actually proposing, I suppose, is the repeal of sub-section 6 of AS 22.15.120. I think that all misdemeanors other than local ordinance violations should be tried by a traveling district judge, and the Rules of Administration provide for just that.

Sincerely yours,

Mary Alice Miller

Mary Alice Miller
District Court Judge

cc: All members, House Judiciary Committee.

March 6, 1970

The Honorable Buell A. Nesbett
Chief Justice, Supreme Court
941 Fourth Avenue
Anchorage, Alaska 99501

Subject: HB-571 - An Act amending rule 1(j) of the Magistrate Rules of Criminal Procedure

Dear Justice Nesbett:

The House Judiciary Committee has had HB-571 under consideration. It is the opinion of the committee that judges in district courts should instruct juries, but that this change should be accomplished by the court through amendment of the court rules rather than by legislation.

Sincerely,

Barry W. Jackson
Chairman
House Judiciary Committee

BWJ/mm

3/2/70

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 582

This bill is primarily a response to the Alaska Supreme Court's decision in Speidel v. Alaska, 460 P 2d 77 (1969), which held a portion of AS 28.35.026(b) unconstitutional. In dealing with the failure to return a rented motor vehicle, the bill changes the definition of "wilfully neglects" to require the element of conscious action, and makes one who wilfully neglects to return a vehicle guilty of a misdemeanor, while retaining the felony provisions for a person who fails to return the vehicle and "secretes, converts, sells or attempts to sell" it.

Barry W. Jackson, Chairman

HB 587

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99801

LEGISLATIVE AFFAIRS AGENCY

April 29, 1970

Barry:

Your CS for HB 587 is attached. It adds a section providing for boroughs setting closing hours for licensed premises. It does not, however, include in sec. 3 (AS 04.10.300) the exception of third class boroughs. The request to put that in appears to be based on the assumption that third class boroughs do not have authority to approve liquor licenses inasmuch as this might be considered a non-areawide power. However, AS 04.10.270 (as amended last year) authorizes organized boroughs to approve liquor licenses. Presumably this is an authorization irrespective of the non-areawide limitations on second as well as third class borough powers under AS 07.15. I discussed this with Greg who says he raised the point last year; however, the bill, as enacted, remained silent on the relationship between AS 04 and AS 07. (Perhaps AS 04.10.270 should be amended to clear this up.) At any rate, if a third class borough does have the authority to approve liquor licenses there would seem to be no reason why its residents should not have the right to protest the issuance under AS 04.10.300. And if a third class borough does not have that authority there would seem to be no need to mention its residents in AS 04.10.300.

A.

Art

6/6/70

HB-591-

IN THE HOUSE BY THE JUDICIARY COMMITTEE

HOUSE RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

Relating to the issuance of liquor licenses.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES:

That it is the sense of the Alaska House of Representatives that when a city has not prohibited the sale of alcoholic beverages under the local option election provisions of AS 04.10.430 or AS 29.25.380 -- 29.25.410 and has itself obtained a liquor license and has established by resolution a policy of opposition to privately owned liquor establishments, it is not "capricious or arbitrary" for the city council to recommend to the Alcoholic Beverage Control Board, under AS 04.10.270, that the application for a liquor license by a private person be denied.

HB 610

WILLIAM R. WOOD
PRESIDENT

UNIVERSITY OF ALASKA
OFFICE OF THE PRESIDENT
COLLEGE, ALASKA

May 9, 1970

Representative Barry W. Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Dear Representative Jackson:

When I appeared before the Judiciary Committee earlier this week concerning House Bill 610, you requested that I report to you any developments at the University in relation to personnel management that might be pertinent. I asked Mr. Max Hullinger, Vice President for Finance and Comptroller, under whose direction the Central Personnel Office has been established, to check into what is being undertaken on campus, and what has been established since the adoption of the Cresap, McCormick and Paget report on management, copies of which were made available to the Legislature in the Spring of 1968.

His report indicates that considerable progress has been made with further arrangements of improvement in process. Mr. Hullinger has just come to us after serving ten years at Purdue University in the capacity of Comptroller, and since he has an excellent background in personnel management matters, including fringe benefits, I am looking forward to giving him an opportunity to study the University of Alaska situation in depth, and to suggest modifications, in the next several months.

I am confident that the University's present personnel management program is a good one for our particular situation, and that it certainly can be and will be improved.

Sincerely yours,

Wm R. Wood

William R. Wood
President

WRW/kb
encl.

Recognizing the need to improve the personnel policies and practices of the University, the Board of Regents contracted with the management consulting firm of Cresap, McCormick and Paget to evaluate its programs.

The report dated January, 1968, indicated the following:

1.) There was no personnel office for the nonacademic employees.

2.) Limited recruiting services were available and most operating departments on campus hired their own personnel.

3.) Vacation and sick leave policies were inconsistent and varied between classification of staff and period of appointment.

4.) The University contributed $5.50 per month for each employee towards the premium on the health and accident insurance. There was no life insurance program.

5.) Secretarial, technical and clerical positions were classified under similar State of Alaska job classification and were compensated accordingly. Manual craftsmen and NARL were compensated under a separate classification scheme. However, there were few written job descriptions, and minimal effort to relate job classifications to the requirements and responsibilities of the individual job.

The University of Alaska's unique environment makes unusual demands on personnel and has a direct effect on the personnel turnover rate. The high wage level in Alaska, particularly in Fairbanks, requires that the University make a particular effort to achieve the maximum productivity from its personnel. The following significant improvements have been either implemented or recommended:

1.) A Director of Personnel Services and a personnel office was established and assigned responsibility for the development and implementation of a complete program of personnel administration for the University and fulfill the following functions:

A. Develop and maintain a manual of uniform personnel policies and procedures.

B. Conduct a program of job evaluation to classify positions according to their duties and responsibilities.

C. Develop and present a nonacademic employee compensation plan and conduct periodic compensation surveys for use in revising the plan.

D. Conduct a central recruiting service for all vacancies in accordance with approved employment standards and job specifications.

E. Establish and maintain central personnel records.

F. Counsel employees concerning personnel policies, practices and programs.

2.) The Board of Regents at its meeting May 15-17, 1969, recommended "that the Assembly and the administration initiate a study in depth of the present program of 'fringe' benefits and submit a report for desirable additions and modifications for the Board's consideration. Whatever such benefits may be, they should be related to the salary program. Attention should be given to technician and classified grades, as well as to professional ranks."

3.) A new and improved employee health insurance was developed and implemented with an increase in the University contribution from $5.50 to $10.00 per month per enrolled employee.

4.) A life insurance program was implemented with the University contributing 50 cents per month per enrolled employee. In their October, 1969, meeting the Board of Regents increased this contribution to $1.00. This amount purchases $2500 of insurance with the option of the employee purchasing up to the highest thousand of his annual salary. The combination of the two cannot exceed $20,000.

5.) Uniform treatment of all employers both professional and classified in respect to staff benefit.

6.) Establishment of a grievance committee for the physical plant.

7.) The Policies and Curriculum Committee of the University Assembly, chaired by Dr. K. B. Mather, has submitted their report entitled "Goal and Planning at the University of Alaska" which recommends general improvements in the various policies and procedures relative to personnel programs.

8.) The Fringe Benefits Subcommittee of the University Assembly is in the process of conducting a poll of all employees to determine their fringe benefit preferences. Results of this study will provide the committee with sufficient information to develop a fringe benefit proposal for consideration by the assembly, after which it will be forwarded for consideration and approval by the Board of Regents.

9.) The University Assembly considered and passed a recommendation to increase the period of time that an employee has to use his accrued annual leave once the maximum has been accumulated.

In addition, the Vice President for Finance and Comptroller, recently employed, has been delegated the responsibility to recommend improvements in the staff benefit and personnel procedures for the University. In the process of being implemented are:

1.) An affirmative action plan for the equal employment opportunity program.

2.) Formalized procedures for termination of and handling grievances of University classified personnel.

Another program being developed is a Classified Personnel Advisory Committee composed of employees from the non-professional staff, chaired by the Vice President for Finance and Comptroller and with the Coordinator of Personnel acting as Secretary. The Vice President for Finance and Comptroller will represent this group in the Assembly.

A University is a center of learning, new ideas and concepts. It strives for equal opportunity for all employees. To single out one group of employees of the University and place them under a different system of selection, promotion, training and compensation outside the control of the corporate administration would greatly reduce their flexibility, authority and operational capacity.

We have been improving our personnel policies and other than offering more days of vacation, a shorter work week and higher pay, have for the most part developed an adequate personnel program for classified employees that is equal to that being provided to similarly classified state employees and, more important, one that is compatible to the program which is being provided to other staffs of the University.

Re HN61o

Report of the University Policies and Curriculum Committee,

University Assembly, University of Alaska

GOALS AND PLANNING

AT THE

UNIVERSITY OF ALASKA

Volume 1 -- DISCUSSION



University of Alaska

March, 1970

Geophysical Institute
University of Alaska
College, Alaska
March 1, 1970

Dr. Bruce Gordon
Vice Chairman, University Assembly
University of Alaska
College, Alaska 99701

Dear Dr. Gordon:

Attached herewith is the report of the University Policies and Curriculum Committee entitled 'Goals and Planning at the University of Alaska'.

The report is in two parts, Volumes I and II. Volume I, the background discussion, has not been read or approved by other members of the committee, although several members contributed the material for substantial portions of it. In another sense, however, it represents a much more comprehensive view than any one committee could contribute, having drawn from a wide range of campus opinion as well as much that has been written about universities and their problems. Volume I does not call for any action by the Assembly. To make it part of the documentary record of the Assembly would be appropriate, however. (I will also place on record the file of all substantial comments received from members of the staff in response to the two 'working papers' of the committee which were distributed during 1969. Some of these comprise significant 'minority reports' on one aspect or another.)

Volume II lists the specific recommendations drafted by the committee as a whole. We commend these to you and trust that they will be brought before the Assembly for action in the near future.

On behalf of the committee(s), may I remark that the assignment has been an informative and challenging experience for all concerned. Needless to say, the present document is a progress report rather than making any pretensions to finality; many issues have been left unexplored and time will, of course, evolve a multitude of new issues and problems. An academic institution without problems would be dull indeed! Next year's committee will find plenty of work.

With my personal thanks to you for the inestimable worth of your encouragement throughout,

Sincerely,

K B. Mather

Keith B. Mather, Chairman
Policies and Curriculum Committee

KBM/afs

...the computer is to exert one of the profoundest effects on the ... of civilization (comparable perhaps with the discovery of ...tricity and evolution of the electrical and electronic technologies), ...shoves the University to match the pace of developments--and to lead ...in Alaska.

15 Matters Relating to Non-Professional Staff

The non-professional staff tend to be the forgotten people of the campus--and the semi-professionals tend to be semi-forgotten. Yet without them the campus would be chaos. To be without one's secretary for a day is hardly to be compared with dispensing with two professors! If the senior technician is home sick the equipment is probably sick too. When the drain stops up the whole place is uninhabitable until the plumber arrives. The non-professional employees of the University of Alaska are not only an essential part of the community (besides the administration, faculty and students), they are also far more numerous than the administration and faculty combined and they constitute a large percentage of the annual salary budget. Figures for the University are as follows:*

Professionals	446	(34%)
Semi-professionals	83	(6%)
Non-professionals	393	(30%)
Part-time & hourly	395	(30%)
Total	1,317	(100%)

The faculty and administration thus account for about a third of the University employment. In terms of budget, the combined semi-professional and non-professional segment comprises about 40 percent of the total annual payroll ($12.2 million).*

Although non-professional employees are not represented on the Assembly--and rightly so; its Constitution provides "official representation for all professional members of the staff, students, and alumni"--some consideration of policy affecting them is permissible because (again quoting the Constitution) the Assembly is concerned with "matters which affect the general welfare of the University," and the non-professional staff certainly does. (They probably affect it much more than the alumni do, although the latter are represented on the Assembly.) At present, non-professional employees have neither spokesman nor representation in any way in the University system.

* Figures supplied by the Comptroller's Office (A. B. Frol) as of September, 1969. Exact numbers will fluctuate somewhat month by month, especially in the (non-contract) non-professional and part-time categories. No attempt has been made to reduce the part-time to equivalent full time. The intent is merely to display the numbers of persons having involvement with the University as employees.

Beyond sensing the need for more attention to this area and suggesting a few pointers to future action, the Policies and Curriculum Committee has not considered itself competent to explore the issues in depth. A more specialized committee might well look into it, either on behalf of the Assembly or the administration--or jointly. The following points, set forth in note form, have come to mind:

(i) Non-professional employees might fare better and treatment in various sections of the campus might be more equitable if some sort of representative body existed. Essentially, they need a spokesman and a channel through which to voice their opinions.

(ii) Conditions of hire need to be more clearly defined in many areas of campus employment. Job descriptions would be helpful. (This and related aspects are referred to in the Cresap, McCormick and Paget report.)

(iii) Overtime work receives different treatment in different administrative units. To some extent this involves the source of funds, e.g. grants and contracts must contain specific clauses to the effect before overtime can be paid. A special problem involves field work and travel, when a man may be 'on the job', at least in principle, continuously.

(iv) The difference in treatment of professionals and non-professionals working side by side on the same job can cause friction. The non-professional is eligible for overtime payment or compensatory time, but the professional is not.

(v) University regulations on compensatory time are unrealistic. The requirement that a person take compensatory time during the following week is absurd; intensive programs may last several weeks (or even months) and the person cannot be spared.

(vi) In general, salary scales of non-professional employees need to follow closely the scales of non-university employees of similar skills, e.g. the State classified scale for local trades and crafts. These employees are generally among the lower-paid persons on the campus and are most vulnerable to the impact of a rising cost of living. However, across-the-board adoption of the State scale can be disadvantageous to the most skilled University employees, for which the State scale fails to make provision. Highly specialized technicians (e.g. logic circuitry) are most affected by this.

Just what HB 610 attempts to do.

(vii) The University could apply the semi-professional contract more widely than it now does.* The employment security of the most senior non-professionals is, in fact, comparable with that of the faculty,

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* It is understood that an ad hoc committee has been established by the president to clarify the terms of semi-professional ('notice of appointment') contracts--such matters as eligibility criteria, salary scales, fringe benefits, etc.

and a contract would give them recognition and added status--and avoid the restrictive (and often inapplicable) State pay scale. This would also avoid overtime and compensatory time problems.

(viii) Some administrative units adopt a liberal policy towards allowing its employees (professional and non-professional) a limited amount of time off to attend classes, without loss of pay. The policy should be revised and standardized--in the direction of liberalism. That an employee sees fit to advance his education is in the interests of the University, and it can also amount to a significant fringe benefit.

(ix) The retirement program in effect for non-professionals is less advantageous than the Teachers' Retirement System for professionals (e.g. a surviving spouse does not benefit).

(x) Non-professionals have no equivalent of tenure. Should there be a non-academic freedom to match academic freedom? And does 'due process' extend to the non-professional ranks? Admittedly the cases are different, but the point warrants a little thought.

(xi) For the senior, tried and trusty servants of the University, should some sort of equivalent of the sabbatical leave scheme be contemplated? There are many walks of non-professional life for which a year or so of 'self renewal' would be beneficial to the individual and the institution. As a start, for example, sabbaticals might be extended to the semi-professional staff.

(xii) Medical costs can be extremely burdensome, and severest upon the lower-paid non-professionals. All full-time employees are, of course, eligible to participate in the University's Group Insurance Plan, but this has limitations. The eyes and the teeth are not generally treated as part of the anatomy, so dental and optometric expenses are excluded. However, some bidders on the University's plan have been willing to include dental and optometric care at a rate which adds about 80% to the monthly premiums of employees. This was one of the options rejected by employees recently, probably because of the increased premium. Yet one wonders how much the teeth and eyes are neglected among families in consequence. The problem again points to salary scales as root cause.

(xiii) As the University develops 'fringe benefit' schemes for the faculty (see Section 3.37), the non-professional staff should not be neglected. Free tuition for the children would be one of the most helpful and sympathetic gestures. We have a 'concern for all' (Gardner again), and the children of non-professionals are as important as any others.

3.37 The Outer Fringe

Grouped together here are a number of items which, conceptually, are peripheral to other issues raised in Section 3--hence the title.*

* Borrowed from the book 'The Outer Fringe: Faculty Benefits Other Than Annuities and Insurance', by M. H. Ingraham with the collaboration of F. P. King (The University of Wisconsin Press, Madison, 1966).

The items are on the fringe of matters within the province of this committee and are under study by other committees of the University Assembly. They are included in the report only because, as practicalities all too often do, they will help determine the capacity of the University to translate any plan into action:

(i) Faculty housing: A basic premise of this report is that quality counts--quality in everything that the University undertakes. Quality in action requires quality in people. Therefore the University, in competition with all other U.S. institutions of higher learning, must attract and retain a faculty of high talent. Faculty recruitment in the Fairbanks area has traditionally been hindered by Fairbanks itself, as a town, especially the availability of adequate housing. The Fairbanks community has failed in the recent past, as in the more distant past, to provide the housing in quality and quantity that befits the faculty. Therefore it is reasonable to assume that the community is unlikely to provide housing in the future. It follows that the University can legitimately and ethically make a goal of solving its own housing problem. The University has a choice between attempting a solution via on-campus or off-campus housing. The faculty prefers on-campus housing, and has long preferred it, with excellent reasons. (The decision by the University, some years ago, to forswear further on-campus housing entirely flouted faculty opinion and was regrettable, if not reprehensible. But the policy seems now to be reversing again.) The University should seek ways to provide additional on-campus housing in a quantity consistent with the present demand and the projected growth in faculty numbers. In addition, every effort should be made to find ways to provide low-interest loans to members of the faculty who wish to build their own homes, either off or on the campus. If the administration, which is now actively concerned with the matter, is able to solve this primary problem of housing, in which the issues are relatively clear, the way may be open to resolve some of the more complex dilemmas raised in this report. No recommendations are called for in the present report--the needs are too obvious and compelling--but specific suggestions as to the best courses of actions would be appreciated.

(ii) A faculty club: This may seem a minor (even frivolous) requirement of the University to follow 'faculty housing', which has aroused such intense feeling. Yet the club would serve a purpose which a mature institution will recognize. The case for a faculty club is stated succinctly in the opening paragraph of Chapter 9 of the book by Ingraham and King* concerning faculty benefits in general:

"Where there is a well-developed faculty club it is generally believed to make a real contribution to the recruitment and retention of the faculty. Yet its use should not be judged chiefly on this basis. Social and intellectual contacts within the faculty help to unify the institution, give its faculty members broader intellectual viewpoints,

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* loc. cit.

emphasize the college as against a too great absorption in the department, and lead to those informal discussions of academic policy from which wisdom is derived to a much greater extent than from formal faculty meetings."

The compelling reason for a faculty club at the University of Alaska is the lack of intellectual contact between the staffs in the various departments and institutes. Though often treated as a 'fringe benefit', this is an inadequate conception of its role. The most valuable purpose it can serve is as a meeting place; it is important in a university, more so, perhaps, than in any other organization, that the disciples of the disciplines rub shoulders, learn what each is doing, share each other's problems, expose half-baked ideas to the critical scrutiny of other minds, and occasionally evolve new ideas. There are, of course, many other conveniences of having a faculty club on campus--it might be residential (a boon to visitors); it may, if the regulations so provide, become a meeting place for faculty wives (anything which makes wives happier in Alaska is not to be discounted); it can serve as a place for committee meetings, etc., banquets and dinners can be held there (i.e. functions of one kind or another which are the trappings of academe). But these lesser reasons should not confuse the primary intent--that engineers mix with psychologists, historians with chemists, geologists with linguists, and administrators with those administered to.

3.38 Continuing Self-Evaluation

The process of formulating goals and objectives is too demanding of time and concentrated effort to be repeated frequently by the University. On the other hand, self-questioning and innovation and a willingness to adapt to the changing order of things (student needs, new approaches to teaching, new fields of study opening up, research trends in older fields, shifting societal interests and pressures, etc.) are the animating flame of self-renewal. The University must find a way to mould into its very structure the potential for change, criticism, dissent, free-thinking radicalism--the potential for the constant quest, yet knowing there is no Holy Grail.

Numerous issues have been raised in the present report, some leading to positive recommendations, others merely indicating the need for continuing study, and many others again have merely been hinted at in passing. Ongoing studies by the new Policies and Curriculum Committee of the Assembly will have plenty of subject material, for the University of Alaska, and all our universities, live in stirring times. Often decisions are very difficult--the imponderables of the scale of values--but all too often they have to be made. Yet even when one draws back--procastinates perhaps--in the face of seemingly overwhelming complexity, something revitalizing has been gained by the very process of self-scrutiny. For an institution, like a person, it is often the experience of travelling, rather than of arriving, which is the stimulus. The University must always keep facing the issues.

Report of the University Policies and Curriculum Committee,

University Assembly, University of Alaska

GOALS AND PLANNING

AT THE

UNIVERSITY OF ALASKA

Volume 2 -- RECOMMENDATIONS



University of Alaska

March, 1970

Recommendation 44 -- Non-professional staff

RECOGNIZING THAT ITS NON-PROFESSIONAL EMPLOYEES ARE ESSENTIAL TO EFFECTIVE DAY-TO-DAY FUNCTIONING, THE UNIVERSITY SHOULD ACTIVELY SEEK WAYS TO IMPROVE THEIR WORKING CONDITIONS. AMONG OTHER APPROACHES, THE UNIVERSITY SHOULD EXPLORE THE EXTENSION OF SEMI-PROFESSIONAL CONTRACTS TO A WIDER RANGE OF THE MOST SENIOR EMPLOYEES.

Comments:

(1) Non-professional employees tend to be overlooked as part of the campus community. Numerically they amount to 60 percent of the total employees of the University (including part-time and hourly personnel); in terms of the budget, they account for nearly 40 percent of the total annual payroll (statistics as of September, 1969). The technical, clerical, secretarial and other non-professional members of the staff are essential, in the sense that the University cannot function effectively without them.

(2) When considering the lot of professional employees, the University should not forget its non-professionals. Matters such as terms of hire, overtime payment, compensatory time, salary scales, time off to attend classes, the retirement program, 'due process', the possibility of sabbaticals, the equivalent of tenure, group health insurance, and free education for their children are important elements in the well-being of the non-professional staff. Some kind of representative body, and a spokesman, might assist their cause.

(3) The latter part of the recommendation suggests that the semi-professional contract ('Notice of Appointment') be extended to more of the most senior non-professional staff, with the implication that their employment is secure.

Reference: Section 3.36.

Further Testimony on HB 610
Before House Judiciary 5/5/70
by: Julie H. Isaac

I do have some additional points I would like to present relative to the effect of HB 610 which I did not cover last week:

1. RECIPROCITY BETWEEN UNIVERSITY AND OTHER STATE AGENCIES. A person leaving University employment and going to work for another State agency would not be able to transfer his accumulated sick of annual leave without this legislation---and the same holds true for those joining the University from other state agencies.

I understand an attempt is being made to bring City and Borough employees under such a reciprocal arrangement with State agencies so they will not lose their leave. When I came to work for the University, I left approximately 70 days' accumulated leave with the School District. If this type of reciprocity is being considered by our governments on the local level, surely it is all the more reason why we should have it between the University and State agencies — the same government level.

2. EXPANSION OF AVAILABLE MANPOWER POOL. This legislation would expand the available manpower pool for both the University and the State. It will also give the Legisla[illegible]e some opportunity to insure that the employees' rights are safe-guard[illegible] by bringing us back into a system that is regulated by the Legislature.

3. COMPETITION WOULD BE LESSENED. By having two systems, such as we now have, it puts the University and other State agencies in competition, rather than having them comparable. Now they are competing rather than working from the same man-power resource.

4. ENDORSEMENT BY ASEA: I will quote the following excerpts from a lett a letter to Bill Ray from Ernie Lahn, Executive Secretary, ASEA, dtd. March 17: ".... an excellent move and improve the University of Alaska personnel program substantially. The University has attempted for several years now to develop some sort of merit system for its employees and to the best of my knowledge they have not been able to come up with a comprehensive program of this magnitude.....By bringing the State personnel plan into the University, we would be adopting a "known quantity" rather than allowing the University to develop an unknown and unmeasured program.....I have had many co contacts with employees of the University who have voiced the need for a comprehensive personnel program, preferably one that would have its basis in law.... As you are aware, the Division of Personnel opened an area office in Anchorage last year that has proven to be of substantial assistance to both employees and management of State government. It has been especially effective in recruitment of new state employees for the Anchorage area. In past months the Division has considered a similar operation for Fairbanks and one of the major drawbacks has been the smaller number of state employees in Fairbanks as compared with Anchorage."

I checked this out with Pat Hunt, Director of Division of Personnel, and it is true that they are contemplating hiring a personnel officer an analyst for Fairbanks, and he felt that if this legislation passes, it would be mandatory. He felt cooperative working arrangements could be made with the University with regard to testing, etc. To carry out the enforcement portion of the Personnel Act, as it would effect the University, from Juneau, he felt would be burdensome and most difficult, but with an area office and adequate personnel, he didn't foresee any unsurmountable problems. He terminated our conversation by saying, "the State agencies have Ph.D.'s, too."

5. MATHER REPORT - FRINGE BENEFIT POLL. Last week I called your attention to the Mather report and the statement that "At present, non-professional employees (60% or 788 of total U. employees) have neither spokesman nor representation in any way in the University system." A week ago, we received at our Station for distribution to all professional personnel a four-page analysis of SB 455, pertaining to Change in Teachers' Retirement Contribution. I haven't seen any such study made relative to HB 610 and how it would effect University employees. (This is Mr. Wilson's copy----Heaven only knows who or which of the Mr. Wilsons this is---he is not an employee at the Douglas Station. Maybe this is one of the reasons why we don't have a personnel system.)

We also received last week a poll regarding a proposed fringe benefit package....I will read some excerpts from it, but totally lacking is any reference to HB 610. ..... I cry discrimination now---can you imagine what the hue and cry would be were some of these to be put in effect.

6. Lastly, may I call your attention to SECTION 6, ARTICLE XII of our STATE CONSTITUTION: "The legislature shall establish a system under which the merit principle will govern the employment of persons by the state." No matter how you slice it, the University of Alaska is a STATE UNIVERSITY, and is operated by STATE EMPLOYEES.

As I said last week, I feel quite alone in this effort, but I think you have heard enough by now to know what is morally right, legal and just---and I ask your support in giving the non-professional employees of the University equity with other State employees.

Thank you again.

Julie H. Isaac
410 "D" Street
Douglas, Alaska

Re: HOUSE BILL No. 610

Judiciary
House ~~Finance~~ Committee
~~3-12-70~~ 4-29-70 -- Julie Isaac

My name is Julie Isaac. I reside at 410 "D" Street in Douglas, Alaska. I appear before you at my own request and represent no one but myself----~~X~~ although I am a drop-out alumna of the University of Alaska, an employee of the Douglas Station, Institute of Marine Science, and a member of the local Community College Advisory Board.

The effect of House Bill 610 is to place a large number of University employees, especially those in clerical, secretarial, maintenance and general operating personnel on the same basis as other comparable State employees.

I think this is important for the following reasons: FIRST AND FOREMOST, I DO NOT BELIEVE IN DISCRIMINATION---between State and University employees or in any groups. ~~[illegible]~~ The State employees work a 7½-hour work day and get eleven holidays a year. This past year, they received two extra---when President Eisenhower died and the Astronauts' Moon Walk. University employees work an 8-hour day and receive only 6 holidays. We did get the "moon-walk" holiday, but we were unable to observe the day of mourning set aside for Gen. Eisenhower.

I feel there is gross discrimination in this area alone. Other agencies of our State, such as the Legislative Affairs, State Courts System, Department of Law, etc., are also in the exempt service ~~and do not come under the State Personnel Act,~~ but it does not mean that they do not observe the same work day and holidays as those State Employees who are not exempt. ~~Just how often do you see in your papers items about the backlog of cases facing our courts today---you'd think they would be putting in the extra thirty minutes a day or foregoing some of the holidays.~~

Not

I certainly am not aware of any great backlog of work that requires University employees to put in the longer hours or fewer holidays. Incidentally, we were notified on Christmas Eve ~~this year~~ that we would have the day off on Friday after the 25th , as well as the ~~[illegible]~~ Friday following New Year's.

Needless to say, we took them without question-----but who wants a "hand-out" when they could have been designated as "legal holidays" at the beginning of the fiscal year. I don't want Dr. Wood or the administration "giving" me something that I feel has been earned.

I won't belabor this point further, but there are other areas in which discrimination also exists for example, the amount of accumulated annual leave---State employees, 60; University---30; Sick leave for State---unlimited; University---90 days. As to salary increases---whatever the percentage was for last year's increase, University employees received a 6% increase, I believe----because supposedly the U. of A. budget was not adjusted to accommodate the same increase as for State employees.

I am aware of Dr. Wood's opposition to the bill---I had about an hour and a half session with him and the Board of Regents following their session with you. We talked of many things. While I am reluctant to say anything that would appear to discredit him, I will only say that no one is more disappointed than I at his unwillingness to accept or lend support to a measure that is designed to help the University.

As I pointed out to him and the Regents, this Bill does more than equalize hours and holidays----it makes the University competitive with private industry and government in attracting and holding capable, qualified and competent employees. It would bring the employees under the merit system, they would be hired from a personnel roster and know exactly what their duties and responsibilities are----they would also have a sense of job security. Those of us who are considered non-professional or non-contractual can be fired at will. I know of no appeals board where I would take a grievance.

Dr. Wood stated that every employee has a job description-----someone may have lead him to believe this, but we have none at the Douglas Marine Station.

Under the State Merit System or Personnel Act, there would be an accurate accounting of leave records----signed by a supervisor, instead of leaving it to the integrity of the employee, who may or may not report his time off for annual or sick leave, where it is merely written in a book without any official authorization----but subsequently reported to the University on the monthly timesheets ----- or bi-weekly timesheets. Incidentally, since the first of the year, those of us in the lower echelons are paid twice monthly without any apparent reason whatever. We were perfectly content with our monthly salaries and were geared to managing our finances on a monthly basis. When then was brought up in my talk with the Regents, Dr. Wood said all employees had been polled and the majority wished to be paid every two weeks. Maybe this was just another break-down in communications, as we WERE NOT POLLED. We merely received an announcement, telling us how it was going to be----and about three months later, it happened.

To my knowledge, the University does not have a Personnel Manual or Personnel Rules, as such. I may be mistaken. We have a large collection of memos, directives, etc., but nothing in a concise form that spells out the general rules and regulations pertaining to personnel or the University.

Now I would like to address myself to a letter received from Chmn. William Hensley, House Health, Welfare & Education Committee, dated Feb. 26: ..... "It is my understanding that the U. of A., particularly Dr. Wood, is very much in opposition to the measure. He indicates that there are such wide-ranging activities of the University that it is almost impossible to deal with the non-academic people under the classified system. He indicated that people up on Ice Island and very remote stations and the scattered activities of the University, would make it difficult to live on if the legislation is enacted."....

First, I'll talk about the wide-ranging activities and the classified system. What Dr. Wood probably hasn't had pointed out to him that by lifting

the University employees out of the exempt service, does not mean that he or his administration cannot draw a line somewhere (the same as all the State Departments do for Assistant Directors and above) and put the higher-ranking employees in the exempt or partially exempt service. This can be done by University regulations. They would follow a uniform salary schedule, observe same holidays and workdays as other employees, but would serve at the pleasure of the appointing authority.

Granted, the University does have wide-ranging activities, but hardly as wide as the Dept. of Public Works for example. The University does have the Research Ship operations-----which under the Personnel Act would make the operations comparable to the State Ferry System. Then there is our Marine Station here at Douglas, or you might also include in this category, the experimental station at Palmer, or the fur farm at Petersburg. I know of no students that come in for special consideration that would necessitate adhering to the academic calendar established at College. There have been two summer institutes at the Douglas Marine Station and during such time, schedules could still be worked out to accommodate the teaching staff and administrative staff.

Remoteness is not a factor. Dr. Wood speaks as though the University situation is unique. Why doesn't he talk to the Fish and Game personnel who have people, scientific and otherwise, scattered all over the State; or the State Department of Education, which operates schools in some pretty remote areas of this great land. While their teaching staff is bound to a contract, to teach so many days a year, it doesn't mean that the maintenance or clerical personnel [redacted] take their holidays [redacted] while the teacher is on duty. The holidays are worked out at the convenience of the school admin. They might pick up their holidays during the long Christmas vacation, spring holidays or at the end of the school year.

Gentlemen, what disturbs me about this proposed legislation is the knowledge that Dr. Wood and the Regents have the power ---almost--- to correct the same ills through University regulations---yet they have not been moved to do so, although ~~from fair~~ they are working on it.

In response to a claim I submitted for overtime on the Friday worked following Thanksgiving, pointing out that Sec. 14.50.020. Definition of Public Schools for Purposes of Statehood Act defines the University as a "public school" and the school holidays included Thanksgiving and the day immediately following, I received a memorandum from the Executive Officer of the Institute of Marine Science, which reads in part: "The University Assembly has before it a request to modify the existing fringe benefit~~x~~ package. I am Chairman of the Committee to write the new proposal and such a proposal will certainly cover such things as more paid holidays, more annual leave, more sick leave, etc." Later, I asked a visiting scientist from College what progress was being made---with a shrug of his shoulders, he said: "Oh that wasn't a serious committee."

Well, I am indeed serious. I want to see ~~my~~ our State University grow and prosper , but I also want to see it operating on a business like basis with competent, dedicated ~~my~~ State Employees.

Thank you.

art
2-26-70

JUDICIARY COMMITTEE REPORT

ON

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 623

This committee substitute provides that an attorney who meets the personal requirements of our reciprocity statute but whose home state does not reciprocate in admitting Alaska attorneys may be admitted to practice law here if he passes a one-day attorney examination given by the Alaska Bar. It is understood that this attorney examination will differ from the regular bar examination in that its primary function will be to test the out-of-state attorney's familiarity with Alaska law. The original bill would have abolished reciprocity and required this examination of all out-of-state attorneys.

Barry W. Jackson, Chairman

JACKSON HB 626
BROWN
FILE
OTHER Copy in File Leg Archives

File

FAIRBANKS, ALASKA

Phillco
Engineering and Architectural Service

Professional Building - 529 Sixth Avenue
Telephone: 456 - 5144 - P. O. Box 464

March 30, 1970

RECEIVED
MAR 31 1970
LAW OFFICES OF
BARRY W. JACKSON

Rep. Barry W. Jackson
P.O. Box 348
Fairbanks, Alaska

Dear Barry:

A few years ago the State of Alaska enacted legislation allowing professional practices to incorporate under certain conditions. One of these conditions was that no corporation could practice more than one profession. The Attorney General at that time ruled that architecture and engineering were two seperate professions and therefore a firm practicing architecture and engineering could not incorporate. As you are aware, many firms throughout the United States practice architecture and engineering jointly. As a matter of fact, all three of the leading firms in Fairbanks practice both professions.

You are also undoubtedly aware that licencing of architects and engineers is handled by a single State board. Since the two professions are so closely allied, and since it is very common for firms tp practice them jointly, I feel that it would be wise to amend the Alaska law to allow for this. I sure would appreciate hearing from you in this regard. If you have any questions that I can answer, please let me know.

Yours truly,

PHILLEO ENGINEERING AND
ARCHITECTURAL SERVICE

Edgar S. Philleo, P.E.

ESP:smh

PLEASE REPLY BY AIRMAIL

HH-626

ALASKA ARCHITECTURAL & ENGINEERING COMPANY

710 THIRD AVENUE • P.O. BOX 509 • FAIRBANKS, ALASKA 99701 • PHONE 452-1266

LEE S. LINCK

April 7, 1970

Representative Barry Jackson
Alaska House of Representatives
Juneau, Alaska 99801

Dear Barry,

It is my understanding that a bill has been introduced which is now in your committee concerning the incorporation of two or more professions. I am particularly interested in seeing the present law revised to permit the incorporation of architects and engineers. It is essential that these two professions be permitted to practice under a single corporation inasmuch as each profession compliments and supplements the other in the planning and design of buildings, structures and facilities. It is recognized throughout the lower 48 states that architecture and engineering are professions which do and must work together in planning and design. The majority of the firms throughout the United States are architectural/engineering offices and utilize consulting engineering offices for civil, structural, mechanical, electrical, acoustical and other engineering services.

Obviously, all professionals practicing in a corporation must be licensed to practice in their respective profession and this would not be changed where both architects and engineers are officers and stockholders of the corporation.

I sincerely believe that corporate practice of combined architects and engineers would in no way adversely affect the public nor change any of the accepted standards and practices that exist where complete architectural and engineering services are utilized.

I would permit those architects and engineers that are now practicing as a partnership or association, as well as those who may desire to do so, to incorporate and participate in the same benefits as other professions that are corporations.

Sincerely,

Lee S. Linck

LSL:l

HB 626

JUSTIFICATION FOR AN AMENDMENT TO THE PROFESSIONAL CORPORATION ACT WHICH WOULD CLARIFY THE RIGHT OF OTHERWISE QUALIFIED PROFESSIONALS TO FORM BUSINESS CORPORATIONS

The Professional Corporation Act (AS 10.45) was adopted in 1968 to clarify the right of professional persons of all kinds to form corporations for the conduct of their profession. The U.S. Internal Revenue Service had for years disputed the right of certain professions, particularly attorneys, to reap the tax benefits of marketing their services through the corporate form. The professional corporation act was adopted to provide specific state authorization for professional corporate practice.

In point of fact, the availability of corporate organization to professions and the attitude of the Internal Revenue Service varied widely from one profession to another even before 1968. In particular the architect and engineering profession had made wide use of the more convenient form of business incorporation without objection.

When the State adopted the professional corporation act, designed primarly for lawyers, it used too broad a brush, leaving the unfortunate inference that the "professional" corporation was the only form available to all classes of regulated professionals, ignoring the wide variations in practice and ethical custom among them.

By leaving the business corporation open to professionals where not prohibited by the ethics of the profession or by board regulation, this amendment cures this accidental defect in the 1968 act.

HB 636

file

GRAY
ROGERS
MYERS &
MORGAN

March 27, 1970

Representative Barry W. Jackson
House of Representatives
Pouch Y
Juneau, Alaska 99801

Dear Barry:

This is just a brief letter on the general subject of professional corporations and the provisions therefor as they relate to our firm.

A couple of days ago I was talking to Ed Philleo and he told me that he had just heard that the legislature was getting ready to do some overhauling of the regulations on professional corporations.

I am wondering whether or not this is the case and, if it is, whether or not it might be possible to explore the possibility of an appropriate modification which would permit architectural engineering firms to incorporate professionally. As we have discussed before, there is a fairly close relationship in this type of business between the architectural and the engineering professions. In fact within the scope of professional regulations and state law, a civil engineer can design a building and many of the things which the civil engineer does are legally performable by an architect. In practice the two professions in a firm such as ours work very closely together.

Accordingly the state regulations appear to be unreasonable. One of the mechanical and electrical consulting firms in Anchorage is a professional corporation and while the three partners are all engineers, they are divided between the disciplines of mechanical and electrical engineering. These are two entirely different disciplines with different educational background and requirements, different licensing examinations and different professional applications. Electrical engineers do not perform mechanical engineering and mechanical engineers do not perform electrical engineering. Yet because they are both called engineers, they can form a professional corporation.

Well, Barry, I hope you are enjoying the battle down in Juneau. If there is any overhauling under way, as I have heard, on the professional corporation act I would appreciate any available information on what is happening.

With best regards,

GRAY, ROGERS, MYERS & MORGAN

Leslie I. Rogers, Partner

ARCHITECTS
ENGINEERS
SURVEYORS
601 COLLEGE ROAD, FAIRBANKS, ALASKA 99701, PHONE: 452-1241

- 626

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF COMMERCE

DIVISION OF BANKING, SECURITIES AND SMALL LOANS

POUCH D — JUNEAU 99801

February 23, 1970

The Honorable Barry W. Jackson
Chairman, Judiciary Committee
Alaska House of Representatives
State Capital
Juneau, Alaska 99801

Dear Mr. Jackson:

We have been asked by Mr. Loren H. Lounsbury of Hewitt V. Lounsbury & Associates to review and comment on HB-626 and SB-477.

Our only reservation in the proposed amendment would be who has the responsibility in determining, and in what manner it is to be determined that each person actually performing the service must be licensed by the appropriate regulatory board.

It is our opinion that certain professional groups, when not contrary to their ethics, may now corporate under AS 10.05. However, the proposed amendments in HB-626 and SB-477 would clarify the Professional Corporations Act in this regard. Filing as a business corporation would allow other than licensed professional persons to become stockholders, directors or incorporators.

Sincerely,

John K. Robertson
Director

cc: Loren H. Lounsbury
Hewitt V. Lounsbury & Associates
723 6th Avenue
Anchorage, Alaska 99501

740 "I" STREET
ANCHORAGE, ALASKA 99501

TELEPHONE 272-3581

CREWS, MACINNES & HOFFMAN
CONSULTING ENGINEERS

File

March 6, 1970

The Honorable Bernie Jackson
State House
State Capitol
Juneau, Alaska

Subject: House Bill No. 626
Senate Bill No. 477

Dear Sir:

It is my understanding that you are a member of the Commerce Committee and are presently studying the subject proposed legislation, and I would like to present a few comments regarding its passage.

I am now, and have been for the preceding three years, a member of the Alaska Board of Architects/Engineers and Examiners. During that time I have been extremely active in the business of administering the present Architects and Engineers Registration Act. I should state at this time that the law as it now exists is, in my personal opinion, grossly inadequate in providing the proper protection to the public that is warranted with the recent tremendous impact of the oil industry on our state. Many violations are occurring every day and the Board is virtually powerless to do anything about it. I am, therefore, extremely interested in corrections to the present act, or better yet, an entirely new act that will have some teeth in it and truly protect the public health, welfare and safety of the people of the state.

This preceding year, prior to the convening of the legislature, various architectural and engineering societies throughout the state were holding numerous meetings, hurriedly attempting to prepare recommendations for a new and more adequate engineering and architectural law. At our latest meeting it was pointed out that because of the extremely heavy load that would be on the legislature this session, and particularly with the impact of the oil industry leasing, we would have very little, if any, success in passage of such an act. We, therefore, felt it would be better to finalize on a new registration act that would be thoroughly thought out and presented for the next year's legislature.

It is my personal opinion, and that of many of my colleagues, that the present proposed change in this legislature would do a tremendous amount of harm and no good. Our present problem is that while certain penalties are listed for violation of the present law there are no teeth in the act, in that we must work through the Attorney General and have had absolutely no luck to date in controlling violations through this channel. The present proposal to permit corporate practice

PAUL B. CREWS
REGISTERED MECHANICAL ENGINEER

DONALD D. MACINNES, JR.
REGISTERED MECHANICAL ENGINEER

ROBERT N. HOFFMAN
REGISTERED ELECTRICAL ENGINEER

would really throw the thing wide open to an overwhelming number of transients who couldn't care less about the public welfare, health and safety in the State of Alaska, but are thinking only of making a bundle and clearing out - avoiding any penalties for the obvious and deliberate violations. I am not referring to ethical firms whose expertise is invited. I personally have no feelings one way or the other regarding corporate practice of engineers as long as adequate safeguards are provided. I believe that this is essential, and I also feel quite strongly that the new change in the act as worded is absolutely useless. Along this line, I would like to point out that our sister state, Washington, has in her Corporation Act for engineers a quite detailed procedure to provide adequate safeguards. I am taking the liberty of enclosing a copy of this for your perusal.

I am strongly recommending that, for this legislature at least, the subject of Corporate Practice in Engineering and Architecture not be permitted, and that at the next legislature an adequate and all-encompassing new act be presented that will be of real benefit to the State of Alaska.

Very truly yours,

Paul B. Crews

Paul B. Crews, P.E.

PBC:no

The board, for reasons it deems sufficient, may reissue a certificate of registration to any person whose certificate has been revoked, provided three or more member of the board vote in favor of such issuance. A new certificate of registration to replace any certificate revoked, lost, destroyed, or mutilated may be issued by the director of licenses, subject to the rules of the board, and a charge of one dollar shall be made for such issuance.

Any person who shall feel aggrieved by any action of the board in denying or revoking his certificate of registration may appeal therefrom to the superior court of the county in which such person resides, and after full hearing, said court shall make such decree sustaining or revoking the action of the board, as it may deem just and proper. [1947 c 283 § 14; Rem. Supp. 1947 § 8306-31. Prior: 1935 § 11; RRS § 8306-11.]

18.43.120 Violations and penalties. Any person who shall practice, or offer to practice, engineering or land surveying in this state without being registered in accordance with the provisions of the chapter, or any person presenting or attempting to use as his own the certificate of registration or the seal of another, or any person who shall give any false or forged evidence of any kind to the board or to any member thereof in obtaining a certificate of registration, or any person who shall falsely impersonate any other registrant, or any person who shall attempt to use the expired or revoked certificate of registration, or any person who shall violate any of the provisions of this chapter shall be guilty of a misdemeanor.

It shall be the duty of all officers of the state or any political subdivision thereof, to enforce the provisions of this chapter. The attorney general shall act as legal adviser of the board, and render such legal assistance as may be necessary in carrying out the provisions of this chapter. [1947 c 283 § 15; Rem. Supp. 1947 § 8306-32. Prior: 1935 c 167 § 14; RRS § 8306-14.]

18.43.130 Excepted services—Fees. This chapter shall not be construed to prevent or affect:

(1) The practice of any other legally recognized profession or trade; or

(2) The practice of a person not a resident and having no established place of business in this state, practicing or offering to practice herein the profession of engineering or land surveying, when such practice does not exceed in the aggregate more than thirty days in any calendar year: *Provided*, Such person is legally qualified by registration to practice the said profession in his own state or country in which the requirements and qualifications for obtaining a certificate of registration are not lower than those specified in this chapter; or

(3) The practice of a person not a resident and having no established place of business in this state, or who has recently become a resident thereof, practicing or offering to practice herein for more than thirty days in any calendar year the profession of engineering or land surveying, if he shall have filed with the board an application for a certificate of registration and shall have paid the fee required by his chapter: *Provided*, That such person is legally qualified by registration to practice engineering or land surveying in his own state or country in which the requirements and qualifications of obtaining a certificate of registration are not lower than those specified in this chapter. Such practice shall continue only for such time as the board requires for the consideration of the application for registration; or

(4) The work of an employee or a subordinate of a person holding a certificate of registration under this chapter, or an employee of a person practicing lawfully under the provisions of this section: *Provided*, Such work does not include final design or decisions and is done under the direct responsibility, checking and supervision of a person holding a certificate of registration under this chapter or a person practicing lawfully under the provisions of this section; or

(5) The work of a person rendering engineering or land surveying services to a corporation, as an employee of such corporation, when such services are rendered in carrying on the general business of the corporation and such general business does not consist, either wholly or in part, of the rendering of engineering services to the general public: *Provided*, That such corporation employs at least one person holding a certificate of registration under this chapter or practicing lawfully under the provisions of this chapter; or

(6) The practice of officers or employees of the government of the United States while engaged within the state in the practice of the profession of engineering or land surveying for said government; or

(7) Nonresident engineers employed for the purpose of making engineering examinations; or

(8) The practice of engineering in this state by a corporation or joint stock association: *Provided*, That

(a) Such corporation shall file with the board an application for certificate of authorization upon a form to be prescribed by the board and containing information required to enable the board to determine whether such corporation is qualified in accordance with the provisions of this chapter to practice engineering in this state;

(b) Such corporation shall file with the board a certified copy of a resolution of the board of directors of the corporation which shall designate a person holding a certificate of registration under this chapter as responsible for the practice of engineering by said corporation in this state and shall provide that full authority to make all final engineering decisions on behalf of said corporation with respect to work performed by the corporation in this state shall be granted and delegated by the board of directors to the person so designated in said resolution: *Provided*, That the filing of such resolution shall not relieve the corporation of any responsibility or liability imposed upon it by law or by contract;

(c) Such corporation shall file with the board a designation in writing setting forth the name or names of a person or persons holding certificates of registration under this chapter who shall be in responsible charge of each project and each major branch of the engineering activities in which the corporation shall specialize in this state. In the event there shall be a change in the person or persons in responsible charge of any project or major branch of the engineering activities, such changes shall be designated in writing and filed with the board within thirty days after the effective date of such changes;

(d) Upon the filing with the board of the application for certificate for authorization, certified copy of resolution, affidavit and designation of persons specified in subparagraphs (a), (b), and (c), of this section the board shall issue to such corporation a certificate of authorization to practice engineering in this state upon a determination by the board (1) that:

(i) The by-laws of the corporation contain provisions that all engineering decisions pertaining to any project or engineering activities in this state

shall be made by the specified engineer in responsible charge, or other responsible engineers under his direction or supervision;

(ii) The application for certificate of authorization states the type, or types, of engineering practiced, or to be practiced by such corporation;

(iii) A current certified financial statement accurately reflecting the financial condition of the corporation has been filed with the board and is available for public inspection;

(iv) The applicant corporation has the ability to provide through qualified engineering personnel, professional services or creative work requiring engineering experience, and that with respect to the engineering services which the corporation undertakes or offers to undertake such personnel have the ability to apply special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as consultation, investigation, evaluation, planning, design and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works or projects.

(v) The application for certificate of authorization states the professional records of the designated person or persons who shall be in responsible charge of each project and each major branch of engineering activities in which the corporation shall specialize;

(vi) The application for certificate of authorization states the experience of the corporation, if any, in furnishing engineering services during the preceding five year period and states the experience of the corporation, if any, in the furnishing of all feasibility and advisory studies made within the state of Washington;

(vii) The applicant corporation meets such other requirements related to professional competence in the furnishing of engineering services as may be established and promulgated by the board in furtherance of the objectives and provisions of this chapter; and

(2) upon a determination by the board based upon an evaluation of the foregoing findings and information that the applicant corporation is possessed of the ability and competence to furnish engineering services in the public interest.

The board may in the exercise of its discretion refuse to issue or may suspend and/or revoke a certificate of authorization to a corporation where the board shall find that any of the officers, directors, incorporators, or the stockholders holding a majority of stock of such corporation has committed misconduct or malpractice as defined in RCW 18.43.105 or has been found personally responsible for misconduct or malpractice under the provisions of subsections (f) and (g) hereof.

The certificate of authorization shall specify the major branches of engineering of which the corporation has designated a person or persons in responsible charge as provided in subsection (8) (c) of this section.

(e) In the event a corporation, organized solely by a group of engineers, each holding a certificate of registration under this chapter, applies for a certificate of authorization, the board may, in its discretion, grant a certificate of authorization, the board may, in its discretion, grant a certificate of authorization to such corporation based on a review of the professional records of such incorporators, in lieu of the required qualifications set forth

in this subsection. In the event the ownership of such corporation shall be altered, the corporation shall apply for a revised certificate of authorization, based upon the professional records of the owners; if exclusively engineers or, otherwise, under the qualifications required by subparagraphs (a), (b), (c) and (d) hereof.

(f) Any corporation authorized to practice engineering under this chapter, together with its directors and officers for their own individual acts, are responsible to the same degree as an individual registered engineer, and must conduct its business without misconduct or malpractice in the practice of engineering as defined in this chapter.

(g) Any corporation which has been duly certified under the provisions of this chapter and has engaged in the practice of engineering shall have its certificate of authorization either suspended or revoked by the board if, after a proper hearing, the board shall find that the corporation has committed misconduct or malpractice as defined in RCW 18.43.105. In such case any individual engineer holding a certificate or registration under this chapter, involved in such malpractice or misconduct, shall have his certificate of registration suspended or revoked also.

(h) All plans, specifications, designs and reports when issued in connection with work performed by a corporation under its certificate of authorization shall be prepared by or under the responsible charge of and shall be signed by and shall be stamped with the official seal of a person holding a certificate of registration under this chapter.

For each certificate of authorization issued under the provisions of subsection (8) of this section there shall be paid an initial fee of five dollars and an annual renewal fee of one hundred dollars.

(9) The practice of engineering and/or land surveying in this state by partnership: *Provided*, That

(a) A majority of the members of the partnership are engineers or architects or land surveyors duly certified by the state of Washington or by a state, territory, possession, district or foreign country meeting the reciprocal provisions of RCW 18.43.100: *Provided*, That at least one of the members is a professional engineer or land surveyor holding a certificate issued by the director of licenses under the provisions of RCW 18.43.070; and

(b) Except where all members of the partnership are professional engineers or land surveyors or a combination of professional engineers and land surveyors or where all members of the partnership are either professional engineers or land surveyors in combination with an architect or architects all of which are holding certificates of qualification therefor issued under the laws of the state of Washington, the partnership shall file with the board an instrument executed by a partner on behalf of the partnership designating the persons responsible for the practice of engineering by the partnership in this state and in all other respects such person so designated and such partnership shall meet the same qualifications and shall be subject to the same requirements and the same penalties as those pertaining to corporations and to the responsible persons designated by corporations as provided in subsection (8) of this section.

For each certificate of authorization issued under the provisions of this subsection (9) of this section there shall be paid an initial fee of one hundred dollars and an annual renewal fee of twenty-five dollars.

18.43.140 Injunctive relief, proof—Board's immunity from liability—Prosecutions. The board is authorized to apply for relief by injunction without bond, to restrain a person from the commission of any act which is prohibited by this chapter. In such proceedings, it shall not be necessary to allege or prove either that an adequate remedy at law does not exist, or that substantial or irreparable damage would result from the continued violation thereof. The members of the board shall not be personally liable for their action in any such proceeding or in any other proceeding instituted by the board under the provisions of this chapter. The board in any proper case shall cause prosecution to be instituted in any county or counties where any violation of this chapter occurs, and shall aid in the prosecution of the violator. [1959 c 297 § 3.]

18.43.150 Disposition of fees. All fees collected under the provisions of RCW 18.43.050, 18.43.080 and 18.43.130 shall be divided and twenty percent paid into the State general fund and eighty percent paid into the professional engineers' account of the State general fund, which account is hereby established to be used to carry out purposes and provisions of RCW 18.43.050, 18.43.060, 18.43.080, 18.43.100, 18.43.110, 18.43.120, 18.43.130, 18.43.140 and all other duties required for operation and enforcement of this chapter. [1965 1st ex.s. c 126 § 3.]

18.43.900 Short title. This chapter shall be known and may be cited as the "Professional Engineers' Registration Act." [1947 c 283 § 19.]

18.43.910 Severability—1947 Act. If any section of this chapter shall be declared unconstitutional or invalid, such adjudication shall not invalidate any other provision or provisions thereof. [1947 c 283 § 17.]

18.43.920 Severability—1959 Act. If any section of this act or part thereof shall be declared unconstitutional or invalid, such adjudication shall not invalidate any other provision or provisions thereof. [1959 c 297 § 8.]

18.43.930 Severability—1961 Act. If any section of this act or part thereof shall be adjudged unconstitutional or invalid, such adjudication shall not invalidate any other provision or provisions thereof. [1961 c 142 § 6.]

ADAMS • CORTHELL • LEE • WINCE & ASSOCIATES

CONSULTING ENGINEERS

AFFILIATED WITH
ALASKA TESTLAB

503 EAST SIXTH AVE. - ANCHORAGE, ALASKA - 99501
TEL. 272-3428

February 20, 1970

Representative Jackson
Chairman, Judiciary Committee
Alaska Legislature
Juneau, Alaska

SUBJECT: House Bill No. 626
Senate Bill No. 477

Dear Representative Jackson:

The conversion of professional corporations t business corporations will---in Alaska as elsewhere---result in the loss of control of professional activities by the professional practitioners, should the corporations become controlled by stock, or at the board of director level, or at the officer level, by non-professionals.

Therefore, please, for the good of the tate, the public welfare and safety (under which the professior are regulated and the practitioners registered), and the integrity of the professions, VOTE NO on this legislation or any similar legislation---which will or could allow a "corporati rather than an "individual" to "practice a profession."

The foregoing, while a personal opinion, is the result of twelve years review of the laws pertaining to engineering, and active participation as a partner in an engineering partnership, and as a principal in a business corporation supplying services to engineers.

Very truly yours,

Harry R. Lee

Harry R. Lee, P. E.
Past President, Alaska Society of Professional Engineers

cc: Paul Robbins, Executive Secretary, NSPE
Milt Lunch, Chief Counsel, NSPE
Larry Spiller, Consulting Engineers Council
Bob Killewich, President, ASPE
Bill Hunsuck, Chairman, PEPP

HRL:ld

file

March 3, 1970

Honorable Barry W. Jackson
House of Representatives
Juneau, Alaska

Dear Mr. Jackson:

Subject: House Bill 626

I strongly urge and request your support of the subject bill.

The modern full-service engineering organization is a well integrated team consisting of many professionals and others of varied training. A single design team faced with the complex problems of today's society may require not only engineers, but planners, economists, attorneys and many others.

Present Alaska law prohibits stock ownership by these latter people in a corporation providing engineering services. This destroys a powerful key incentive to those members of the team who are not engineers. House Bill 626 will correct this inequity while continuing to guarantee the overall supervision and participation in any given project of the registered practicing engineer.

Thank you for your consideration.

Respectfully yours,

Philip A. Mather

Philip A. Mather
700 M Street
Anchorage, Alaska

HB 626

ROBISON, McCASKEY, STRACHAN & HOGE
ATTORNEYS AT LAW
921 SIXTH AVENUE WEST
ANCHORAGE, ALASKA 99501

TELEPHONE 272-9446
AREA CODE 907

PAUL F. ROBISON
KENNETH McCASKEY
JOHN R. STRACHAN
ANDREW E. HOGE
MARVIN S. FRANKEL
WILLIAM G. RICHARDS

13 February 1970

Mr. Barrie Jackson
Chairman
Judiciary Committee
House of Representatives
Juneau, Alaska 99801

And

Mr. Terry Miller
Chairman
Judiciary Committee
State Senate
Juneau, Alaska 99801

Dear Barrie and Terry:

It has been reported to me several times in the last couple of years that it is difficult to obtain insurance for corporations in Alaska indemnifying Officers and Directors against lawsuits, the costs of lawsuits, judgments and penalties for acts performed by Officers and Directors of the corporation, or for acts performed by an Officer or Director or a principal person of one corporation who, at the request of that corporation, is also serving on the Board or as an Officer of another corporation.

This condition also makes it difficult for corporations such as banks to get members of their boards of directors to serve on boards of directors of other corporations. This is just one example -- there are many.

This problem has been recognized in other states which have amended their statutes. One of the most recent is the Delaware amendment which has been adopted into the Delaware corporation law. I enclose a brief explanation of the Delaware amendments and copies of the Delaware amendments as now incorporated in the Delaware statute.

If you should see fit to introduce such amendatory legislation, and I am requesting that one of you do introduce it either as your personal Bill or as a committee Bill if your committee agrees with you; the sections of the Delaware statute would replace Sub-section (15) of 10.05.009 Alaska Statutes.

Very truly yours,

Paul F. Robison

cc: Rep. Mildred Banfield
Sen. Ed. Merdes

STATUTORY PROVISIONS FOR INDEMNIFICATION OF OFFICERS AND DIRECTORS

It is apparent that if corporate directors or officers are forced to bear litigation costs despite the propriety of their acts on behalf of the corporation, qualified and responsible persons will refuse to serve in such capacity. This is especially true in the case of directors who do not have controlling interest in the corporation and who frequently serve without compensation. Even directors who are compensated generally are not paid enough to enable them to be self-insurers against the risk of becoming involved in a suit. Therefore, it is in the interest of the corporation to provide indemnification for loyal directors and officers. Besides protecting the directors and officers personally, the promise of indemnification encourages them to seek to vindicate the corporation and its management in the eyes of the investing public. It is probable that the indemnification of corporate directors also has the effect of reducing shareholders' strike suits. Thus, it is in the interest of the public to provide indemnification for loyal directors and officers.

Realizing the above-mentioned benefits derived from the existence of proper indemnification of directors and officers, the State of Delaware recently amended its corporation laws. The present provision is well written both from the viewpoint of the public and from the viewpoint of the corporation. The statute is intended to encourage active business participation by directors and officers and, at the same time, to protect the shareholders of the corporation and the public in general.

Delaware Corporation Law Section 145

Sub-section a grants the corporation the power to indemnify directors and officers who are threatened to be made a party to any threatened, pending or completed action, suit or proceeding. The director or officer must be threatened to be made a

party by reason of the fact that he is or was a director or officer of the corporation or was serving at the request of the corporation as a director or officer of another business entity. Indemnification includes any expenses, judgments, fines or amounts paid in settlement which the director or officer actually and reasonably incurs in such action, suit or proceeding. The director or officer must show that he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation. With respect to any criminal action or proceeding, the director or officer must show that he had no reasonable cause to believe that his conduct was unlawful. The termination of any proceeding or any pleas entered by the directors or officers shall not create a presumption that the director or officer did not act in good faith, in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation or in a manner which would have reasonably caused him to believe that his conduct was unlawful.

Sub-section b grants the corporation the power to indemnify a director or officer threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in the corporation's favor. This section deals with derivative suits. The threat to be made a party must be caused by the fact that the director or officer is or was a director or officer or is or was serving at the request of the corporation as a director or officer of another business entity. A director or officer may be indemnified against expenses actually and reasonably incurred by him in connection with the defense or settlement of such action or suit. The director or officer must show that he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation. The corporation may not indemnify the director or officer for expenses incurred in any claim, issue or matter in which the director or officer is adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation, unless a court of equity deems that the director or officer is fairly and reasonably entitled to indemnity.

Sub-section c states that to the extent that the director or officer has been successful in the defense of any action, suit, proceeding, claim, issue, or matter referred to in sub-section a or b, the director or officer must be indemnified against the expenses actually and reasonably incurred by him in connection therewith.

Sub-section d states that indemnification by the corporation is authorized only upon an affirmative determination that the director or officer is entitled to such indemnification because he has met the applicable standards of conduct set forth in Sub-sections a or b. Determination may be made (1) by the Board of Directors by a majority vote of a quorum of disinterested directors, or (2) by independent legal counsel in a written opinion, or (3) by the stockholders.

Under Sub-section e the director or officer may obtain expenses incurred in defending a civil or criminal action, suit or proceeding in advance of the final disposition of said action, suit or proceeding. The advance payment may be obtained if authorized by the Board of Directors in the specific case, upon receipt of an undertaking by or on behalf of the director or officer to repay such amount unless it is ultimately determined that the director or officer is entitled to be indemnified by the corporation.

Sub-section f states that the indemnification provided by Section 145 is not exclusive of other rights to which the directors and officers may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise. Additional indemnification may be granted to the director or officer for actions taken in the director's or officer's official capacity and for actions taken in another capacity while holding such office. Indemnification provided by Section 145 shall continue as to a person though he has ceased to be a director or officer and shall inure to the benefit of the heirs, executors and administrators of such person.

Sub-section g allows the corporation to purchase and maintain insurance on behalf of any person serving in the capacity of director or officer against liability asserted against him and incurred by him in such capacity, or arising out of his status as such.

§ 145. Indemnification of officers, directors, employees and agents; insurance

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be

liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(c) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b), or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subsections (a) and (b) (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsections (a) and (b). Such determination shall be made (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (3) by the stockholders.

(e) Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

(f) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any by-law, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another

capacity while holdi
son who has ceased
and shall inure to th
trators of such a per

(g) A corporat
tain insurance on be
officer, employee or
at the request of th
or agent of another
or other enterprise
incurred by him in
as such, whether o
to indemnify him a
this section.

(As amended

SUBCHAPT

§ 151. Classes and

(a) Every cor
stock or one or m
any or all of whic
stock without par
such voting power
such designations,
tional or other spe
restrictions thereo
certificate of inco
in the resolution o
stock adopted by
expressly vested i
corporation. The
adjust the capital
to all or any such c

(b) Any prefe
redemption at suc
and may be issu
preferences and re
rights, and qualifi
shall be stated in

capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

(As amended by Ch. 186, Laws of 1967.)

SUBCHAPTER V. STOCK AND DIVIDENDS

§ 151. Classes and series of stock; rights, etc.

(a) Every corporation may issue one or more classes of stock or one or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value and which classes or series may have such voting powers, full or limited, or no voting powers, and such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation. The power to increase or decrease or otherwise adjust the capital stock as provided in this chapter shall apply to all or any such classes of stock.

(b) Any preferred or special stock may be made subject to redemption at such time or times and at such price or prices and may be issued in such series, with such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof as shall be stated in the certificate of incorporation or in the resolu-

FORM SIG 1B

HB 638

MEMORANDUM

State of Alaska
DEPARTMENT OF COMMERCE

TO: The Honorable Barry W. Jackson (Chairman)
The Honorable Tom Fink (Vice Chairman)
House Judiciary Committee
Alaska House of Representatives
Alaska State Legislature

DATE : March 31, 1970

FROM: Willis F. Kirkpatrick
Securities Examiner
Division of Banking, Securities,
Small Loans & Corporations
Department of Commerce

SUBJECT: HB-638

House Bill 638 - "An Act relating to the transfer or pledge of securities within a central depository system under the Uniform Commercial Code; and providing for an effective date."

The Act will enable Alaskan corporations that have their shares listed on national exchanges, to be eligible to have shares deposited in a central depository of the clearing corporation.

Exchange firms who are clearing members deposit securities with Central Certificate Service - CCS - and thereby create a balance in each stock eligible for the system, much as you do when you deposit money in your checking account at your bank.

All shares in the system are fungible. Share certificates are registered in the name of a common nominee - Cede & Co. - and held unendorsed by Stock Clearing Corporation or a custodian bank. Following a sale and upon instructions to deliver, the balance in the account of the selling broker is changed electronically to reflect the transaction. A corresponding change is simultaneously made in the account of the buying firm, and ownership is thus transferred by electronic bookkeeping entry while the certificate representing the shares transferred remains immobilized in the vault.

Banks are eligible for membership, and through their participation in CCS much can be done to simplify the troublesome COD deliveries required in institutional transactions. In time this program will be expanded to include more and more banks.

Section 1. AS 45.05.614 is amended to read

(d) the clearing corporation; and

(e) the custodian bank are self-explanatory.

Section 2. AS 45.05.664 is repealed and re-enacted to read

(a)(5) entries on the book of the clearing corporation can constitute delivery or ownership.

(b) the purchaser of a security may be noted as the rightful owner but that ownership may be a portion of a larger fungible bulk.

(c) the broker and the customer is entitled to "good delivery" and free from adverse claim. The purchaser is further protected to receive delivery from the broker. The transaction is between the customer and the broker and the customer is entitled to good delivery.

Section 3. AS 45.05 is amended by adding a new section to read:

Section 45.05.667. (a) The electronic bookkeeping entries of the clearing corporation constitute delivery between members when the security is

(1) in custody of the clearing corporation and subject to the corporations instructions

(2) is in bearer form (negotiable)

(3) is shown on the account of a transferor or pledgor on the books of the corporation

(b) transfers and pledges from one member to another are on a net basis and need not reference to name of registered owner or certificate numbers.

(c) the electronic entries are the same as "delivery" and is binding as to the pledgee or a secured party

(d) pledges or account transfers do not constitute a registration of shares by the company's registrar

(e) the clearing corporation is liable for the errors they make and also liable as to the results of the errors.

4/2/70

HOUSE JOURNAL

Judiciary Committee Report

on

HOUSE BILL NO. 638

This bill proposes language recommended by the National Conference of Commissioners on Uniform State Laws in its 1962 official text of the Uniform Commercial Code. Alaska's version of the U.C.C. is based on the 1958 official text.

The heart of this bill is Section 3, which adds a new AS section, the purpose of which is, according to the "official comments" accompanying the 1962 edition, to expressly authorize "a newly developing and commercially useful method of transferring or pledging securities on the organized securities markets, particularly among brokers and banks ....." This method allows for registration of share certificates in the name of a common nominee and then holding of them unendorsed by a stock clearing corporation or a custodian bank. As explained in part by Willis F. Kirkpatrick, Securities Examiner in the Alaska Department of Commerce, "Following a sale and upon instructions to deliver, the balance in the account of the selling broker is changed electronically to reflect the transaction. A corresponding change is simultaneously made in the account of the buying firm, and ownership is thus transferred by electronic bookkeeping entry while the certificate representing the shares transferred remains immobilized in the vault." (March 31, 1970, memorandum to the House Judiciary Committee.)

Section 1 of the bill adds definitions of two essential terms in Section 3. Section 2 of the bill, adding AS 45.05.664(a)(5) and 45.05.664(c) and rewriting 45.05.664 (b), takes the new method into account when specifying when"delivery" occurs in securities transactions.

Barry W. Jackson
Chairman
House Judiciary Committee

3/14/70

HOUSE JOURNAL

Judiciary Committee Report

on

CS for HOUSE BILL NO. 639

As stated in the governor's cover letter for this bill (see 1970 House Journal, Page 267), "It establishes the State Troopers as the depository for [lost and found] property, with specific duties relative to its receipt, holding, destruction, and disposition." The Judiciary Committee Substitute incorporates numerous relatively minor clarifications suggested by the Department of Public Safety.

Barry W. Jackson

Barry W. Jackson
Chairman
House Judiciary Committee

3/4/70

A M E N D M E N T

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: HOUSE BILL NO. 639

Page 1, line 15: Change the comma to a period and add: "or if no state trooper is available he shall deposit it with the nearest peace officer of a political subdivision of the state."

Page 1, line 21: After "shall", insert ", by certified mail with return receipt requested,".
Ater "give", insert "written".

Page 2, lines 7, 9, and 11: Before "value", insert "fair market".

Page 4, line 24: Delete "first".

Page 4, line 25: After "property", add: "knowing it to be lost property".

Page 4, line 28: Before "which", insert: ", except that classified as contraband,".

Page 4, line 29: Delete "or stolen".

FORM SA-18

MEMORANDUM State of Alaska

TO: The Honorable Barry Jackson
Chairman, House Judiciary Committee
State Legislature
Juneau, Alaska

DATE : April 9, 1970

FROM: John K. Robertson, Director
Division of Banking, Securities,
Small Loans & Corporations

SUBJECT: H.B. 643
Amendments to the Alaska Banking Code

The following are brief summaries of each section of H.B. 643:

Sec. 1. AS.06.05.005 is amended by deleting certain language as it was originally adopted from the model banking code. This section is known as the "wild-card" statute and its purpose is to ensure a competitive balance between state and national banks. However, as it now stands, it is not as useful as it might be since it requires that any banking powers authorized by the department to maintain the competitive balance must be acted upon by the legislature by the close of the next session. It is suggested that time limit represented in "until the close of the next regular session of the legislature" be deleted. Of the six states having this type of statute, three have no time limit.

Sec. 2. AS.06.05.015 is amended by adding a new subsection defining bad debts. As we broaden the powers of state chartered banks, we must also concern ourselves with asset quality. Most other state banking codes, as well as the national banking law, contain statutory bad debt provisions.

Sec. 3. AS.06.05.025 is amended to clearly authorize the employment of an examination team and conduct whatever examinations are required in the discretion of the commissioner, including followup examinations for mergers or branch banks.

Sec. 4. AS.06.05.035 is amended to enable the department to charge and collect adequate examination and investigation fees.

Under the existing examination statutes (Sections .025 through .035), every examination or investigation performed results in a substantial loss to the department. Due to the increased examination responsibilities, and activities of the department, as well as the increasing number of new bank and branch applications, we feel that it is businesslike and appropriate to collect sufficient fees to offset the costs incurred.

Sec. 5. A new section covering leasehold and development loans is proposed. This section would permit banks to make loans, within certain limits, secured by first lien leaseholds. A leasehold loan is a type of real estate loan in which the borrower (lessee) is the holder, or owner of a leasehold estate, which is of sufficient qualility to warrant a lender accepting it as security for a loan. In other words, the borrower holds a long term lease, which together with the improvements provide security to the lender. Leasehold

loans normally apply to hotels, office buildings, warehouses, service stations, apartment houses, and other similar commercial development. This method of lending is now being used extensively throughout the nation and should be made available to our state chartered banks.

Sec. 6. AS.06.05.207 is rewritten to allow a bank to make second mortgage real estate loans. This will permit our banks to serve customers who have a substantial equity in real property and avoid a rewrite of the first mortgage loan. Due to the loan/value ratios and amortization rates established, we believe that the concept is sound and also believe that it will provide a definite advantage over national banks.

This section is rather lengthy due to rearranging existing language for clarification, however, nothing was deleted or added except the provision covering second mortgages.

Sec. 7. A new section is proposed, allowing state chartered banks to make loans secured by forest tracts. We believe this is particularly important to banks and their customers located in areas where there is a significant and economically marketable timber resource. National banks may make such loans and the more modern state banking codes contain such a provision.

Sec. 8. A new section permitting banks to invest in a bank service corporation is proposed. A bank service corporation normally provides computerized bookkeeping and record keeping services to other banks, businesses, and the public. Such an investment is subject to examination and regulations by the department. Bank service corporations are quite common throughout the nation.

Sec. 9. The new section proposed would permit banks to acquire and lease at the request of the customer, both real and personal property. This enables the bank to offer broader services to its customers, relieving them of capital investment and providing tax advantages. The bank's investment in real and personal property under lease arrangements combined with other investments under Sec.230 is limited to an amount not to exceed the shareholder's equity. National banks may engage in leasing and the more modern state banking codes contain such a provision.

Sec. 10. It is proposed that AS.06.05.235 be rewritten to provide clarification and a broader definition for domestic bank holding companies. The definition (AS.06.05.540(9)) as it now reads, is very confusing and limits corporate ownership of bank stock to the controlling interest in one bank. We believe this is too restrictive and should be changed.

The proposed new section would require a company to register as a domestic bank holding company, if it owns 10% or more of an Alaska bank or banks. The term "company" includes a corporation, business trust, partnership, association, or other similar organizations. The language used in the proposed new section is sufficiently broad to recognize a registered bank holding company (Bank Holding Company Act of 1956, controlling two or more banks), provided there is compliance with the domestic qualifications under this section. We believe this type of organization is desirable if not vital to the smaller banks in this state for purposes of remaining competitive with the larger banks.

Sec. 11. This is a proposed new section covering various banking prac

including issuing letters of credit, trade acceptances, banker's acceptances, and the sale of data processing services.

Due to the increasing involvement of Alaska in foreign trade and frequency of large commercial transactions between banks and their customers in this state, our own state banks should have such authorized capability.

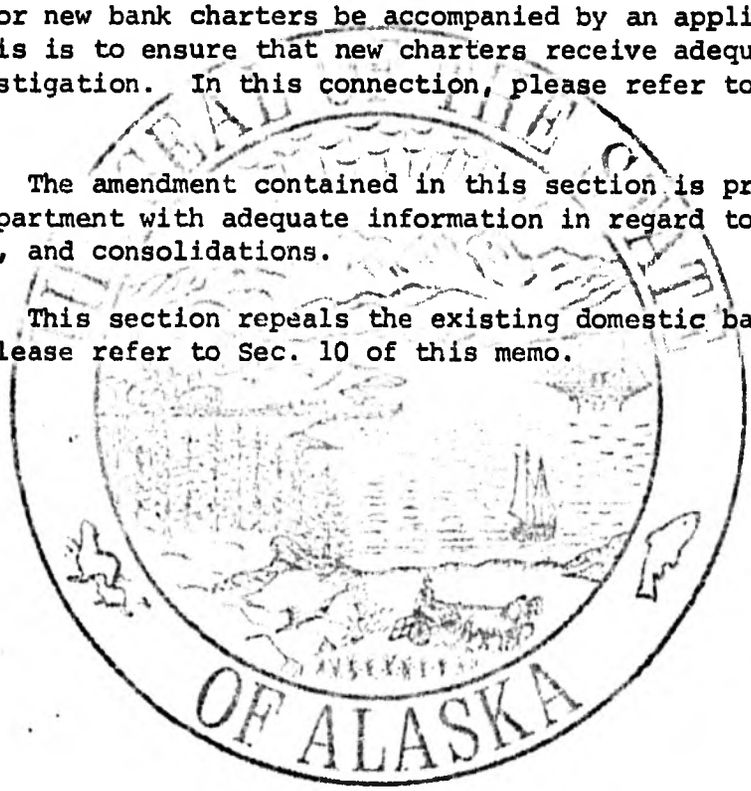
Authorizing the sale of data processing services should not be confused with the proposed bank service corporation legislation. This section permits the bank to offer the same services, but does not involve an investment in a separate corporate subsidiary.

Sec. 12. AS.06.05.345(a) is amended to reduce the par value of the capital stock from $10 to $1. We believe reducing the par value to $1 will allow a broader distribution of the capital stock, thus encouraging wider ownership of Alaska financial institutions.

Sec. 13. It is proposed that AS.06.05.365 be amended to provide that applications for new bank charters be accompanied by an application fee of $1,000. This is to ensure that new charters receive adequate feasibility study and investigation. In this connection, please refer to Sec. 3 and Sec. 4 of this memo.

Sec. 14. The amendment contained in this section is proposed in order to provide the department with adequate information in regard to bank conversions, mergers, and consolidations.

Sec. 15. This section repeals the existing domestic bank holding company definition. Please refer to Sec. 10 of this memo.



HB667

MEMORANDUM

TO: The Honorable Willie Hensley, Chairman
House H&E Committee

FROM: J. W. Bettit, Commissioner
Department of Health and Welfare

SUBJECT: HB No. 667 - Fiscal Note

DATE: February 27, 1973

Attached is Fiscal Note relating to House Bill 667. Subject to compensation

JWB/JFW/cyb
Attachment
cc: John Beard, Governor's Office
House Finance Committee
House Judiciary Committee
Budget Management Div., Dept. of Admin.

Form 2-767 01
1/70M

STATE OF ALASKA
Inter-Department Route Slip

TO: DEPT: Legislative Affairs
ATTN: House Judiciary Comm.

- ☐ Approval
- ☐ Signature
- ☐ Comment
- ☐ Contact Me
- ☐ Prepare Reply For Your File
- ☐ Note & Return
- ☐ Initial & Return
- ☐ Return As Requested
- ☐ Return For Approval
- ☐ Necessary Action
- ☐ Your Information

Remarks:

From: Dept: Pete Hoffman Williams Date 2/27
By: Gay

Second FISCAL NOTE
~~First~~ Session - Sixth State Legislature

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST, POUCH V
___THE LEGISLATIVE FINANCE COMMITTEES' STAFF, POUCH Y
___THE DIVISION OF BUDGET & MANAGEMENT, POUCH C
___RETAIN A COPY FOR YOUR FILES

subject HB 667 SB
requested by
referred to date of request
completion date requested date received

EXPENDITURE DETAIL	FY 1971	FY 1972	FY 1973
100 PERSONAL SERVICES	$28.300	$ 30.400	$30.400
200 TRAVEL	13.800	15.000	18.000
300 CONTRACTUAL SERVICES	6.600	7.000	8.000
400 COMMODITIES	800	900	1.000
500 EQUIPMENT	2.200	-0-	
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE	22.300	150.000	220.000
900 Inter-Agency Charges	1,000	1,000	1,000
TOTAL	$75,000	$204,300	$278,400

FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	75,000	204,300	278,400
Man Months	24	24	24
Permanent Positions	2	2	2
Temporary Positions			

FISCAL ANALYSIS

As the Sec. 44.58.110 (d), HB 667 would disallow payments for compensation for injuries or death resulting from incidences or offenses occurring prior to July 1, 1970, we assume that no obligations would be incurred until that date. The expenses of the Violent Crimes Compensation Board plus two (2) employees, an administrator and secretary are estimated at approximately $52,700 for FY 1971 as detailed on the attached budget forms, $54,300 for FY 1972 and $58,400 for FY 1973.

No statistics are available which would indicate the probable amount of claims which might be awarded under the provisions of BY 667 during FY 1971 and in subsequent years. Therefore, for planning purposes only we have included under Grants and Claims (code 700) $22,300 for FY 1971, $150,000 for FY 1972 and $220,000 for Fy 1973. These amounts could be either inadequate or excessive depending on events and circumstances over which we would have no control.

DATE 2/26/70

SIGNATURE U. G. Dennis

NAME & TITLE Director, Div. of Corrections

SA-11
State of Alaska
Dept. of Administration
Budget & Management Div.
(Rev. 8/69)

EXPENDITURES BY OBJECT AND SOURCE OF FUNDS

For the Fiscal Year Ending June 30, 1971

		Code
Department	Health & Welfare	06
Division	General Adm.	
Program	Office of Violent Crimes Compensation Board	

Exp. Code	EXPENDITURES BY OBJECT	1968-69 Actual	1969-70 Authorized	1970-1971 ESTIMATED Department Request	Increase (Decrease)	Governor's Allowance	Legislative Allowance
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
100	Personal Services			28,300			
200	Travel			13,800			
300	Contractual Services			6,600			
400	Commodities			800			
500	Equipment			2,200			
600	Lands & Structures						
700	Grants, Claims & Shared Revenue			22,300			
800	Miscellaneous						
900	Inter-Agency Charges			1,000			
	Total Expenditures						
	Outstanding Encumbrances (Col. 3)						
	Amount Lapsed						
	Total			75,000			
Rec. Code	SOURCE OF FUNDS						
	Federal Receipts (See SA-15)						
	Program Receipts (See SA-15)						
	Inter-Agency Receipts						
	Special Fund						
	UNRESTRICTED GENERAL FUND			75,000			
	TOTAL			75,000			

SA-13
State of Alaska
Dept. of Administration
Budget & Management Div.
(Rev. 8/69)

DETAIL OF PERSONAL SERVICES

For the Fiscal Year Ending June 30, 1971

Department: Health & Welfare — Code: 06
Division:
Program: Violent Crimes Compensation Board

CLASSIFICATION TITLE (1)	PCN (2)	Pay Rge (3)	No. Sal. (4)	68-69 Annual Amount (5)	69-70 Actn. No. Pos (6)	69-70 Actn. No. Mo. (7)	69-70 Actn. Annual Amount (8)	1970-1971 ESTIMATED Dept. Request No. Pos. (9)	Dept. Request No. Mo. (10)	Dept. Request Annual Amount (11)	Increase (Decrease) (12)	Gov. Allowance No. Pos. (13)	Gov. Allowance No. Mo. 14)	Gov. Allowance Annual Amount (15)	Legis.Allow. No. Pos. (16)	Legis.Allow. No. Mo. (17)	Legis.Allow. Annual Amount (18)
1 Admin istrator		32	1473					1		17,676							
2 Secretary I		10	631					1		7,572							
3																	
4																	
5																	
6																	
7 Employee Benefits @ 12%										3,030							
8																	
9										28,278							
10																	
11 Rounding										22							
12																	
13																	
14																	
15																	
16																	
17																	
18																	
19																	
20																	
21																	
22																	
23																	
24																	
25																	
26																	
Outstanding Enc.(Col.5)																	
SUMMARY																	
Permanent-Full-time Positions								2									
Permanent-Part-time Positions																	
Temporary (Full Time Equivalent)																	
No. Man Months									24								
TOTAL ANNUAL AMOUNT										28,300							

SA-14
State of Alaska
Dept. of Administration
(Rev. 8/69)

DETAIL OF EXPENDITURES-200 TRAVEL

For the Fiscal Year Ending June 30, 1971

Department: Health & Welfare — Code: 06
Division:
Program: Violent Crimes Compensation Board

Code (1)	TRAVEL CLASSIFICATION (2)	1968-69 Actual (3)	1969-70 Authorized (4)	1970-1971 ESTIMATED Department Request (5)	Increase (Decrease) (6)	Governor's Allowance (7)	Legislative Allowance (8)
210	Transportation Costs Within Alaska			6,500			
220	Per Diem & Other Costs Within Alaska			7,300			
230	Transportation Costs Outside Alaska						
240	Per Diem Costs Outside Alaska						
	Outstanding Encumbrances (Col. 3)						
	TOTAL			13,800			

ANALYSIS OF REQUESTED TRAVEL

PURPOSE	LOCATION	DATE	EMPLOYEE TRAVELLING	NO. DAYS	COST TRANS.	COST PER DIEM	COST ANALYSIS CURR. LEV.	COST ANALYSIS PROG. INC
Board Meetings	Variable	Variable	Board Members (Five)	30	4,500	5,250		
Hearing Officer	"	"		40	1,500	1,400		
Board Meetings	"	"	Admin Officer	30	500	630		
					6,500	7,280		

SA-14a
State of Alaska
Dept. of Administration
Budget & Management Div.
(Rev. 8/69)

DETAIL OF EXPENDITURES--300
CONTRACTUAL SERVICES
For the Fiscal Year ending June 30, 1971

		Code
Department	Health & Welfare	06
Division		
Program	Violent Crimes Compensation Board	

Code	CONTRACTUAL SERVICES CLASSIFICATION	1968-69 Actual	1969-70 Authorized	1970-1971 ESTIMATED			
				Dept. Request	Increase (Decrease)	Governor's Allowance	Legislative Allowance
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
310	Communications			1,600			
320	Printing & Advertising			500			
330	Rents & Utilities			2,500			
340	Repairs, Services & Alterations						
350	Transportation of Things						
360	Equipment Rental						
370	Insurance & Bonding						
380	Professional Fees & Services						
390	Other Contractual Services			2,000			
	Outstanding Encumbrances						
	TOTAL			6,600			

EXPENDITURE REQUEST - COST ANALYSIS

	Current Level	Program Increase	Total
310			
320			
330			
340			
350			
360			
370			
380			
390			

EXPENDITURE REQUEST - NARRATIVE ANALYSIS

310 Telephone, telegraph, Postage

320 - Printing forms

330 - Rent - Four Months

390 - Witness Fees

SA-14b
State of Alaska
Dept. of Administration
Budget & Management Div.
(Rev. 8/69)

DETAIL OF EXPENDITURES---400 COMMODITIES

For the Fiscal Year Ending June 30, 1971

		Code
Department	Health & Welfare	06
Division		
Program	Violent Crimes	
	Compensation Board	

Code	COMMODITY CLASSIFICATION	1968-69 Actual	1969-70 Authorized	1970-1971 ESTIMATED			
				Department Request	Increase (Decrease)	Governor's Allowance	Legislative Allowance
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
410	Clothing						
430	Food for Human Consumption						
440	Fuel (Other than for Mtr. Vehicles)						
450	Maintenance & Construction Materials						
460	Mtr. Veh. Parts, Supplies & Access.						
470	Professional & Scientific Supplies						
480	Stationery & Office Supplies			800			
490	Other Supplies, Materials & Parts						
	Outstanding Encumbrances (Col. 3)						
	TOTAL			800			

EXPENDITURE REQUEST - COST ANALYSIS

	Current Level	Program Increase	Total
410			
430			
440			
450			
460			
470			
480			
490			

EXPENDITURE REQUEST - NARRATIVE ANALYSIS

SA-14c
State of Alaska
Dept. of Administration
Budget & Management Div.
(Rev. 8/69)

DETAIL OF EXPENDITURES-500 EQUIPMENT

For the Fiscal Year Ending June 30, 1971

Department: Health & Welfare — Code: 06
Division:
Program: Violent Crimes Compensation Board

Code	EQUIPMENT CLASSIFICATION	1968-69 Actual	1969-70 Authorized	1970-1971 ESTIMATED Department Request	Increase (Decrease)	Governor's Allowance	Legislative Allowance
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
510	Vehicles, Boats, Airplanes						
520	Office Furniture & Equipment			2,200			
530	Equipment Peculiar to the Program						
560	Shop & Maintenance Equipment						
590	Other Equipment						
	Outstanding Encumbrances (Col. 3)						
	TOTAL			2,200			

ANALYSIS OF EQUIPMENT REQUEST

ITEM NO.	DESCRIPTION OF EQUIPMENT	EQPT. CODE	NO. UNITS	UNIT COST	TOTAL COST	COST ANALYSIS CURR. LEV.	COST ANALYSIS PROG. INC.
1	Executive Desk	520	1	188	188		
2	Executive Chair	520	1	60	60		
3	Chair Side	520	3	25	75		
4	Dictating Unit	520	1	446	446		
5	Transcribing Unit	520	1	519	519		
6	Typist Desk	520	1	220	220		
7	Typist Chair	520	1	50	50		
8	Electric Typewriter	520	1	486	486		
9	File Cabinet	520	1	100	100		
					2,144		

SA-14d
State of Alaska
Dept. of Administration
Budget & Management Div.
(Rev. 8/69)

DETAIL OF EXPENDITURES (600, 700, 800, 900)
For the Fiscal Year Ending June 30, 1971

		Code
Department	Health & Welfare	
Division		06
Program	Violent Crimes Compensation Board	

Code	EXPENDITURE CLASSIFICATION	1968-69 Actual	1969-70 Authorized	1970-1971 ESTIMATED			
				Department Request	Increase (Decrease)	Governor's Allowance	Legislative Allowance
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
600	Land, Bldgs. Non-Structural Improvemt.						
700	Grants, Claims & Shared Revenue						
	Compensation Payments			22,300			
800	Miscellaneous						
900	Inter-Agency Charges						
	Dept. of Admin - Central Duplicating			500			
	Dept. of Highways - Car Rentals			500			
				1,000			

EXPENDITURE REQUEST - COST ANALYSIS

Current Level	Program Increase	Total

Judiciary Committee Report

on

CS for HOUSE BILL NO. 667

This bill establishes a system of compensating victims of bodily crimes for their out-of-pocket expenses incurred as a result of the crime. One of the most fundamental functions of a government is the protection of its citizens; therefore, when the various statutory deterrents, law enforcement activities and conditions of the society fail to provide this protection, it is only reasonable that the government compensate the victims of that failure. Under present law, when the person who commits the crime is not financially responsible, the innocent victim who suffers the personal injury is left to his own resources. This obviously works an especial hardship on the poor and the elderly.

The bill is limited to personal injuries and to out-of-pocket expenses in order to avoid the likelihood of collusion. The total amount payable is limited, and the bill specifies additional limitations on and factors to be considered in awarding compensation. Information presented in an August 1969 report of the Arkansas Legislative Council indicates a rather low cost for such a system. In California, with a population of approximately 19,163,000, the 1967-68 fiscal year budget for the system was $22,411; in the 1968-69 fiscal year the budget was $105,374; and the proposed budget for the 1969-70 fiscal year was $127,000. The costs rise as more people become aware of the availability of compensation for their injuries. According to the Arkansas report, as of early 1969, at least five states had enacted victim compensation systems such as this one, and at least six others and Congress (for the District of Columbia) were considering similar legislation. In the preparation of this bill, the relevant provisions in the law of Hawaii, California, Massachusetts, and Maryland were reviewed.

Barry W. Jackson
Chairman
House Judiciary Committee

Yellow

S U M M A R I E S

Massachusetts

The compensation system in Massachusetts is similar in substance to that contemplated in Alaska. On the whole, however, it is shorter and provides fewer guidelines. The main difference is that the judiciary has been given the authority to hear and determine cases. Jurisdiction is vested in the district courts, rather than a separate administrative agency. Some key additions that are not found in Alaska's proposed act are as follows: it specifies a minimum loss for a claim - the individual must have suffered an out-or-pocket (medical) loss of at least $100 or lost two continuous weeks of earnings or support. Massachusetts compensates for an injury attributable to an effort by the victim to aid another victim (not specified in Alaska). The Massachusetts system was conceived of as compensating, irrespective of need, wishing to disconnect itself as much as possible with that brand of welfare legislation. For purposes of comparison the monetary limit of a claim is $10,000 and a claim must be filed within one year after the occurrence of the crime upon which it is based.

California

This system, functioning by means of an administrative board, compensates for injury or death resulting from an attempt to rescue another from drowning or other catastrophe, as well as for injury that is the result of criminal activities. Damage to property is specified as a valid claim for compensation. The program has been criticized for its strong welfare orientation, requiring in all regard that the victim be in need of compensation, and it is broader than just compensating victims of crime. Most critics feel that compensation should not be a handout; that rather it is restitution and a program should not legitimately exclude thousands of people from its protection on purely a class basis. Under California's statute, the monetary limit of a claim is $5,000.

Hawaii

Hawaii's provisions closely approximate those proposed in Alaska, suggesting a close following of the system outlined in Suggested State Legislation, 1967. The Hawaii body is a three-member administrative commission within the Department of Social

Hawaii - (continued)

Services. Hawaii, unlike the other states, provides for a set daily compensation for commission members, at the rate of $50 per day for "each day's actual attendance to his duties," as well as traveling and subsistence expenses. A maximum of $6,600 a year is allowed. (A set yearly salary is provided for under the Maryland system, but the amount is unspecified, to be provided for in the annual budget.) Attorney fees, paid out of the compensation, may be made up to 15% of the award (as in most of the other systems), but Hawaii provides that this is only if a claim exceeds $1,000. However, in no case shall attorney fees exceed the award of compensation. The Hawaii statute sets out an express appeal provision, but limits appeal to cases where it is asserted that the order or decision was in excess of the commission's authority or jurisdiction. Under Alaska's statute, orders and decisions of the board are final, without exception. Hawaii provides that the attorney general is the legal advisor to the commission and its statute includes a survival and abatement provision. Hawaii's limit for compensation is $10,000 and the claim must be made within one and one-half years after the date of injury, death, or property damage.

Maryland

Maryland's system (three member administrative board) is generally the same in substance as that proposed in Alaska, but the administrative proceedure is more detailed. Claims are initially assigned to one member who investigates and makes a decision. A hearing may be ordered. A claimant may, within 30 days after receiving the report from the single member, make application for consideration by the full board. The action of the full board in affirming or modifying the decision is final. 30 days after receiving a copy of the report, attorney general, in his own judgment may commence judicial review. Judicial review may not be initiated by any other person. Maryland provides for an emergency award up to $500 prior to taking action on the claim, in cases where an award is probable and undue hardship will result to a claimant if immediate payment is not made. Final awards must be specifically reduced by (1) emergency awards; (2) sums from or on behalf of the person committing the crime; (3) payments from any other public or private source, including Workemen's Compensation Commission awards. The Maryland system includes a provision making a false claim a misdemeanor.

No.5
HB

HB 680

The Legislature of the State of Alaska
FISCAL NOTE
Second Session - Sixth State Legislature

COPIES: ___ THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST, POUCH V
___ THE LEGISLATIVE FINANCE COMMITTEES' STAFF, POUCH Y
___ THE DIVISION OF BUDGET & MANAGEMENT, POUCH C
___ RETAIN A COPY FOR YOUR FILES

subject Fair Hearings HB 680 SB
requested by
referred to date of request
completion date requested date received

EXPENDITURE DETAIL	FY 70-71	FY 71-72	FY 72-73
100 PERSONAL SERVICES	$ 45,000	$ 50,400	$ 56,400
200 TRAVEL	52,600	58,900	66,000
300 CONTRACTUAL SERVICES	30,000	33,600	37,600
400 COMMODITIES			
500 EQUIPMENT	8,400	9,400	10,500
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
TOTAL	$ 136,000	$ 152,300	$ 170,500
FUNDING DETAIL			
FEDERAL RECEIPTS	$ 78,000	$ 87,400	$ 97,900
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	58,000	64,900	72,600
Man Months			
Permanent Positions			
Temporary Positions			

FISCAL ANALYSIS

1 Attorney	$25,000	
1 Reporter/secretary	20,000	
Travel-attorney 100 trips @ $150 average	15,000	
Travel-reporter 100 trips @ $150 average	15,000	
Per diem-attorney 300 days @ $21 per day	6,300	
Per diem-reporter 300 days @ $21 per day	6,300	
Salaries- 100 client attorneys, 3 days @ $100 per day	30,000	
Travel- 100 client attorneys @ $100 average	10,000	
Equipment, office space, etc.	8,400	
Total		$136,000

The above is based on 100 fair hearings throughout the State considering the fair hearing officer based in Juneau.

Federal matching claimed at 50% for hearing officer. Federal matching at 75% for client attorney costs per SRS Regulation 10-2. A fee schedule must be developed to claim federal matching and payment through the Department of Health and Welfare.

DATE February 23, 1970 SIGNATURE

NAME & TITLE Stanley P. Harris, Director
Division of Public Welfare

HB 702

O'NEILL INVESTIGATIONS

FOURTH AVENUE BUILDING
272-2431
ANCHORAGE, ALASKA 99501

COLLECTION & AUDIT DIVISION

R. MICHAEL O'NEILL, OWNER

March 10, 1970

To: House Commerce & Judiciary Committees

Re: H.B. 702 - Regulating collection activities of collection agencies and loan companies

Gentlemen:

As a member of the Governor's Collection Agency Board and as a owner of one of the biggest collection agencies in Alaska I can see no need for additional legislation to regulate our agencies as is indicated in H.B. 702. We have in Alaska a model collection agency act that was passed two years ago which already covers many of the proposals in 702.

I question why collection agencies are grouped with finance companies. There is a wide divurgance in the collection procedures of a collection agency and those of a finance company. Alaska Court records will reflect judgments against finance companies for damages based on their collection tactics yet I do not know of any cases against collection agencies. The Better Business Bureau Division of the Anchorage Chamber of Commerce reports they have had a minimum number of complaints on collectors as compared to other service agencies.

Alaska is experiencing a great influx of transients at this time which will ultimately put a maximum burden on our various welfare agencies. If you take away the credit grantors final remedy of collection by curtailing our activities you will be creating a haven for the nations deadbeats as I know of no other state that restricts the collector such as is proposed in 702.

For the betterment of Alaska I feel this Bill should not pass and request to be heard at a Committee Hearing on this matter.

Very truly yours,

O'NEILL INVESTIGATIONS

R. Michael O'Neill

R. Michael O'Neill

File

LOIS J. INGALLS
OWNER, MANAGER
PHONE 277-3037

LICENSED & BONDED
NOTARY PUBLIC

DOCTORS' COLLECTION SERVICE

213 - 6TH AVENUE, ROOM 3
ANCHORAGE, ALASKA

March 5, 1970

In Re: House Bill 702

House of Representatives
The Honorable, Barry W. Jackson
Chairman of Judiciary Committee
Pouch V
Juneau, Alaska 99801

Dear Sir:

I an very concerned about House Bill 702 as it could very probably put me and several other collection agencys out of business. We are already regulated by federal and state laws and most of us are under the American Collectors code of Ethics.. If I could stay in business at all it would mean higher collectiong fees which in turn would evidiently mean the Doctors would have to raise their fees to conpensate for the loss.

I am very much against this Bill and sincerly hope that you will consider my concern and future, which depends on if this bill passes or not.

Thank you.

Very truly yours,

Lois J. Ingalls

HB-702



AMES CREDIT and ADJUSTMENT BUREAU
514 Second Avenue, Lathrop Building Room 102
P.O. Box 522, Fairbanks, Alaska 99701
Phone 452-4481 or 452-4482

Member of:
Alaska Collectors Association
American Collectors Association
Washington State Collectors Association
American Repossession Association
Allied Finance Adjusters

March 3rd, 1970

House of Representatives
The Honorable, Barry W. Jackson
Chairman of Judiciary Committee
Pouch V
Juneau, Alaska

Re: House Bill 702

Dear Barry:

On behalf of the Alaska Collector's Association of which I am Sect. and Treasurer we urge it's defeat. Benefits from passage we do not see. The people in Alaska engaged in collection activity are all bonded, finger printed and yes, even mugged. The integrity of no other "profession" (if I may so call it) has been attacked as has collections. The owners and employees of these agencies are law abiding citizens, property owners and voters in the State of Alaska. Believe at this time we have enough legislation governing collections.

It is our firm belief that we have the most qualified men down in Juneau IF only they would concentrate and apply their knowledge to vital issues. The future of Alaska is in the hands of the men in Juneau, certainly this vast knowledge combined will work toward the most important items, thus benefiting all Alaskans.

Hope to see you during convention, with kindest regards,

Mary Barnes

Protect Your Credit That It May Serve You Well

HB-702

PERSONAL COLLECTIONS

P.O. BOX 988
ANCHORAGE, ALASKA 99501

D. M. LEACH, OWNER

March 3, 1970

Re: House Bill 702

Honorable Barry W. Jackson
Chairman, Judiciary Committee
Pouch V
Juneau, Alaska 99801

Dear Chairman Jackson:

As a new Owner of this Collection Agency, but a three and one half year manager of O'Neill Investigations, after Mel Personett came to Juneau, I would like to urge you to VETO the above bill. As anyone can see, it would hamstring an agency and for all practical purposes put one out of business. With the write-offs to business being what they are now for unpaid bills, we cannot afford to further restrict RESPONSIBLE agencies.

I am highly in favor of being very restrictive as to whom is granted a license to operate a Collection agency, however. I wish to go on record as being in favor of a higher Collection agency bond than is now required, and further, to not license anyone as owner or operator of a Collection agency in Alaska who personally has a past record of not paying their own bills, and this would have to be established by a Credit report.

I have been a resident of Alaska since January, 1963, have three children in school here, the ldest, Linda, who graduates from Dimond this year with a straight A average. My wife is a GS 6-8 with the FAA, and 13 years Government service.

Very truly yours,

PERSONAL COLLECTIONS

Donald M. Leach

Donald M. Leach

440 W. 5th Ave. Suite 5
272-8525

File

Professional Business Bureau

519 W. 8TH AVENUE ANCHORAGE, ALASKA 99501 272-8214

March 2,1970

The Honorable Barry W. Jackson
State of Alaska
Chairman of Judiciary Committee
Pouch V
Juneau, Alaska 99801

Dear Sir: Re: House Bill 702

I would like to voice opposition to the above named bill, relating to Collection activities.

As manager of a collection service for the members of the Alaska State Medical Association, I find the bill to be very stringent and restrictive for the Creditor and Agency and allows more leniency for the debtor !! There would be such detailed paper work involved as to cause additional charges and personnel , in order to process claims.

Please, see what you can do to influence the vetoing of this bill.

Thank you.

Sincerely,
Lois W. Rone
Lois W. Rone
Manager

lwr

(P.S.) If you have any questions in regard to our stand on the bill , please contact us.

File
HB 702

CREDIT BUREAU OF KETCHIKAN

PHONE CAnal 5-5131 - 327 MISSION STREET - P. O. BOX 2207

KETCHIKAN, ALASKA 99901

March 3, 1970

The Honorable Barry W. Jackson
Chairman of Judiciary Committee
House of Representatives
Pouch V
Juneau, Alaska 99801

Dear Sir:

HB # 702 restricting collection agency activities has come to my attention and I feel that it is very unfair and discriminatory to my business. The reasons I am opposed are:

1. The State of Alaska has just passed a collection agency law (which the Alaska Collectors helped work out with our representatives) setting up bonding requirements and qualifications for collectors. There has been a board appointed to handle any complaints against collection agencies.

2. My business is already regulated, not only by the State of Alaska, but also by the Code of Ethics of the National American Collectors Assn and my membership in the Associated Credit Bureaus of America. There are strict requirements that I had to meet as manager of a Credit Bureau before I could be admitted to membership in the Associated Credit Bureaus. I have been a member since 1962 and have had no complaints filed against me.

3. This law is discriminatory against collection agencies. Lawyers and credit managers of local business houses also do a great deal of collecting in our state. What restrictions have been set up against their collection methods?

4. We do serve a need in our area by returning money to the economy. Last year our agency returned $ 85,535.72 to our community that had been written off in bad debts. I pay a four person payroll, city, state, borough and federal taxes.

5. I conduct an ethical and honest business and I feel that HB # 702 could possibly increase my costs and certainly my worries so that I could not continue to operate.

Your consideration of this matter will be appreciated and I would like to have the opportunity to appear before your committee. Please advise when this will be possible.

Yours very truly,

Virginia Briant

(Mrs.) Virginia Briant

CC: Rep. Bill Boardman
Senator Bob Ziegler
G. L. Gucker, Legislative Chairman
Ketchikan Chamber of Commerce
Governor Keith Miller

HB 703

LAW OFFICES OF
FAULKNER, BANFIELD, BOOCHEVER & DOOGAN
ROOM 201, 311 FRANKLIN STREET
JUNEAU, ALASKA 99801

TEL. 586-2210
AREA CODE 907

HERBERT L. FAULKNER
NORMAN C. BANFIELD
ROBERT BOOCHEVER
FRANK M. DOOGAN
DONALD L. CRADDICK
AVRUM M. GROSS
MICHAEL M. HOLMES

February 20, 1970

COPY

The Honorable Lester Bronson, Chairman
Commerce Committee
House of Representatives
Juneau, AK 99801

re: HB - 703 -
Alaska Small Loan Act

Dear Mr. Chairman:

Enclosed is a copy of HB-703 which has been referred to your committee.

I represent Household Finance Corporation which is interested in this type of legislation and if this bill is considered by your committee, I would like to have notice of the time of the meeting and be allowed to present the views of my client.

This bill states that if a small loan company has an outstanding loan which is in default, it cannot make a new loan for a larger amount.

The branch managers of Household Finance Corporation are instructed that they are not to make a larger loan than the balance of the prior loan then in default, unless they will be doing some service which will permit the borrower to repay a larger loan.

A typical illustration is where a borrower has missed a payment and comes into the office to explain that an emergency has arisen which has taken his available cash, such as a member of his family being in the hospital and he has to use his money to give money to the hospital in order to release his wife or child. Very often they need more money and are capable of repaying a large loan. Under such circumstances, Household permits a larger loan to be made because the company then rescues the customer from an unfortunate situation he could not avoid and it permits him to continue making regular payments to the company.

In my own personal dealings with my regular bank, I have often borrowed more money than I owed at the time I originally took out the loan and I think people dealing with small loan companies

should be allowed the same privilege.

We know of no logical reason for such a restriction and we believe this bill, if enacted, would do a disservice to many people who have good credit, make their payments regularly but find themselves in a position where they have to have an additional amount of credit.

I intend to be in Anchorage all of next week and will not be available then to appear before your committee.

Yours very truly,

N. C. Banfield

Barry:
I think Lee will come to your Committee after Commerce -
Norman

NCB:rp
cc: F. O. Ketaugh
D. R. Buckey
Wendall Kay
Barry W. Jackson

FORM SA-2
ADM 6-68

STATE OF ALASKA
Inter-Department Route Slip

TO: Alaska State House
DEPT.: of Representatives
ATTN.: Barry W. Jackson!

☐ Approval	☐ Note & Return
☐ Signature	☐ Initial & Return
☐ Comment	☐ Return As Requested
☐ Contact Me	☐ Return For Approval
☐ Prepare Reply	☐ Necessary Action
☐ For Your File	☒ Your Information

Remarks:

Xerox 10 copies
of bill 2 pages only
for Tues.

From: Sig Strandberg
Dept.: Local Affairs **Date** 4/16
By: SS

FORM SA-1B

HB 740

MEMORANDUM

State of Alaska

OFFICE OF THE GOVERNOR

TO: The Honorable Barry W. Jackson, Chairman
House Judiciary Committee
Alaska State House of Representatives

DATE : April 7, 1970

FROM: Sigvald J. Strandberg
Acting Director
Local Affairs Agency

SUBJECT: House Bill No. 740

Mrs. Mason, Secretary to your committee, recently advised the agency of your interest in the agency's analysis of House Bill No. 740. It is my understanding that this bill has been moved out of your committee with a majority signing "No Recommendation."

House Bill No. 740 amends AS 40.15.190(2) to allow a limited amount of land subdivision to be accomplished without subjection to the control of a local government platting authority. This proposed amendment would enable a land owner to divide a piece of property into four or fewer parcels, each of which is required to be five or more acres in size, without the approval of the platting authority The bill provides that such parcels must be amenable to aliquot parts description.

Apparently the primary purpose of House Bill No. 740 is to relax local subdivision control in order to permit property owners of a municipality to perform a limited amount of subdivision without having to comply with that municipality's subdivision regulations. In addition, exemption from compliance with local subdivision regulations to the extent afforded in House Bill No. 740 would afford the land owner with the opportunity to avoid engineering and surveying expenses through the use of aliquot parts method of property description.

It is the opinion of the agency, after having reviewed House Bill No. 740 and a similar measure in the Senate (Senate Bill No. 164), that the current definition of subdivision as expressed in AS 40.15.190(2) should be retained in the statutes. Control of subdivision by city and borough platting authorities is an extremely important tool in regulating the land usages and general patterns of community development. Exemption from compliance from local subdivision ordinances, even to the extent proposed in House Bill No. 740, introduces a potential for disorderly patterns of land use and attendent future problems in the location of roads and public utilities. Even though House Bill No. 740 provides that the land which is to be divided into four or fewer tracts must have access to a public highway or street, this is not adequate assurance that such land division will harmonize with established land use patterns. Aliquot parts division tends to minimize rights-of-way difficulties as does restriction of the size of the divided parcels to units of five acres or more. However, the salient objections would still exist: establishment of land use patterns not in concert with the overall principles set forth in a Comprehensive Community Development Plan, loss of control of population densities, future difficulties in integrating road networks and utility extensions and future engineering problems with respect to varying topographies.

In light of the above potential difficulties, it is our opinion that local planning, platting, and zoning authorities should continue to have the same subdivision authority as they now are accorded under the definition of subdivision contained in AS 40.15.190.

I am attaching the comments of the Greater Anchorage Area Borough Planning and Zoning Commission relative to their opposition to House Bill No. 740.

SJS:lk

Attachments

PLANNING DEPARTMENT
GREATER ANCHORAGE AREA BOROUGH
104 NORTHERN LIGHTS BLVD.
ANCHORAGE, ALASKA 99503

Joe Local Affairs

March 11, 1970

TO: Senate and House Resources & Local Government Committees

FROM: Planning and Zoning Commission

SUBJ: Opposition to House Bill 740

HB 740 purports to change the definition of "subdivision".

Since subdivision control is a legal and proper device for fostering better community development, it becomes an important facet in comprehensive community planning. The orderly and planned growth of undeveloped areas within a municipality is best promoted through statutes regulating land subdivision. It would appear that the developer of a subdivision is to some extent an architect of the future growth of a municipality. The developer establishes a land use pattern that will endure for years through the creation and installation of new streets, utilities, parks and other open spaces, and through the changes that his development occasions in the pattern of population density. Such development may necessarily and properly be guided by an exercise of police power.[1]

From the standpoint of actual subdivision practice, enactment of the proposed legislation would mean that literally thousands of acres could be subdivided without reference to the Platting Board. The benefits to the individual buyer in a properly platted subdivision are clear; guarantee of access via a dedicated street, proper provision of utility easements, clear, legal, recorded and surveyable description of his land, careful planning of lot sizes, road grades and drainage, detailed knowledge of available public facilities and many others. The great advantage to the general public in having equitable, logical and strictly enforced subdivision regulations is not always so clear, but when one considers the real shortage of available land for urban expansion, the over-riding necessity of land subdivision regulations can be readily seen.

Planning is for the people; and the priorities for schools, roads, water and sewer services, police and fire protection, libraries and cultural facilities, parks and recreation and open spaces can best be determined in accordance with a basic land use plan. The meaningful development of such a plan, and the implementation thereof is dependent, to a large degree, on the ability to regulate and guide the subdivision of land.

---

[1] Yokley: The Law of Subdivisions, the Michie Company, 1963.

It is not felt necessary at this time, to research and document the many factors of a planning program that could become virtually meangless if this act were to pass. We think, however, that the dangers of changing the very meaning of subdivision and excluding tracts of 5 acres or more, and aliquot parts divisions, should be abundantly clear to all those who have, as their prime goal, the protection of the public interest.

The Greater Anchorage Area Borough Planning Commission last year adopted a resolution in firm opposition to the passage of a similar bill (SB 164), and enclose herewith a resolution opposed to the passage of HB 740. The Planning Association of Alaska has also expressed opposition to this bill, as has the City of Anchorage Public Works Department. If this bill is going to be substantively discussed by the Committees, we would be most appreciative of an opportunity to testify, and to submit resolutions from a large number of concerned agencies.

Respectfully submitted,

R. W. Pavitt, AIP
Planning Director

RWP:rvd

GREATER ANCHORAGE AREA BOROUGH

PLANNING AND ZONING COMMISSION RESOLUTION NO. 527

RESOLUTION OPPOSING PASSAGE OF HOUSE BILL NO. 740

WHEREAS, subdivision control is a reasonable, effective and proper device for bettering and fostering community development, and

WHEREAS, the orderly growth of undeveloped areas within a municipality is best guided through statutes regulating land subdivision, and

WHEREAS, the development of subdivisions has a profound effect on the growth of a community through the installation of streets, utilities, parks and other open spaces, and through the changes that the said development occasions in the pattern of population density, and

WHEREAS, AS 40.15.190 (2) adequately and properly describes the meaning of subdivision, and the resultant regulation of platting activity constitutes a measure of protection to the individual purchaser, assuring him of a proper, legal and surveyable parcel of land, and

WHEREAS, the Greater Anchorage Area Borough, and other rapidly developing areas throughout the State of Alaska would be grievously damaged if the responsibility and duty of providing public protection through duly enacted subdivision regulations was to be removed from public review.

NOW, THEREFORE, BE IT RESOLVED by the Greater Anchorage Area Borough Planning and Zoning Commission, sitting as the Greater Anchorage Area Platting Board, that this body go on record as being inalterably opposed to the passage of House Bill No. 740, currently before the Sixth Legislature, Second Session, in the Legislature of the State of Alaska.

BE IT FURTHER RESOLVED that true and correct copies of this resolution be forthwith addressed to the Borough Assembly of the Greater Anchorage Area Borough, the Borough Chairman, the Borough Attorney, the Chairman of the Local Government Committees and Resource Committees of the Alaska House and Alaska Senate, and other interested parties.

PASSED AND ADOPTED this 4th day of March, 1970, by the Greater Anchorage Area Borough Planning and Zoning Commission.

R. W. Pavitt, Secretary

Arliss Sturgulewski, Chairman

File

LAW OFFICES
WANAMAKER & DICKSON
ROOM 301 - AUSTRALASKA BUILDING
360 "K" STREET
ANCHORAGE, ALASKA 99501

JAMES N. WANAMAKER
GEORGE A. DICKSON

TELEPHONE
272-0519

April 2, 1970

Dear Representative Jackson:

It has come to my attention that HB 740 (Land Subdivision) may come to a floor vote.

Presently, the pertinent statute (AS 40.15.190 (2)) requires a subdivision of land to be approved by a platting board before it can become legal. This requirement of subdivision approval is the most basic and important tool available to land planners. It insures that land is developed in an orderly manner. The control of these divisions of land is as old as written records. The Egyptians and Greeks both maintained systems for the division of land.

To gut Title 40 by passing HB 740 would be to retreat almost beyond the dawn of recorded history. The social and economic cost to the community and to present and future generations which would be incurred by the passage of HB 740 are almost incalculable. HB 740 would allow land to be subdivided into as many as four lots with no more control than that all lots have access to a public highway. This ignores whether or not all lots have practical access to the public highway (there could very well be a cliff at the point of access), it takes no account of land lying behind the subdivided acreage which could be left without access if no dedicated road was required, the bill makes no provision for utility easements, no survey would be required so that a future buyer would know where his land actually was, dedication could not be required for the needed widening of existing public highways, the lots created could be of any shape, i.e., 100 feet wide and 1,000 feet long. The above are only a few items that occur to me as I write this.

I spent three years as a land planner and my law practice now is primarily concerned with real estate. For the public welfare, I ask you to please vote against HB 740.

Very truly yours,

George A. Dickson

GAD/kdr

Matanuska-Susitna Borough, Inc.
BOX B, PALMER, ALASKA 99645 • PHONE 745-3246
PLANNING-ZONING COMMISSION

April 6, 1970

Harold M. Eby
819 E. Fourth Avenue
Anchorage, Alaska 99501

Dear Mr. Eby: FIRST NOTICE

Under the provisions of Title 8 of the Borough Code of the Matanuska-Susitna Borough and the provisions of state law, the Matanuska-Susitna Borough Planning Commission is the duly constituted platting authority with jurisdiction over all lands in the Matanuska-Susitna Borough.

A copy of Ordinance number 65-4 which spells out the powers and duties of the Platting Board and the penalties against property owners who do not comply with the law concerning subdivision plats will be furnished you upon request.

Information has been received that you, or someone acting for you, as the case may be, may have sold or entered into a contract to sell land in a subdivision created by you before a plat of the subdivision has been prepared, approved and recorded as required by law. If such is the case, you are in violation of state law and the purpose of this letter is to call the matter to your attention. If, after reading the statute quoted hereinbelow you find that you are in violation, you are requested to get in touch with the undersigned promptly with the object of filing your plat, or request to waive the platting regulations, without undue delay and securing the required approval of the Platting Authority before recording it. Failure to comply with the law after notice will subject anyone in violation ultimately to prosecution under the strict terms of the law.

The penal statute referred to above is to be found in Alaska Statutes, Section 40.15.130, and reads as follows:

> "PENALTIES. A.S. 40.15.130. (a) The owner or agent of land located within a subdivision who transfers, sells, or agrees, or enters into a contract to sell land in the subdivision before a plat of the subdivision has been prepared, approved, and recorded in compliance with this chapter and the subdivision regulations adopted under this chapter, is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $500 for each lot or parcel transferred or sold or agreed or included in a contract to be sold. The platting authority may enjoin a transfer or sales or agreement to sell, and may recover the penalty by appropriate legal action.

(b) No person may file or record a plat of subdivision in any public office unless the plat bears the approval of the platting authority. Any person who files or records a plat in violation of this requirement upon conviction is punishable by a fine of not more than $500 or by imprisonment for not more than six months, or by both."

If there is any question as to whether you are in violation of the above quoted ordinance it is advised that you notify the Borough Office, Planning and Zoning Department, as soon as possible.

Yours truly,

Verlyn J. Smith

Verlyn J. Smith
Planning Commission Secretary
Matanuska-Susitna Borough

vjs

Enclosure: Evidence of violation

17N2W-S14

USMR 19-980

Book 150 Page 248
Palmer Recording District

*STATUTORY WARRANTY DEED
(Tenancy by the Entirety)

The Grantor, HAROLD M. EBY, a single man, pursuant to *Section 34.15.030, Alaska Statutes 1962, for and in consideration of the sum of One Dollar ($1.00), and other valuable considerations in hand paid, conveys and warrants to ROGER L. MUSGROVE and JUDITH A. MUSGROVE, husband and wife, as TENANTS BY THE ENTIRETY with the right of survivorship, Grantees, the following described real estate situate in the Palmer Recording District, Third District, State of Alaska, to-wit:

> The South one-half of the Northeast one-quarter and the Northeast one-quarter of the Southeast one-quarter, Section 14, Township 17 North, Range 2 West, Seward Meridian, in the Palmer Recording District, Third District, State of Alaska, containing approximately 120 acres, more or less; subject to existing easements, restrictions and reservations of record, if any.

DATED this 9th day of May, 1969.

Harold M. Eby
Harold M. Eby

STATE OF ALASKA)
) ss.
THIRD DISTRICT)

THIS IS TO CERTIFY that on this 9th day of May, 1969, before me, the undersigned Notary Public, personally appeared HAROLD M. EBY, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

Margaret Kinnel
Notary Public in and for Alaska
My commission expires 6-11-72

PLANNING DEPARTMENT
GREATER ANCHORAGE AREA BOROUGH
104 NORTHERN LIGHTS BLVD.
ANCHORAGE, ALASKA 99503

March 11, 1970

TO: Senate and House Resources & Local Government Committees

FROM: Planning and Zoning Commission

SUBJ: Opposition to House Bill 740

HB 740 purports to change the definition of "subdivision".

Since subdivision control is a legal and proper device for fostering better community development, it becomes an important facet in comprehensive community planning. The orderly and planned growth of undeveloped areas within a municipality is best promoted through statutes regulating land subdivision. It would appear that the developer of a subdivision is to some extent an architect of the future growth of a municipality. The developer establishes a land use pattern that will endure for years through the creation and installation of new streets, utilities, parks and other open spaces, and through the changes that his development occasions in the pattern of population density. Such development may necessarily and properly be guided by an exercise of police power.[1]

From the standpoint of actual subdivision practice, enactment of the proposed legislation would mean that literally thousands of acres could be subdivided without reference to the Platting Board. The benefits to the individual buyer in a properly platted subdivision are clear; guarantee of access via a dedicated street, proper provision of utility easements, clear, legal, recorded and surveyable description of his land, careful planning of lot sizes, road grades and drainage, detailed knowledge of available public facilities and many others. The great advantage to the general public in having equitable, logical and strictly enforced subdivision regulations is not always so clear, but when one considers the real shortage of available land for urban expansion, the over-riding necessity of land subdivision regulations can be readily seen.

Planning is for the people; and the priorities for schools, roads, water and sewer services, police and fire protection, libraries and cultural facilities, parks and recreation and open spaces can best be determined in accordance with a basic land use plan. The meaningful development of such a plan, and the implementation thereof is dependent, to a large degree, on the ability to regulate and guide the subdivision of land.

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[1] Yokley: The Law of Subdivisions, the Michie Company, 1963.

It is not felt necessary at this time, to research and document the many factors of a planning program that could become virtually meangless if this act were to pass. We think, however, that the dangers of changing the very meaning of subdivision and excluding tracts of 5 acres or more, and aliquot parts divisions, should be abundantly clear to all those who have, as their prime goal, the protection of the public interest.

The Greater Anchorage Area Borough Planning Commission last year adopted a resolution in firm opposition to the passage of a similar bill (SB 164), and enclose herewith a resolution opposed to the passage of HB 740. The Planning Association of Alaska has also expressed opposition to this bill, as has the City of Anchorage Public Works Department. If this bill is going to be substantively discussed by the Committees, we would be most appreciative of an opportunity to testify, and to submit resolutions from a large number of concerned agencies.

Respectfully submitted,

R. W. Pavitt, AIP
Planning Director

RWP:rvd

GREATER ANCHORAGE AREA BOROUGH

PLANNING AND ZONING COMMISSION RESOLUTION NO. 527

RESOLUTION OPPOSING PASSAGE OF HOUSE BILL NO. 740

WHEREAS, subdivision control is a reasonable, effective and proper device for bettering and fostering community development, and

WHEREAS, the orderly growth of undeveloped areas within a municipality is best guided through statutes regulating land subdivision, and

WHEREAS, the development of subdivisions has a profound effect on the growth of a community through the installation of streets, utilities, parks and other open spaces, and through the changes that the said development occasions in the pattern of population density, and

WHEREAS, AS 40.15.190 (2) adequately and properly describes the meaning of subdivision, and the resultant regulation of platting activity constitutes a measure of protection to the individual purchaser, assuring him of a proper, legal and surveyable parcel of land, and

WHEREAS, the Greater Anchorage Area Borough, and other rapidly developing areas throughout the State of Alaska would be grievously damaged if the responsibility and duty of providing public protection through duly enacted subdivision regulations was to be removed from public review.

NOW, THEREFORE, BE IT RESOLVED by the Greater Anchorage Area Borough Planning and Zoning Commission, sitting as the Greater Anchorage Area Platting Board, that this body go on record as being inalterably opposed to the passage of House Bill No. 740, currently before the Sixth Legislature, Second Session, in the Legislature of the State of Alaska.

BE IT FURTHER RESOLVED that true and correct copies of this resolution be forthwith addressed to the Borough Assembly of the Greater Anchorage Area Borough, the Borough Chairman, the Borough Attorney, the Chairman of the Local Government Committees and Resource Committees of the Alaska House and Alaska Senate, and other interested parties.

PASSED AND ADOPTED this 4th day of March, 1970, by the Greater Anchorage Area Borough Planning and Zoning Commission.

R. W. Pavitt, Secretary

Arliss Sturgulewski, Chairman

HB- 741

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
111 FOURTH STREET
JUNEAU, ALASKA 99801
TELEPHONE 586-6145

DICKERSON REGAN
SUPERVISING ATTORNEY

ANCHORAGE OFFICE
WILLIAM H. JACOBS
EXECUTIVE DIRECTOR
425 "G" STREET, SUITE 630

January 27, 1970

TO: Barry Jackson, Chairman
House Judiciary Committee

FROM: Philip B. Byrne, Deputy Director PBB

Dick Regan and I will appear before your Committee to seek Committee support for three bills we are advocating.

(a) A bill to prohibit harrassment and abusive practices by collection agencies.

(b) A bill to abolish the remedy of common law distraint.

(c) A bill to provide certain tenant remedies to assure habitable rental housing.

I am enclosing a copy of each proposed bill, together with an explanation of its provisions.

Should you have any questions, I am available at 6-6145, and can meet with you at any time.

cc: All House Judiciary Committee members.

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
111 FOURTH STREET
JUNEAU, ALASKA 99801
TELEPHONE 586-6145

DICKERSON REGAN
SUPERVISING ATTORNEY

ANCHORAGE OFFICE
WILLIAM H. JACOBS
EXECUTIVE DIRECTOR
425 "G" STREET, SUITE 630

February 13, 1970

Representative Barry W. Jackson
Chairman
House Judiciary Committee

Dear Mr. Chairman:

In response to your request for further information regarding our proposed legislation concerning the right of a tenant to use rent payments for the repair of leased dwellings I have prepared a revised version that reflects some of the concerns of the Committee.

We have not been able to satisfy your request for case histories since our inability to offer any satisfactory legal approach to these problems inhibits the number of clients that seek us out and ask for help in this area. We do know that there is a serious lack of adequate and safe housing for indigent people in both urban and rural settings, but have no experience in attempting to use rent payments for the repair of defects.

The revised bill would tie the existence of housing defects to a local housing or building code or ordinance, as determined by the local official responsible for enforcement of that code.

A section-by-section analysis and a copy of the revision is attached. I am most interested in exploring with you the prospects for legislation of this type, and am available at 6-6145 at any time.

Very truly yours,

Philip B. Byrne

Philip B. Byrne

PBB:fm

SECTION BY SECTION ANALYSIS OF

REVISED

SAFE HOUSING BILL

Section 34.05.050.

(a) Provides for termination of a residential lease after one week's notice where there is a violation of the local housing code (hereafter, "code violation").

No notice is required where the code violation is a danger to health or safety of the occupants.

Inapplicable where the code violation was caused by an occupant.

(b) Code violations are to be determined only by the local code enforcement official (Hereafter, "official").

If the official does not make the inspection within 10 days, or where there is no official, then the tenant may terminate if the code violation is a threat to the health or safety of the occupants.

(c) Code violations caused wilfully or negligently by the landlord subject him to an action for damages.

Section 34.05.060.

(a) Provides for the use of up to two weeks' rent to repair code violations where the violation has been determined by the local official, and where the tenant has given the landlord two weeks' notice. The tenant must also give the landlord copies of the receipts for the work done.

(b) Provides for the use of up to four weeks' rent, where, in addition to the determination of a code violation by the local official, the tenant submits a written estimate four weeks before having the work done and supplies receipts to the landlord.

(c) Where there is no official, or the official does not inspect within 10 days after a request, then the tenant may proceed according to the other requirements of this section if the code violation renders the dwelling unsafe, unsanitary, untenantable, or poses an imminent threat to the health or safety of any occupant.

Section 34.05.070.

Prohibits retaliatory evictions of tenants using the provisions of this Act.

Section 34.05.050. Tenant's Remedy of Termination at Any Time.

(a) If there exists any violation of any local statute, code, regulation, or ordinance governing the maintenance, construction, use or appearance of the swelling unit and the property of which it is a part, the tenant may notify the landlord in writing of the fact; and, if the landlord does not remedy the violation whithin one week, the tenant may terminate the rental agreement. Such notice need not be given when the condition or violation involved renders a dwelling unit uninhabitable or poses an imminent threat to the health or safety of any occupant. The tenant may not terminate for a violation or condition caused by the want of due care of the tenant, a member of his family, or other person on the premises with his consent.

(b) Such violations shall be determined by the official charged with enforcement of or inspections under the local statute, code, regulation, or ordinance referred to under subsection (a) above. If such official or his duly authorized agent does not inspect or examine the condition alleged in writing by the tenant to be a violation within ten days after receipt of notification in writing, or if there is no such official the tenant may proceed as required in subsection (a) where the condition or violation involved renders the dwelling unit unsafe, unsanitary, untenantable, or poses an imminent threat to the health or safety of any occupant.

(c) If the condition or violation under this section was caused willfully or negligently by the landlord, the tenant may recover any damages sustained as a result of the condition

or violation including, but not limited to, reasonable expenditures necessary to obtain adequate substitute housing.

Section 34.05.060. Tenant's Remedy of Repair.

(a) If the landlord of an apartment or single family dwelling fails to repair remedy violations of any local statute, code, regulation, or ordinance governing the maintenance, construction, use or appearance of the dwelling unit and the property of which it is a part within two weeks after being notified by the tenant of such violation, the tenant may further notify the landlord of his intention to correct the violation at the landlord's expense and immediately do or have done the necessary work in a workmanlike manner. The tenant may deduct from his rent a reasonable sum, not exceeding two weeks' rent for his expenditures by a submitting to the landlord copies of his receipts covering at least the sum deducted.

(b) If the tenant submits a written estimate by a qualified workman at least four weeks before having the work done, and substitutes workmen and materials as the landlord may reasonably request in writing, the tenant may deduct from his rent a reasonable sum not exceeding one month's rent by submitting to the landlord copies of his receipts covering at least the sum deducted.

(c) Where there exists no official or agent charged with enforcement or inspections under such statute, code, regulation or ordinance, or where such or agent does not inspect or examine the condition alleged in writing by the

tenant to be a violation within ten days after receipt of notification in writing, the tenant may proceed under this section where the condition or violation involved renders the dwelling unit unsafe, unsanitary, untenantable, or poses an imminent threat to the health or safety of any occupant.

Section 34.05.070. Retaliatory Eviction Prohibited.

(a) In order to insure that dwelling units conform to applicable law in regard to habitability, health, safety, and fitness for use, it is the declared policy of this state to encourage tenants to enforce such applicable law in regard to the dwelling they inhabit.

(b) Any eviction, attempted eviction, increase in rent, or change in conditions or requirements to the detriment or a tenant or tenants, which is caused by, related to, or proximate to any such efforts of a tenant or tenants to correct violations of any applicable local statute, code, regulation or ordinance governing the maintenance,construction, use or appearance of the dwelling unit and the property of which it is a part, is in violation of public policy and is hereby prohibited.

February 2, 1970

Alaska Legal Services
Corporation
111 Fourth Street
Juneau, Alaska 99801

Dear Sir:

The committee has briefly reviewed the proposed bill of tenant rights. The committee sees serious difficulty in applying this bill in the rural areas of the state and the committee is aware that many, if not most, cities have housing codes covering these problems. There may, however, be a need for legislation and the committee would therefore appreciate a memorandum on your experience in this area, including case histories. We would appreciate having this information by February 13, 1970. Further delay beyond this date will make it difficult to enact appropriate legislation in this session.

Very truly yours,

Barry W. Jackson, Chairman

BWJ/mm

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
111 FOURTH STREET
JUNEAU, ALASKA 99801
TELEPHONE 586-6145

DICKERSON REGAN
SUPERVISING ATTORNEY

ANCHORAGE OFFICE
WILLIAM H. JACOBS
EXECUTIVE DIRECTOR
425 "G" STREET, SUITE 630

February 12, 1970

Representative Barry W. Jackson
Chairman
House Judiciary Committee
Capitol Building
Juneau, Alaska 99801

Dear Mr. Chairman:

I appreciate this opportunity to submit further information on our proposal for legislation abolishing common law distraint.

I have researched the laws in selected states, but the sampling was limited to about nine or ten states. The best overall comment on the state of existing law follows:

> "The courts of this country have never looked with favor upon this form of self-help because of the opportunity afforded for injustice and oppression, and also because it discriminates in favor of one particular class of creditors. For this reason, in a number of states the remedy of distress was held not to be a part of the common law of that jurisdiction. (Cites cases from Alabama, Colorado, Missouri, Montana, North Carolina, Oklahoma). In other states it has been abolished by statute. (Cites 2 Tiffany, Landlord and Tenant, § 325, n. 20 (1912). In those states where it still exists, it has to a large extent been modified by statute. The general tendency of the statutes is to take away the self-help feature that existed at common law and to vest control over the proceedings in a public official. . . . Furthermore, the list of exempt chattels has been extended in many states to include specific chattels of the tenant himself, which at common law were not exempt. II American Law of Property, A. James Casner, § 9.47 (1952). See also 32 Am. Jur., Landlord and Tenant, § 613.

The State of Washington has provided for a statutory landlord's lien, but with a specific exemption as to the property of a tenant in residential dwellings. Wash. Rev. Code § 60.72.010.

The State of Oregon provides a statutory landlord's lien upon all personal property, except wearing apparel, but retains the self-help feature of the common law remedy. Ore. Rev. Stat. §§ 87.535-87.551.

I was unable to find a statutory landlord's lien in either New York or California, but Am. Jur. and A.L.P. indicate the common law remedy has been abolished by court decision. Interesting enough, California law provides, in a stature dating back several decades, a much broader statute permitting use of rent payments for the repair of dwellings. Calif. Civil Code § 1942.

Other states provide as follows:

Minnesota -- Complete abolition of distraint, with no statutory replacement. Minn. Stat. § 504.01.

Colorado --- Statutory lien, but inapplicable to a rented house. Colo. Rev. Stat. Ann. § 86-1-1.

Illinois --- Statutory distraint provided, but inapplicable to any property exempt from execution. Ill. Rev. Stat. Tit. 80, s 16-35.

Arizona ---- Statutory lien on all tenants property which is not exempt, but permits seizure of all property. Ariz. Rev. Stat. § 33-362.

Alabama ---- Statutory lien broader than common law remedy, primarily for sharecropper of situations. Ala. Code Ann. tit. 31, §§ 29-34.

The Committee has, at this point two choices if it is unwilling to abolish distraint completely. It can provide for a statutory lien, with appropriate judicial enforcement procedures to remove the self-help feature -- or it can provide for abolition of distraint only as to property exempt from execution.

The objective of our clients is attained by either approach, but I would prefer for reasons of legislative economy to follow the latter approach.

Therefore, I have drafted a new proposal which provides that landlords, in the use of common law distraint, may not take or seize exempt property. That bill is attached.

I am available at any time to meet with you or the Committee to discuss this measure, and reiterate my hope that you will see fit to introduce it as a Judiciary Committee bill.

Respectfully submitted,

Philip B. Byrne
Deputy Director, Alaska Legal Services Corp.

PBB/fm

Enclosure

Proposed Amendment to A.S. § 34.05.010

Subsection "c" of A.S. 34.05.010 shall hereafter be subsection "d."

A new subsection "c" is added to A.S. 34.05.010 which reads:

"(c) In the use or exercise of the common law remedy for distress of rent, no landlord or lessor of residential property or dwellings may seize, sequester, attach, or keep a tenant from the use or possession of any property exempt from execution or attachment under state or federal law."

COMMENTS OF
ALASKA LEGAL SERVICES CORPORATION
IN SUPPORT OF PROPOSED AMENDMENT TO A.S. 34.05.010

The common law right of the landlord for distress of rent is an ancient doctrine conferring an extra-judicial remedy upon the landlord. Many states and common law countries have recognized this doctrine as giving the landlord the power to hold his tenant's personal belongings as security for unpaid rent. This ancient self-help remedy is now the subject of regulation in many states, and has been abolished in some. The abolition of the common law right for distress of rent has been strongly recommended due to the gross inequities created by its exercise. See Model Residential Landlord-Tenant Code, Tentative Draft Sections 3-403(b) (American Bar Foundation, 1969).

The proposed amendment would abolish this extra-judicial remedy with respect to residential dwellings only. It is in this area that the abuses are most blatant and oppressive. Although the common law doctrine gives the landlord the right to retain his tenant's personal belongings, it does not give the landlord the right to seize the personal belongings or to sell them. Most frequently, a seizure is accomplished by an eviction. The landlord will commonly put a padlock on the door of the house or apartment and refuse to release the tenant's food, clothing, and furniture until the tenant pays the overdue rent. This activity on the part of the landlord would place the burden on the tenant to go into court to

recover his personal belongings. Thus, the person least likely to be familiar with judicial process is forced to initiate the action that would be necessary to determine justice. The Alaska Statutes provide that all or most of an individual's food, clothing, and home furnishings are exempt from levy of attachment or exeuction. A.S. 9.35.080. Thus, in most instances, the landlord is seizing property to which he has absolutely no right. Furthermore, such an action constitutes an eviction which is not sanctioned by the Alaska Statutes. A.S. 9.45.060-160 and A.S. 9.45.690 provide remedies for the landlord and do not sanction summary evictions.

The proposed amendment in no way limits the landlord's remedies at law. The action of forceable entry and detainer is still available for the purposes of eviction and reduction of accrued rent to judgment. The landlord retains his right at law to attach non-exempt assets.

The Alaska Legal Services Corporation Board of Directors has endorsed this proposal.

3/25/70

HOUSE JOURNAL

Judiciary Committee Report

on

HOUSE BILL NO. 751

This bill seeks to make financing easier for electric and telephone cooperatives. The limited funds available for loans from the federal Rural Electrification Administration require the electric cooperatives to seek supplemental financing in order to provide facilities to meet consumer demands for service. The National Rural Utilities Cooperative Finance Corporation, formed by the electric cooperatives to help solve this problem, is still not adequate to meet the needs of Alaska where present growth is so rapid and demands for electric power so great. It is essential that the cooperatives be able to seek conventional financing when alternate sources are inadequate. The first section of the bill removes the language restricting the board of directors from mortgaging the cooperative's property to secure the cooperative's indebtedness to entities other than the United States and its agencies without the authorization of the members of the cooperative.

The second section of the bill would allow a cooperative to mortgage or encumber "all or a substantial portion of its property" without having the "affirmative vote of not less than a majority" of all of its members. It is believed that the inertia and apathy of most members of cooperatives make it extremely difficult if not impossible to get a majority of the members to respond to a mail vote let alone attend a meeting, especially when considering the number of people involved (over 18,000 are members of the Chugach Electric Association, Inc., for example). Thus, under present law, the flexibility of the board of directors to secure needed funds is severely and unnecessarily restricted. Electric cooperatives with REA loans and mortgages will have to get REA approval of subsequent loans and mortgages, and all electric cooperatives with an annual gross income over $25,000 are by definition "public utilities" and subject to regulation by the Alaska Public Service Commission; it is believed that these safeguards against unwise borrowing and indiscriminate pledging of credit are adequate to protect the interests of members of the cooperative.

Barry W. Jackson
Chairman
House Judiciary Committee

#6751

PHONE 272-4461
AREA CODE 907

WILLIAM J. MORAN
ATTORNEY AT LAW
P. O. BOX 1891
ANCHORAGE, ALASKA 99501

March 13, 1970

Hon. Barry W. Jackson
Chairman, Judiciary Committee
House of Representatives
Pouch V
Juneau, Alaska 99801

Re: House Bill 751

Dear Mr. Chairman:

This letter is written in explanation and support of the subject bill, which was introduced by the House Rules Committee at my request on behalf of the Alaska Rural Electric Cooperative Association. The latter organization is composed of the eleven non-profit electric cooperative membership corporations which are organized and operate subject to the Electric and Telephone Cooperative Act, as amended, AS 10.25. I am the registered legislative counsel and legislative agent, pursuant to AS 24.45.010, of the Alaska Rural Electric Cooperative Association.

The several electric cooperatives in Alaska were organized to participate in the rural electrification programs sponsored by the Federal Government pursuant to the Rural Electrification Act of 1936, as amended. (7 U.S.C.A. §§ 901, et seq.) These programs, administered by the Rural Electrification Administration, commonly known as "REA," consist essentially of loans on favorable terms to finance the purchase and installation of electric generation, transmission, and distribution facilities, and related facilities, in order to furnish central station electric utility service. During the period since 1936, over 1,000 such cooperatives have been organized throughout the several states and their combined facilities serve several million consumers on a non-profit basis. The cooperatives, no less than investor-owned utilities, have been hard pressed to meet the ever increasing demands for electric power and energy. Unfortunately, the appropriations to REA have been static for some years and the applications for loans far exceed the funds available to REA to meet these critical needs. The electric cooperatives must seek supplemental financing.

In recognition of this need for supplementing financing, the electric cooperatives, acting through their National Rural Electric Cooperative Association, established

the National Rural Utilities Cooperative Finance Corporation (known as "CFC") in which the electric cooperatives may hold membership. This corporation will sell its securities in public offerings and has the full support of REA. By subscribing to the corporation's Capital Term Certificates according to a financing formula, the subscribing member is eligible for loans to meet at least a portion of its supplemental financing requirements. For some cooperatives operating in areas of relatively static economic growth and access to adequate power supplies, this supplemental financing may suffice. In Alaska, however, where the need is so very great for additional facilities, and where, in communities dependent upon the electric cooperatives for this vital service, growth is rapid and demand for electric power and energy even greater, it is essential that the cooperatives be likewise able to seek conventional financing when alternate sources are inadequate.

Under the present statute (AS 10.25.390 and 10.25.400), the board of directors of an electric cooperative may execute and deliver a mortgage or other encumbrance on the cooperative's property to secure its indebtedness to REA, but a similar mortgage or encumbrance on a "substantial portion of its property" to secure indebtedness to other than the "United States of America or an agency or instrumentality of it" requires the authorization of an affirmative vote of not less than a majority of all the members of the cooperative. Frankly, the inertia that one encounters in such matters - even apathy - would make it extremely difficult (impossible?) to obtain the approval of a majority of the members of the cooperative, particularly of those cooperatives having a large membership or a substantial membership distributed over a wide area. To quote the most recent statistics immediately available to me - those from the April, 1969, issue of the Northwest Public Power Bulletin, Golden Valley Electric Association, Inc. had 5,422 consumers, Homer Electric Association, Inc. had 3,168, Kodiak Electric Association, Inc. had 1,945 consumers, Matanuska Electric Association, Inc. had 3,610 consumers, and Chugach Electric Association, Inc. had 21,073 consumers. Since I know that Chugach now has 24,000 consumers, i.e. meters in service, serving over 18,000 members, I must assume (1) that the statistics quoted above are probably substantially below current numbers, and (2) that the number of members is probably not much lower than the number of meters served. (I believe that Chugach and Golden Valley have a larger percentage of members being served at multiple locations than the other cooperatives because of the nature of their service areas.) A very special case is the Alaska Village Electric Cooperative, Inc., which was organized to furnish central station electric utility service in the villages of Alaska. Its consumer-members are distributed over wide areas of Alaska; there will be even wider distribution as additional villages are added to the program. In any case, I think you will readily understand that the necessity for having the authorization of a majority of the members - or even having to convene the membership for such purpose - poses a peculiarly difficult problem - if not an insurmountable one - for the cooperative requiring financing

from a source other than the Federal government. (I do not see authority of AS 10.25.120 to vote by mail a solution for reasons already mentioned above. There isn't a meeting facility in Anchorage which could house a majority of Chugach's membership for a meeting, assuming that one had the charm to induce their attendance.)

I know of no good reason for not amending the statute to permit the cooperative's board of directors to contract debt and to execute and deliver such instruments as may be required to secure the payment of such debt, particularly when each such transaction will require the approval of REA in the form of a release of its mortgage interest in the property to be encumbered, inasmuch as the several cooperatives' loan agreements with REA provide that the latter's security interest attaches immediately to after-acquired property upon acquisition - and AS 10.25.420 gives clear effect to such contractual provision.

On occasion, it has been suggested that the similarities - public or quasi-public ownership, for example - between the municipally owned utility and the cooperatively owned utility justify treating the encumbrancing of the latter's property the same as the former's, that is, that since municipal utility revenue bonds must be authorized by a vote of the electorate, indebtedness of cooperatives should similarly require the authorization of their members. But the justification for comparable requirements fails for several reasons, among which one need only cite the fact that the cooperatives are in fact private business corporations and, with respect to their right to effective management authority, entitled to the same consideration as the business corporation organized for profit. Of course, the theory is that municipal revenue bonds are secured only by the revenue of the facility for which authorized, but in effect these bonds are a pledge of the credit of the municipality - and that credit is secured by the property located within the municipal boundaries. Members of the cooperative and their property, on the other hand, are specifically relieved of liability for the debts of the cooperative. (AS 10.25.410) And no municipality is required to obtain a majority of its qualified voters to authorize the issuance of bonds, revenue or otherwise. The regulatory effect of requiring REA approval, and the fact that each of the electric cooperatives is a public utility by definition and subject to regulation by the Alaska Public Service Commission, are further restrictions on unwise borrowing and indiscriminate pledging of cooperative credit.

The Electric and Telephone Cooperative Act (AS 10.25) is substantially a melding of what is contained in two so-called model acts for REA-financed cooperatives offering electric and telephone services, respectively. There was a time when the cooperatives may have needed the statutory requirement of the majority vote of the members in such matters to protect them

from the efforts of investor-owned to acquire their facilities and customers via whatever route was available, including the acquisition, by assignment or otherwise, of security rights of a cooperative's creditors in and to its properties. If such threat was ever real elsewhere, it poses no danger in Alaska.

For the foregoing reasons, I urge the Committee's favorable action on House Bill 751 and early attention on the floor of the House, where I hope that I will likewise have your generous and effective support. If circumstances here permit, I will be in Juneau for your Committee meeting on March 18.

What I have said above concerning electric cooperatives applies in general to Alaska's one telephone cooperative, the Matanuska Telephone Association, Inc., except that the prospects of the Congress creating a supplemental financing agency for the telephone cooperatives similar to the Federal Land Bank are promising. Competitive and other considerations in the electric utility industry defeated similar arrangements for the electric cooperatives. However, the Matanuska Telephone Association, Inc. will likewise benefit from a more flexible and realistic statute controlling its management. In these days of limited capital sources and high interest rates - in the face of ever-growing demands for additional investment, we cannot afford to maintain artificial barriers between these vital public services and their access to investment capital. Considering the needs of Alaska, I think that you will agree that our efforts should be directed toward attracting investment rather than discouraging it.

Thank you kindly for your consideration.

Sincerely,

William J. Moran
Legislative Counsel/Agent
Alaska Rural Electric Cooperative
Association

cc: Members, House Judiciary Committee
Hon. Mike Bradner, Chairman, Rules Committee (sponsor)

3/20/70

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 756

In creating a division of recruitment and retention within the Department of Military Affairs, this bill seeks to establish a system of assisting members of the Alaska National Guard in gaining employment for which their training while in military service has qualified them. A pilot program in the field of smokejumping and firefighting has proved the need for the people and the success of such a system. Since most members of the Alaska National Guard live in the more remote areas of the state where there is a high rate of unemployment, this system would provide employment for many people and a regular, meaningful activity for the National Guard.

Barry W. Jackson, Chairman

HB 756

ALASKA NATIONAL GUARD RECRUITMENT AND RETENTION PROGRAM

HB 756 - Division of Recruitment and Retention: This bill is a part of a comprehensive program of the Alaska National Guard Officers Association to follow through with the Recruitment and Retention program. One of the basic concepts is that many of our rural Guardsmen can receive military training which will assist them in gaining employment which fits their background. We need a full-time staff putting these men next to the job opportunities which we know from a pilot program do exist.

This pilot program was to capture approximately 100 smokejumping and fire-fighting aid jobs which are of the semipermanent nature with BLM. The wages would be from $6,000 to $9,000. A permanent division is necessary to expand upon this program and add to the same, as well as to ensure that the other portions of our Recruitment and Retention programs are enacted administratively.

ALASKA NATIONAL GUARD OFFICERS ASSOCIATION
ESTIMATED COST OF RECRUITMENT AND RETENTION PROGRAM

INCREASES IN FEDERAL RECEIPTS

Part Timers - Increases:			
10% increase in actual number of personnel			
Basic pay x $1,370,000			$ 137,000
10% increase in longevity because of longer term guardsmen			137,000
	Total		$ 274,000
Multiplier Effect of 1	Total	$548,000	
Multiplier Effect of 2	Total		$ 852,000

Job Program: Just using the possibility of gaining the semi-permanent smokejumper and firefighting aid jobs heretofore going to lower 48 State personnel:

100 jobs with average wage of $6,000	$600,000	
Multiplier Effect of 1	600,000	$1,200,000
Total in these two areas alone		$2,052,000

Summary of Cost of Bills Not Through Administration	Peak Cost
Education Program	$ 10,000
Re-enlistment Program	30,000
Retirement Program	60,000
Uniform Allowance & Initial Allowance & Maintenance	130,000
Total Estimated	$ 230,000
Administration Bills - Recruitment & Retirement Program	30,000
Total Direct Cost	$ 260,000

DISTRIBUTION OF ADDITIONAL FEDERAL DOLLARS

	Rural	Urban
Part Timers - Increases:		
10% increase in number of personnel & longevity		
50% of authorized strength 2,500 to 2,600	$ 426,000	$ 426,000
Job Program using only 100 BLM jobs plus multiplier effect of 1	1,200,000	
Total	$1,626,000	$ 426,000

Not added are the additional Scout villages which can be programmed into the seasonal firefighting. In addition, providing to the Scouts the BLM firefighting training program would result in a step increase in pay.

Not included are other Federal agency jobs that are not now utilizing villagers for seasonal, semi-permanent and permanent jobs, much of which goes to lower 48 people. These jobs can be captured with the full time staff of the Recruitment and Retention Branch.

DISTRIBUTION OF ADDITIONAL STATE DOLLARS

	Rural	Urban *
Education Program	$ 2,000	$ 8,000
Re-Enlistment Program	18,000	12,000
Retirement Program	36,000	24,000
Uniform Allowance	65,000	65,000
Total	$ 121,000	$ 109,000
Recruitment & Retirement Branch		30,000
Total	$ 121,000	$ 139,000

* Majority of jobs in Anchorage

The Honorable Mildred Banfield
House of Representatives
State of Alaska

COMMENTS ON HOUSE BILL 756

The largest number of National Guardsmen live in remote areas outside of normal communications relating to employment. Also many recruitment bulletins require a minimum of high school education for any employment consideration.

Many guardsmen lack education but have skill in mechanics, electronics and other less technical positions and are still unemployed simply because they are not aware of vacancies.

The National Guard has several capabilitiesthat can be used to assist these guardsmen in obtaining employment such as, personnel records showing abilities of each individual, a radio network to 63 villages for reporting when employees are needed, and the Air Guard (100% federally funded) to provide transportation to employment areas.

This bill would place a full time in the office of the Adjutant General to evaluate the potential of unemployed guardsmen and match them with state and federal recruitment bulletins then notify the guardsmen that such vacancies exist and provide transportation.

A pilot program in firefighting shows that we could expect a minimum of 100 guardsmen to obtain employment thereby reducing the cost of welfare in villages but mainly giving prestige and dignity to the members affected.

James J. Brunette

JAMES J. BRUNETTE

Recruitment and Retention Activities
January 1970 - June 30, 1970
Preliminary Steps Prior to Launching Expanded Program

ACTIONS NEEDED WHILE SCOUTS IN CAMP:

Six month's or semi-permanent BLM jobs, smokejumpers, firefighting aids.

1. Coordinate with Len Nelson to complete coverage of smokejumpers for those that may be qualified for jobs in 1970.

2. Prepare Federal application forms on others who may be qualified for the 1971 season in rough. Explain the program to the EM or officers concerned. Do not fill in the type of position. This form may also be used for other applications or other positions.

3. Fill out applications for State employment.

4. Prepare seasonal firefighting callup plan. Start dialogue with firefighting personnel of BLM (Messrs. Richardson and Tank) concerning getting all Scout villages on the seasonal callup on a priority basis.

a. Utilize officer in 38th Detachment now working in BLM communications.

b. Determine transportation capacity of Air Guard and Army Guard to assist BLM.

c. Arrange that when a Scout village is picked up that not only the Scouts but unemployed civilians in that village can be employed. Pay to start when they depart on Army or Air Guard planes. Procedure for signing people up in the villages for BLM should be worked out.

d. Orientation program for all village NCOs and members concerning the seasonal callup plan. Determine whether or not firefighting training course is being extended to these village Scouts -- make sure they get the course.

STATEWIDE GUARD -- RECRUITMENT AND RETENTION

1. Send an order down to all Unit Commanders for an inventory by name of unemployed Guardsmen. Get State and Federal application forms on same completed in order to evaluate possibilities for employment.

2. Get on Division of Personnel's mailing list for bulletins for openings.

3. Obtain information on all seasonal jobs from State Departments.

4. Work with hiring personnel of the various State Departments.

5. Get on list for Civil Service Bulletins.

6. Coordinate with hiring personnel of the military bases throughout State.

7. Get information on seasonal jobs, field jobs (Example: BLM cadastral eng.)

8. FAA. Isolated assignment type of work. Determine how we can input our Scouts or Guardsmen into the FAA program. Note that much of the work should fall into the Air Guard type of qualifications. A list of FAA stations, turnover information and qualifications helpful.

1003 B Street
Juneau, Alaska 99801
March 16, 1970
(Telephone: 586-3334)

MEMORANDUM

To: Representative Mildred Banfield

From: Rev. Dr. Walter A. Soboleff W.A.S.

Subject: Alaska National Guard Recruitment, Retention and Retirement Program

Figuratively speaking, for an orderly development of this State to be brought about, an awareness of its many facets must be expressed by those with concern and foresight. Where there develops an awareness of the need for natural conservation and economic use of resources, we are obliged to survey and recommend measures reflecting the best interests of our State's greatest resource, its people.

Not since the development of air travel in Alaska has there been an impact so profound as the coming of the Alaska National Guard to approximately seventy communities throughout Alaska. Under capable leadership, the influence upon these areas continues to have a lasting value in terms of health, recreation, morale, and adult education. In the past, under professional guidance and adequate funding, qualified youth have varied opportunities to attend military schools and return home for positions of leadership in the community.

But, the Alaska National Guard has not reached its greatest potential for development of human resources. It is not at present satisfactorily involving the lower income segment of our society since many of these people cannot afford to engage in activities which fail to provide adequate pay for services and expenses involved. The youth that the National Guard can help most are not joining. This is true in both rural and urban Alaska. For those who do enlist to meet their mandatory military obligations, the pay and other benefits are such that further sacrifice of time on the part of the individual and his family is necessary. Consequently, re-enlistments are few. This is a waste of human resources.

The Alaska National Guard Officers' Association's Recruitment, Retention and Retirement Program is designed to boost the morale, pay and benefits and provide recognition to this citizen soldier who also provides a standby public safety and emergency force for the State.

I have participated in the inventory of the enlisted men's opinions and recommendations for building a more effective Alaska National Guard. These bills before you are reflections of what these men feel are necessary to keep them in the Guard and attract others. Thus the organization will accrue the greater gains of education and training of the individuals who re-enlist.

I urge you to favorably consider and vote for the following bills which make up the comprehensive program:

House Bills

83	Qualifications of Assistant Adjutant Generals (In Senate)
649	Appropriation for the Recruitment, Retention and Retirement Program
753	State Pay - Emergencies
754	Retirement and Death Benefits
755	Educational Assistance - Alaska Guardsmen
756	Recruitment and Retention Division, Department of Military Affairs
757	Re-enlistment Bonus
758	Uniform and Maintenance Allowances

Senate Bills

380	Retirement and Death Benefits
472	Military Leave State Employees
514	Suspension of Civil Liabilities
515	National Guard Registration Plates
516	Free Ferry Trip - Space Available Basis
517	National Guard Preference State Hire
518	National Guardsmen Qualifying for Veterans Loan Program
519	Alaska National Guardsmen Qualifying for Veterans Public Loan Preference

Rep Jackson

JUDICIARY COMMITTEE REPORT

ON

HOUSE BILL NO. 762

This bill allows for the establishment of the position of coroner/public administrator in each judicial district. With the approval of the supreme court, the presiding judge of the superior court in a district may appoint the public administrator. The primary duty of this person will be to administer the estates of deceased persons when administration is required by law and when no other person entitled to administer a particular deceased person's estate has been issued letters testamentary or letters of administration within 30 days after the death. He will also perform the duties of coroner set out in AS 22.15.110.

Presently the law requires district judges to perform these non-judicial duties, and a great amount of time is spent on them. This bill will free these judges for their appropriate judicial functions. The bill is strongly supported by the Alaska Supreme Court and the Alaska Judicial Council.

Barry W. Jackson, Chairman

Coroner

HB-762

File
Misc Judiciary
Correspondence

February 24, 1969

Mr. Thomas Schulz, President
Juneau Bar Association
319 Seward Street
Juneau, Alaska

Dear Mr. Schulz:

I am enclosing herewith the Fifth Report, namely the report for 1967-68, of the Alaska Judicial Council.

I also am enclosing suggested language prepared by the Council and submitted to the legislature which would provide for appellate review of sentences.

Also enclosed is a copy of a bill prepared by the Legislative Affairs Agency, although not yet introduced, relating to the duties of coroner and conservator of decedent's effects. For quite some time the Council considered the desirability of transferring the functions of the district and deputy magistrates when investigating the death of a deceased person, and inventorying and conserving the assets of a decedent's estate, out of the jurisdiction of the district judges to the Department of Public Safety. Within the Department of Public Safety would be created the office with a position of coroner to perform these duties. I alone among the Council members dissented to this proposed legislation, not on the grounds that I was opposed to the transfer of functions but on the grounds that I felt that there should be some safeguards built into the statutes protecting the rights and privacies of individuals.

Under the proposed legislation the Commissioner of Public Safety names the coroners in each judicial district and, in addition, has the authority to designate a state trooper or any other personnel of his department as deputy coroner. In my opinion the sleeper in the bill

as proposed is Section 6, which without restriction would authorize a policeman to take custody and control and preserve the property and the estate of deceased persons until a legal custodian is appointed. Under the way the proposed bill is worded a policeman being appointed deputy coroner could search the premises of the deceased under the guise of inventorying, taking custody and control, and preserving the deceased's property. This means, for example, that if a child in the City of Juneau or the City of Anchorage, or any other populated area, died in a hospital surrounded by his parents, brothers, sisters, aunts and uncles, etc., the police would still have the authority to enter the family home and search the home for the purpose of taking custody and control of the deceased child's estate. The same would apply to the death of a spouse living in Alaska but dying in the south forty-eight. The Alaska dwelling of the deceased person could be searched by the police, notwithstanding the fact that it was occupied by the family of the deceased.

While I can understand the rationale behind the proposition that someone has to conserve and preserve the estates of decedents who die out in unpopulated areas such as a trapper in his cabin, fifty miles from nowhere, or in a village or small community having no administrative or law enforcement agency, I don't believe that such reasoning applies to populated areas.

I submit the foregoing for consideration of the Juneau Bar Association. While the proposed bill has not yet been introduced, I anticipate that it will be introduced this session.

Very truly yours,

F. M. Doogan, Member
Alaska Judicial Council

Enclosures
FMD:pdc

cc: The Honorable Buell A. Nesbett
Senators Rader, Josephson, Engstrom, Merdes and Ziegler
Representatives Cornelius, Croft, Guess, Kay, McVeigh, Jackson and E. Miller

HB 767

File

LAW OFFICES OF
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AVRUM M. GROSS
MICHAEL M. HOLMES

March 4, 1970

The Honorable Barry W. Jackson
Chairman, Judiciary Committee
House of Representatives
State of Alaska
Juneau, Alaska 99801

Re: H.B. No. 767 - Destruction of Records of Motor Vehicle Violations

Dear Mr. Chairman:

As a representative of American Mutual Insurance Alliance I am concerned with House Bill No. 767 which states that all records held by state and local officials disclosing a violation of Sections 28.15.170 and 28.15.280 shall be destroyed three years after the violation.

This legislation is poorly drafted because the Sections referred to cannot be violated by a motor vehicle driver. These sections confer authority on the Department to cancel or suspend licenses if the license was improperly obtained or a court orders such suspension or cancellation. The only persons who can violate these sections are the employees of the Department who are required to administer them.

I do not think any serious harm would be done if the records of the Department of Revenue which are more than three years old are the only records which are to be destroyed but I cannot imagine the legislature requiring that either the records of the courts or the records of the Department of Public Safety or any municipality be destroyed. The records of the Department of Public Safety are particularly valuable in connection with police investigations.

I do not know who requested the bill to be introduced or what reasons there are for introducing it but I suspect the author wants to make it impossible for the courts and other public officials to be influenced by driving violations more than three years old. I do not think this is advisable. If a person gets drunk and is convicted of manslaughter as a result of drunken driving, I do not think the records should be destroyed after a period of three years and the same is

true of any other criminal violation. My principal concern is with respect to the proper rating of insured drivers. Generally speaking, companies want to consider records for a period of at least five years and sometimes longer in order that they can rate each person justly for premium purposes.

I am sending a carbon copy of this letter to the Alliance which will constitute a request for its opinion and policy in this matter, and I will write to you again as soon as I receive an answer. In the meantime I would like to be informed in advance of the time of any consideration of this bill and be permitted to appear in opposition to it.

Yours very truly,

N. C. Banfield

NCB:db

cc: Chas. A. Brown
James S. Stickles
F. O. Eastaugh

HB-767

ROBERTSON, MONAGLE, EASTAUGH, ANNIS & BRADLEY
ATTORNEYS AT LAW
P. O. BOX 1211
JUNEAU, ALASKA 99801

R. E. ROBERTSON (1888-1961)
M. E. MONAGLE
F. O. EASTAUGH
R. J. ANNIS
J. B. BRADLEY
W. G. RUDDY
T. P. BLANTON
L. B. JACOBSON

200 NATIONAL BANK OF ALASKA BLDG.
PHONE 586-3340
CABLE ADDRESS: ROMEA

March 16, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Capitol Building
Juneau

Re: House Bill No. 767

Dear Chairman Jackson:

Thank you for your notice that the House Judiciary Committee will hear representations regarding the subject bill this afternoon at its regular 4:00 P. M. meeting. I am writing this memo on the subject as suggested and submit it in lieu of an appearance because of a conflicting meeting at that time.

The bill itself would result in the destruction of motor vehicle violation records kept in the Department of Public Safety under the provisions of Article 2, Chapter 15, Title 28, Alaska Statutes, after three years.

It is my understanding that Alaska by virtue of certain interstate compacts reciprocates with other states with respect to driving records of individuals who seek to be licensed to operate motor vehicles. Such records would have a bearing on insurance matters such as rating drivers according to experience. More important is their relation to criminal violations, or the absence of criminal violations, associated with motor vehicle operation. With the prospect of many new residents in Alaska, I suggest the importance of our State officials being advised of their previous driving records.

Insofar as insurance matters are concerned, there have very infrequently been reports of unfair rating of insurance applicants because of a stale violation of perhaps 3 to 5 years past and perhaps even 10 years. Such sanctions are not favored by the American Insurance Association and do not have its approval.

From time to time insurers and insurance associations

have encouraged and entered into such group efforts as safe driver plans and have encouraged and paid for analyses of driver accidents in the attempt to obtain meaningful statistics with respect to the more important general subject of better highway safety in the interests of the motoring public. The results of the California study show that the driver with a previous history of moving violations is more apt to be involved in a subsequent accident than the driver with a clear record. This bill would in effect destroy "good records" as well as bad ones.

Aside from the value of these records from an insurance standpoint I suggest that there is a greater public interest in the existence and maintenance of such records from the possible connection of criminal violations involved with motor vehicle violations. The importance of a record of a vehicle failing to stop at a stopsign is not essentially important by itself, but the fact that the driver may have been under the influence of drugs or under the influence of liquor at that time is a matter of legitimate public concern.

I have talked with judges involved in sentencing, and think it fair that they have the whole record before them, so the first offender may be treated more leniently than the habitual offdener.

In view of the above considerations, I am authorized to state the opposition of the American Insurance Association to the enactment of the subject bill.

Very truly yours,

FOE:bh

F. O. Eastaugh

FORM SA-18

MEMORANDUM State of Alaska

TO: Representative Irwin L. Metcalf
House of Representatives

File
Xerox 10 copies

DATE : March 16, 1970

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: HB 767

In addition to the obvious mistaken section references contained in this bill as outlined in my earlier memorandum, I submit the following comments concerning the possible intent of this bill.

If the bill is intended to prevent cancellation of insurance or higher premiums based upon an insurance company's request for a driver's record, you should be aware of the present procedure.

We currently disregard any conviction of OMVI, reckless driving, negligent driving or other serious violations which occurred five years or more prior to the request. All other driving convictions are disregarded if they occurred three years or more prior to the request.

Also, if the intent is based upon use by the insurance company, I question the need to "destroy" the records since they do have a great deal of bearing on the individual's demonstrated driving habits and under AS 28.15.220(b)(3) and (4) may be considered by the courts when imposing license restrictions at the time of conviction.

One must also consider what will occur when you have a situation wherein a person is convicted for a third offense of OMVI or reckless driving and his license is revoked for three years. He would be starting out with a clear record at the end of his revocation and would be able to be convicted several more times before any serious remedial action could be taken.

It would also be possible for a person to be convicted many, many times for OMVI and never show any past convictions, depending upon the time lapse between offenses.

I seriously question whether this bill will provide any great benefit to the vast majority of citizens, but it will unquestionably be quite beneficial to that 9% to 10% of drivers who cause the greatest concern for the traffic safety of the majority of drivers.

3/31/70

HOUSE JOURNAL

Judiciary Committee Report

on

CS for HOUSE BILL NO. 776

Taking into account the fact that Alaskan courts have interpreted the prohibition of AS 11.15.060 against criminal abortions as not applying to the artificial interruption of a pregnancy before the quickening of the fetus, this bill prohibits all abortions by persons other than physicians licensed in this state and it treats abortions by these licensed physicians as a matter of the practice of medicine.

The committee substitute adds a section to the physician's licensure chapter and makes clear that this is a matter of medical practice. This new section sets out certain requirements: the physician must be licensed; the woman's consent must be knowledgeable; she must be a domiciliary of the state or physically present in the state for at least 60 days immediately before the abortion, as evidenced by her affidavit; the abortion must be performed in a facility which conforms to acceptable standards of organized medicine and hospitals; and, if the woman is an unmarried minor, the consent of her parent or guardian or the Department of Health and Welfare is required. The inclusion of guardian and the department is intended to cover those cases in which the department or a guardian has legal custody of the minor, or in which the parents are dead or have abandoned her, or in which she is an emancipated minor.

The committee notes with approval and attaches to this report a memorandum by Legislative Counsel Hayden Kaden, dealing with current abortion law in Alaska and other states.

Barry W. Jackson
Chairman
House Judiciary Committee

HB776

JOHN A. PENNINGTON, M.D.
Anesthesiologist

5003 Cambridge Way
ANCHORAGE, ALASKA 99502
Phone: 279-2612

American Board of Anesthesiology
American College of Anesthesiologists

February 16, 1970

Representative William L. Hensley
Chairman, House Health, Welfare &
Education Committee
Pouch V
Juneau, Alaska 99801

Dear Representative Hensley:

Enclosed you will find a possible substitute bill I suggest to replace measures for abortion law reform presently before committees of both houses of the Legislature. This is a possible compromise measure which incorporates many of the safeguards indicated as desirable during a recent hearing by the Senate Judiciarry Sub-Committe in Anchorage, while minimizing unnecessary interference with the practice of medicine.

I also enclose a copy of a statement recently drafted for possible publication, for whatever value you and your committee might obtain therefrom.

These enclosures represent my personal convictions and are not issued on behalf of the Alaska State Medical Association.

Respectfully yours,

John A. Pennington, MD

John A. Pennington, MD

February 16, 1970

Dear Editor:

This letter is addressed to the abortions law reform question. The recent Senate Judiciary Sub-Committee hearing was educational for me, for it indicated several areas of legitimate concern by both lay public and other physicians. The following are my personal views as a physician who encounters this problem in my own practice; I do not speak here as a representative of the Alaska State Medical Association, although I believe our opinions are frequently parallel.

These considerations seem relevent to me:

1. Abortion presently is commonplace in our society. Few knowledgable proponents of reform expect a liberalized statute to entirely eliminate illicit abortion with its burden of venality, guilt, morbidity, and death. Elimination of any of this scourge, however, would at least be a step forward.
2. A woman has the constitutionally protected rights of person and private conscience to determine whether to continue a pregnancy. This doctrine, like it or not, has been affirmed by judicial decisions. In the near future most present state abortion laws, including Alaska's, will probably be struck down by the courts for unjustified limitation of these rights. Still to be defined in Alaska by legislative act and/or judicial decree are those areas where personal liberty and the legitimate interests of the state intersect. The state indisputably has the duty to suppress illicit abortion with its attendant hazards to both Society and the individual woman; ethical physicians urge this regulation. The state also might properly and wisely require that abortion be performed only in an adequate hospital by a qualified practitioner of medicine after appropriate consultation and appropriate delay to allow reconsideration by the woman. Individuals may differ on the stringency of these safeguards, but their differences are open to compromise.
3. Abortion is repugnant to most physicians; we are dedicated to the preservation of meaningful life. The need for artificial termination of a pregnancy usually results from failure to either prevent or protect that pregnancy. There are definate medical indications for therapeutic abortion--diseases of mother or fetus--which could not be anticipated prior to conception, but these are uncommon. More frequently, abortion is thought to be the only remaining solution for unwanted pregnancies arising from potentially avoidable defects in society, the mother-to-be, or the fetus. To prevent a need for this solution, physicians actively support family planning programs, adolescent sex education, marital counselling, suppression of sex crime, child aid measures, eradication of intrauterine deseases, facilities for unwed mothers, and supportive care for women with undesired pregnancies who might be so aided as to eschew abortions. Unfortunately, until such measures are more generally available and effective, "...abortion is often the best (though an unhappy) solution."
4. In my opinion legal abortion whould be unacceptable for the primary purpose of population control, urgent though that may be. Abortion is successfully promoted for this purpose in some countries, but the concept is alien to most Americans. I am unacquainted with any Alaskan physicians who would abort a woman on a casual repetitive basis as a consequence of her repeated unconcern with avoidance of conception or for the sole purpose of limiting population. We do not seek a situation where legal abortion is available "by demand".

5. Whether abortion is or is not morally acceptable is entirely subjective depending on one's ethical and religious beliefs. The crux of this argument is the stage in fetal development at which the conceptus is considered a human being with the soul, inherent rights, and protections thereof. This time has been variously held to be from the instant of conception onward to parturition when the fetus assumes independent existence as an infant, with various points in between. Obviously this basically is a theological, not medical, question; consequently, consensus will never be achieved. All shades of personal belief can exist on this question without clear-cut adverse effect to the public welfare so long as mutual toleration prevails. By recognizing the existence of non-illicit abortion and formulating reasonable regulations for its safe practice, the state takes no more of a partisan moral position than it does regarding the use of alcohol, for example, by licensing the sale of liquor. I believe it inappropriate and unconstitutional for the state to impose by law an essentially religious doctrine in an area where there is no consensus of belief, no clearly overriding public interest, and where private conscience should prevail. Scrupulous non-interference by the state offers the only ultimate protection to <u>all</u> that cherished, though conflicting, religious and ethical doctrines will remain inviolable for each to follow as his faith and conscience dictates.

The battle is joined; this issue will not just fade away. Those minorities holding opposing extreme positions have clearly and vociferously stated their respective cases, and they are irreconcilable. Hopefully, a large, if "silent" majority of our electorate exists which may promote measures not simply to legalize appropriately regulated abortion, but also measures to minimize the necessity for resort to abortion as a solution. I would urge such people to communicate with our state legislators---they need your views and support now as never before.

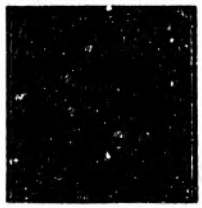
Sincerely,

John A. Pennington, MD

IN THE LEGISLATURE OF THE STATE OF ALASKA
SIXTH LEGISLATURE - SECOND SESSION
A BILL

For an Act entitled: "An Act relating to abortion."
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:
"Section 1. AS11.15.060 is repealed and re-enacted to read:
Sec. 11.15.060. ABORTION. (a) A person, not a physician, who provides to a woman, or procures a woman to take, a drug, medicine, or substance, or uses any instrument or other means whatever upon a woman with intent to induce an abortion of a woman is punishable by imprisonment for not less than one year nor more than five years. For purposes of this section it shall not be necessary to prove that the woman was in fact pregnant, nor that an artificial interruption of pregnancy occurred.
(b) The artificial interruption of pregnancy by a qualified and licensed practitioner of medicine is a matter of the practice of medicine and not prohibited by criminal law if the pregnant woman has been consulted and consents, if the abortion is performed in a licensed hospital which conforms to standards of hospital accreditation approved by the Joint Commission on Accreditation of Hospitals, if at least two other licensed and qualified physicians consult with the woman and concur with the decision to abort, and if, in a non-emergency case, a period of at least 72 hours will transpire between the time of the request for the operation and the time of the operation.
(c) Nothing in this section shall be construed as requiring a pregnant woman to consent to abortion, a hospital to permit an abortion on its premises, or a physician to perform or consult on the performance of an abortion.

file HB776





ALASKA STATE MEDICAL ASSOCIATION

519 WEST EIGHTH AVENUE ANCHORAGE, ALASKA 99501 TELEPHONE 277-6891

March 27, 1970

The Honorable Barry W. Jackson
Alaska House of Representatives
Pouch "V"
Juneau, Alaska 99801

Dear Representative Jackson:

As you know, the Alaska State Medical Association is still hopeful for enactment of a liberal abortion law or repeal of the present statute.

H. B. 776 would be satisfactory but we recommend deletion of the wording "after consultation with her husband if married". This phrase would drive certain women to criminal abortionists. For example, the illicitly pregnant wife of a military man overseas, or for that matter the adulterously pregnant wife of a man not overseas, only added marital discord might be produced if the husband has to be consulted. In any event, the phrase is out of order because a woman is not required to consult her husband about other surgery, such as hysterectomy or appendectomy (though fortunately she usually does). A woman should have sole right as to decision about abortion if the doctor concurs that it is the best solution to her problem.

You may be interested in the editorial support for liberalized abortion laws by the Wall Street Journal.

Thank you for your continued attention to this matter.

Sincerely yours,

J. Rodman Wilson, Jr., M.D.
Chairman
Legislative Committee

JRW:ch
Attachment

REVIEW and OUTLOOK

Repealing Abortion Laws

A growing number of Americans are coming to the conclusion that the best reform of abortion laws is outright repeal, and the state of Hawaii has already acted on that promise.

It is a rather remarkable turnaround. Only a couple of years ago no one would think that anything so "radical" as a repeal proposal would have any chance at all. Yet today several states have liberalized their laws and one house of the New York State legisture this week approved what would amount to Hawaii-like repeal.

The changing attitude is not, in our opinion, just one more manifestation of the new permissiveness of the times. On the contrary, it attests to a greater awareness of the anguish suffered by the victims of the harsh laws that remain on the books.

The objections to repealing abortion laws have by no means, of course, been completely stilled.

Abortion is anathema to certain religions, and while they have every right in their views, they have no right to impose their views on the society at large. Legalizing abortion obviously does not require Roman Catholics or anyone else to practice it; they are as free as ever to shun it and indeed to denounce it.

Some contend that legal abortion would aggravate the sexual latitude of the age. We doubt it. Presumably no one wants an abortion if there is a better choice, and as it is the number of illegal abortions is appallingly high. Taking abortion out of the legal realm altogether might therefore not mean any significant increase in the total number of the operations.

Then there is the objection on the ground of moral philosophy: That abortion is the taking of human life. One answer to it is that no consensus, let alone proof, exists among medical practitioners or moralists. The fact is that many doctors would long since have been performing abortions had it been legal to do so.

For our layman's part, we find it particularly hard to accept that the embryo (first three months of pregnancy) is a human being in any real sense; we incline to the thesis that it is still part of the mother, manifestly incapable of independent existence.

Against these objections, the arguments for repeal seem far more persuasive.

First is that it is simply humanitarian. We have mentioned the suffering of the victims. It involves the degradation, humiliation and mental strain imposed by unwanted pregnancy and the effort to remedy it. A civilized society should not have such draconian laws, although it certainly can and should require that abortions be performed by licensed physicians under sanitary conditions.

Probably legalizing abortion would not be a significant population-control measure in this country (it has been highly effective in Japan). However, it fits in with the new concern—even apprehension—that unless population is controlled, the nation will in the not too distant future be so inundated that decent living conditions will be impossible.

In addition, the question of how many children should be up to the discretion of the woman or the husband and wife as the case may be. Generally speaking they have that right now—they do not have to have any children if they do not want to—and the right, it seems to us, should include the possibility of terminating an unwanted pregnancy.

To put it another way, this is an area where government has no necessary or appropriate function. These severe laws go back to a time and a mentality in which the State assumed it should closely regulate people's private lives; the statutes are, or are analogous to, sumptuary laws. We do not think they accord well with the concept of individual liberty.

Needless to say, there are still other areas where the State's intrusion is questionable. As a broad criterion in such matters, we believe that where the situation is truly private—that is, where the conduct of the individual or couple or family does not impinge on society or hurt anyone—government should refrain from intervention.

For whatever it is worth, it seems to us that abortion, unhappy though it be at best, belongs in that category.

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

PUBLIC DEFENDER AGENCY
Pouch AE, Juneau, Alaska

March 3, 1970

HB 781

The Honorable Barry W. Jackson
Chairman
Judiciary Committee
Alaska State House of Representatives
Juneau, Alaska 99801

Re: Proposed bill to amend work release program

Dear Representative Jackson:

This letter is to set forth the distinctions between the Department of Health and Welfare's suggested amendments to the work furlough program and the amendments I have suggested. The department would not permit persons who have been convicted of a violent crime or who have a history of violent or assaultive behavior to be eligible for work release until one-third of their sentence is served.

From observation many convictions involving violent crimes relate directly to the consumption of alcohol. A person with a history of assaultive behavior relating to the use of alcohol profits greatly from the work release program, he can begin to develop good work habits without the interference of alcohol. Further, the alcohol related offender in many instances has a family and the work release program permits him to contribute to the support of his family and himself.

A further problem faced by the correctional system and the state is providing a secure institutional setting with its great costs for persons who, when not under the influence of alcohol, are capable of living in an unguarded manner. Presently, the jail in Anchorage may be filled to over capacity with prisoners, many of whom could be living as successfully in a half-way house enviroment, where the only contact with the prison would be daily or less frequent meetings with the institutional probation officer. The proposed rehabilitation furlough bill would authorize the Commissioner of Health and Welfare to permit prisoners to reside outside of the prison, e.g., in the Salvation Army dormitory or other non-state contracted institutions.

The department's proposed amendments do not grant as much authority to the Commissioner of Health and Welfare to develop programs for the rehabilitation of prisoners as the suggested amendments of the undersigned. A large measure of flexibility to provide individualized programs appears to be needed. The department only goes part way in seeking this flexibility.

Very truly yours,

Victor D. Carlson

VICTOR D. CARLSON
Public Defender

VDC:rj

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

PUBLIC DEFENDER AGENCY
Pouch AE, Juneau, Alaska
99801

February 27, 1970

HB 781

The Honorable Barry W. Jackson
Chairman
Judiciary Committee
Alaska State House of Representatives
Juneau, Alaska 99801

Re: Proposed amendment to AS 33.30.250,
Rehabilitation Furlough

Dear Representative Jackson:

This letter relates to the memorandum from Charles G. Adams, Jr., Director, Division of Corrections, dated February 17, 1970 proposing amendments to the work furlough program. Attached is a proposed bill to accomplish the amendments requested by Mr. Adams and, in addition, to make the furlough program a better tool to aid the prisoner's rehabilitation.

From the undersigned's experience it is apparent many of the prisoners in state correctional institutions are involved with alcohol related offenses. In certain instances these alcohol related offenses are violent crimes, e.g., cutting with intent to wound, assault with a dangerous weapon, assault and battery, the law presently prohibits work furlough for these prisoners. It is the alcohol related offender who profits greatly from work releases.

A further problem faced by the correctional system and the state is providing a secure institutional setting with its great costs for persons who, when not under the influence of alcohol, are capable of living in an unguarded manner. Presently, the jail in Anchorage may be filled to over capacity with prisoners, many of whom could be living as successfully in a half-way house enviroment, where the only contact with the prison would be daily or less frequent meetings with the institutional probation officer. The proposed rehabilitation furlough bill would authorize the Commissioner of Health and Welfare to permit prisoners to reside outside of the prison, e.g., in the Salvation Army dormitory or other non-state contracted institution.

In summary, the proposed bill is submitted as a step in the direction of giving the Commissioner of Health and

Welfare the latitude he needs to implement the provision of Section 12, Article 1, Constitution of Alaska:

> "Penal administration shall be based on the principle of reformation and upon the need for protecting the public."

If you or the members of your committee have questions concerning the proposed-bill, I am prepared to furnish additional information.

Very truly yours,

VICTOR D. CARLSON
Public Defender

VDC:rj

Enc.

cc: Arthur H. Peterson
Revisor of Statutes
Legislative Affairs Agency

Charles G. Adams, Jr.
Director
Division of Corrections

IN THE

BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to rehabilitation furloughs."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 33.30.250 is repealed and re-enacted to read:

Sec. 33.30.250. REHABILITATION FURLOUGH. (a) When a person is awaiting trial or is convicted of a crime and is sentenced to a prison facility, or is imprisoned in the prison facility for nonpayment of a fine, for contempt, or as a condition of probation for a criminal offense, the commissioner may, if he concludes that the person is a fit subject for a rehabilitation furlough direct that the person be allowed to continue in his regular employment, may authorize the person to secure employment for himself, participate in educational, training, medical, psychiatric, or other rehabilitation programs approved by the commissioner.

(b) If the commissioner directs that the prisoner be permitted to continue in his regular employment, the commissioner shall arrange for a continuation of the employment so far as possible without interruption. If the prisoner does not have regular employment, and the commissioner has authorized the prisoner to secure employment for himself, the prisoner may do so, and the commissioner may assist him in doing so. Any employment secured must be suitable for the prisoner. The employment must be in accordance with the

prevailing working conditions and wages in the area. No employment may be permitted where there is a labor dispute in the establishment in which the prisoner is, or is to be, employed.

(c) Whenever the prisoner is not involved in the rehabilitation program, he shall be confined in the jail unless the commissioner directs otherwise.

(d) The earnings of the prisoner shall be collected by the commissioner and the prisoner's employer shall transmit the wages to the commissioner at the commissioner's request. Earnings levied upon under a writ of attachment or execution or in other lawful manner may not be transmitted to the commissioner. If the commissioner has requested transmittal of earnings before the levy, the request shall have priority for those earnings due and payable at that time. When an employer transmits the earnings to the commissioner, he has no liability to the prisoner for the earnings. From the earnings, the commissioner shall pay the prisoner's board and personal expenses, both inside and outside the prison facility, and shall deduct so much of the costs of administration of this section as is allocable to the prisoner, and, in an amount determined by the commissioner, shall pay the support of the prisoner's dependents, if any. If sufficient funds are available after making the foregoing payments, the commissioner may, with the consent of the prisoner, pay, in whole or in part, the pre-existing debts of the prisoner. Any balance shall be retained by the commissioner and paid to the prisoner at the time of his discharge.

(e) If the prisoner violates the conditions established

for his conduct, custody, or employment, the commissioner may order the balance of the prisoner's sentence to be spent in actual confinement.

(f) The wilful failure of a prisoner to return to the place of confinement not later than the expiration of any period during which he is authorized to be away from the place of confinement under this section, is an escape from the place of confinement and is punishable under the laws relating to escape.

(g) A rehabilitation furlough for employment may not be authorized for a prisoner identified with large-scale, organized criminal activity.

HB 784
file

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE
GEORGE F. BONEY, ASSOCIATE JUSTICE
ROGER G. CONNOR, ASSOCIATE JUSTICE

Supreme Court
State of Alaska
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

April 14, 1970

Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Pouch V, State Capitol Building
Juneau, Alaska 99801

Subject: House Bill No. 784 - Magistrates' jurisdiction over misdemeanor cases

Dear Mr. Jackson:

Thank you for your letter of April 8.

Mr. Carlson has suggested that the supreme court, in the exercise of its rule-making power, permit appeals from sentences imposed by magistrates which exceed thirty days. I think this might have to be done by legislative act. See AS 22.15.240(b) [SLA 1969 ch. 117].

Sincerely yours,

John H Dimond
John H. Dimond
Acting Chief Justice

cc: Victor D. Carlson
Public Defender

HB 784

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

PUBLIC DEFENDER AGENCY

Pouch AE, Juneau, Alaska
99801

April 6, 1970

The Honorable Barry W. Jackson
Chairman
Judiciary Committee
Alaska House of Representatives
Juneau, Alaska 99801

Re: House Bill No. 784 relating to magistrates' jurisdiction over misdemeanor cases

Dear Representative Jackson:

Your committee has submitted the subject bill which would remove from the jurisdiction of magistrates the power to be the judge in trials of misdemeanors alleging violations of state law. The bill does not affect the jurisdiction of magistrates to sentence upon a plea of guilty to a misdemeanor in violation of state law or to be the judge in trials of misdemeanors alleging violations of municipal ordinances.

An alternative to the subject bill is suggested, a resolution urging the Supreme Court to permit appeals from sentences imposed by magistrates which exceed 30 days. Presently, Supreme Court Order No. 101, which amended Rule 7, Alaska District Court Criminal Rules, permits appeals from sentences of 180 days or more.

Further, the appropriation of funds to supplement the training of magistrates and other court personnel would help to eliminate mistakes which may now be occurring.

If you have any questions concerning this letter, I shall be happy to answer them.

Very truly yours,

Victor D. Carlson

VICTOR D. CARLSON
Public Defender

VDC:rj

HB 784

April 8, 1970

The Honorable John H. Dimond
Acting Chief Justice
Supreme Court
State of Alaska
Pouch "U", Capitol Building
Juneau, Alaska 99801

Subject: House Bill No. 784 - Magistrates' jurisdiction over misdemeanor cases

Dear Justice Dimond:

Our committee has reviewed your letter on HB-784 and has decided to place this bill in "Hold" status. I anticipate the committee will take no further action on this bill.

Enclosed is a copy of a letter from the Public Defender suggesting as an alternative that appeals be permitted from sentences imposed by magistrates which exceed 30 days. I feel this suggestion is worthy of consideration. I would request that the court consider this during its current review of the rules.

Very truly yours,

Barry W. Jackson, Chairman
House Judiciary Committee

Enclosure - Copy of letter from Public Defender

BWJ/mm

file - HB 784

BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE
GEORGE F. BONEY, ASSOCIATE JUSTICE
ROGER G. CONNOR, ASSOCIATE JUSTICE

Supreme Court
State of Alaska
POUCH U. CAPITOL BUILDING
JUNEAU, ALASKA
99801

April 3, 1970

Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
State Capitol Building
Juneau, Alaska 99801

re: House Bill No. 784

Dear Representative Jackson:

You have asked for my comments on House Bill No. 784 which would take away from magistrates jurisdiction over misdemeanor cases, except those involving violations of ordinances of political subdivisions.

There are 54 magistrate locations in Alaska. House Bill No. 605, which would assign magistrates to each city of the fourth class, would increase the number of magistrates by 50 - for a total of 104. There are about 16 district judges. All misdemeanor cases, except those involving violations of ordinances of political subdivisions, would have to be handled by the district judges if House Bill No. 784 becomes law. This would create great delays in disposing of misdemeanor cases in remote areas, and would also result in considerable increased costs in travel.

I do not understand the basic reason for this piece of legislation. A defendant must waive jurisdiction of the district court in order to be tried by the magistrate.

This seems to be ample protection of his rights. If there is concern about protection of the public interest, which might arise by reason of a magistrate being too lenient, then recourse can be had to the presiding judge of the superior court who has the authority to terminate a magistrate's employment and appoint a new one.

I think it is unwise to enact such legislation without a complete and thorough study of the impact it will have on the administration of justice outside the major populated areas of Alaska. Certainly it would result in delays and in increased costs and administrative burdens. Whether this would be justified by the need to limit a magistrate's jurisdiction, I do not know.

You wondered whether some kind of a certification procedure could be set up, whereby the presiding judge of a district court could certify certain misdemeanor cases for trial by the magistrate. I do not know on what basis such decisions would be made, whether based on the kind of case involved or the quality of the magistrate. I am certain, however, that this would result in a considerable increase in administrative work and delays in disposing of cases.

We are trying our best to improve the quality of the magistrate courts. This year marks the second year of a concerted effort by the court system to bring comprehensive training programs to all of the magistrates in Alaska. During the period April 6 to 10, 1970, every magistrate will be in Anchorage for a seminar designed to better equip them to handle matters currently within their jurisdiction. We have noted from last year's seminar, that this type of training has had a good effect, in producing better decisions, procedures and records. We are hopeful and expect that there will be continued improvement.

Sincerely yours,

John H. Dimond

John H. Dimond
Acting Chief Justice

HB-784

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

LEGISLATIVE AFFAIRS AGENCY

February 20, 1970

M E M O R A N D U M

TO: Barry W. Jackson, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson
Revisor of Statutes

SUBJECT: Qualifications of magistrates

You requested information on this subject. In AS 22.15.160, "Qualifications of district judges and magistrates", subsection (b) provides:

> "(b) A magistrate shall be a citizen of the United States and of the state, at least 21 years of age, and a resident of the state for at least six months immediately preceding his appointment. The supreme court may prescribe additional qualifications."

In AS 22.15.170, "Selection of district judges and magistrates", subsection (c) provides:

> "(c) The presiding judge of the superior court in each judicial district shall appoint the magistrates for the district court for the judicial district. Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed."

Rule 36(b), Rules of Administration, provides:

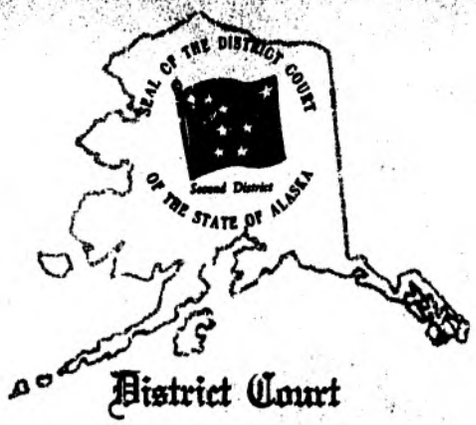
> "(b) Magistrates. To be eligible for appointment as a magistrate, a person must meet the qualifications prescribed in AS 22.15.160."

Today I talked with Judge Thomas Stewart, the Presiding Superior Court Judge of the First Judicial District, about the appointment of magistrates. He said that, so far as he knows, the judicial council

has not recommended and the supreme court has neither proposed nor adopted qualifications for magistrates beyond those specified in the statute. He stated that he follows a very rigid screening process which involves soliciting applications in the community, personally interviewing applicants (for example, before the relatively recent appointment in Yakutat he interviewed at least seven persons in addition to the one finally appointed), and personally going to the community to interview leaders of the community to learn more about the applicants. Factors he considers are age, experience, education, residence in the community, and standing in the community. The judge expressed his willingness to discuss with the committee these procedures and the qualifications of magistrates.

AHP:ic

magistrates -
HB-784



District Court
State of Alaska
FEDERAL BUILDING
BOX 431
NOME, ALASKA 99762

March 17, 1969

Mr. Barry Jackson
Alaska House of Representatives
Juneau, Alaska 99801

Dear Mr. Jackson:

I concur with Judge Mary Alice Miller's letter to you of February 24 regarding the amending of AS 22.15.140. It gives me no inconvenience here as my clerk (only one) is also a magistrate, but I can see it could be quite annoying in a big office.

I also agree with Judge Miller's recommended amendment of AS 22.15.070.

Yours very truly,

Maurice Kelliher
District Judge

MK:jw

cc: Judge Mary Alice Miller

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

April 2, 1970

M E M O R A N D U M

TO: Barry W. Jackson, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson AHP
Revisor of Statutes

SUBJECT: HB 786 (notice requirements for regulation-adopting under the APA)

Two objectives must be borne in mind when dealing with a notice requirement for administrative regulations: (1) the need to give the public actual notice of agency action; and (2) the need to allow some administrative flexibility. The present language in AS 44.62.200 would seem to do this, but in light of certain judicial interpretations and the reaction to certain attorney general opinions perhaps some clarification would be helpful. (It should be noted that Judge Occhipinti's September 19, 1969 order in Botner v. Reetz, No. 69-697D, is not in the least bit helpful without reading the memoranda of counsel in that case. He simply says "In reviewing the memoranda of counsel, the Court finds that notice as given after 1961 did not comply with the statutory requirements of setting forth 'either the express terms or an informative summary of the proposed action'." No reasoning is given in the order.)

There are various possible approaches:

(1) HB 786 suggests one aimed at action of the Department of Fish and Game. However, it poses some problems: first, the reference to "(a) of this section" and to "times, dates, numbers and similar items" is slightly confusing because (a)(1) refers to the time, place, etc., for the regulation-adopting proceedings; secondly, "similar items" is extremely vague; thirdly, the list of certain matters that may vary from the notice raises a strong implication that no others may do so, which is not desirable because this part of the APA applies to all state agencies (with limited exceptions); fourthly, the possibility of variation is wide open, the restriction to the same "subject matter" not being an adequate guide to the agency in giving proper public notice (e.g., is the subject matter "fishing regulations", or "fishing regulations on season dates", or "fishing regulations on season dates for Southeastern Alaska", or "fishing regulations on season dates for Southeastern Alaska, District 14"?).

(2) Somewhat similar to HB 786, a new section or subsection could be added expressly allowing variation from the notice; e.g., add (b) to AS 44.62.200 to read something like "A regulation which is adopted, amended or repealed may vary in content from the terms or summary specified in (a)(3) of this section if the subject matter of the regulation remains the same and the original notice was written so as to assure that members of the public are reasonably knowledgeable of the proposed agency action in order for them to determine whether their interests will be affected by it and whether there is cause for them to make their opinions on the matter known to the agency."

(3) It has been suggested that approach no. (2), above, be modified by omitting the last part, so that it would read: "A regulation which is adopted, amended or repealed may vary in content from the terms or summary specified in (a)(3) of this section if the subject matter of regulation remains the same." As indicated in approach no. (1), above, this would require a determination of what the "subject matter" is in each case, without giving any further guidance to the agency or protection to the public.

(4) The "informative summary" could be explained; e.g., amend AS 44.-62.200(3) to read: "either the express terms or an informative, subject-matter summary of the proposed action, which summary shall be written so as to assure that members of the public are reasonably knowledgeable of the proposed action in order for them to determine whether their interests will be affected by it and whether there is cause for them to make their opinions on the matter known to the agency;".

(5) Since the Department of Fish and Game and the problems regarding its regulations are somewhat unique, a special provision dealing with variation in its regulations could be added. However, correspondence with the Alaska Bar Association's Administrative Law Committee indicates that this approach would not be favored since the members of that committee are interested in bringing all state agencies under the APA, presumably with uniform notice requirements, etc.

(6) Perhaps an explanatory intent clause, added to any of the above approaches, would be helpful.

The committee may wish to consider whether the language in approaches no. (2) and (4), above, could be used to invalidate a regulation on the ground that an individual who belatedly discovers that his interests were affected by an agency regulation was not given sufficient information to make his decision before the regulation was adopted. If such an interpretation does not seem likely or reasonable, it is suggested that (2) and (4) are the best approaches of those listed above. Suggestions for different language are invited.

It should be noted that almost any language, short of a provision that omits a notice requirement altogether or one that requires the notice to contain

the regulation verbatim, will necessitate an administrative decision as to what is "an informative summary" or what is the "subject matter" or what is a "minor" variation or what is "reasonable notice", etc. It should also be noted that the Department of Fish and Game's "double meeting" problem seems to be a matter of policy rather than of law. The department uses the first meeting as an information gathering session. It is not apparent how even the original HB 786 deals with that matter.

AHP:ic

WORK DRAFT COPY

JUDICIARY COMMITTEE REPORT

ON

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 786

The original HB 786 was directed at solving certain problems the Board of Fish and Game has been having in its regulation-adopting procedures. The main problem has been the interpretation of "informative summary" in AS 44.62.200(3); notice of proposed regulations is required to contain either the express terms or an informative summary of them. Apparently as a result of certain opinions and advice from the Office of the Attorney General and certain rulings of the superior court in the Third Judicial District, the board feels that a regulation it adopts may not vary at all from the notice given for that regulation, especially when dealing with such things as the bag limits on game animals and the starting times and dates for fishing seasons; it also seems to feel that two meetings are required for the adoption of regulations, the first one being an information-gathering session.

The Judiciary Committee believes that the intent of the existing law does not require this, but that since such administrative difficulty has arisen there should be some clarification of the law. Two objectives must be borne in mind when dealing with a notice requirement for administrative regulations: (1) the need to give the public reasonable notice of agency action; and (2) the need to allow some administrative flexibility. The committee substitute attempts to meet these objectives, providing some guidance for the agencies and protection for the public. It removes two items of uncertainty in the original bill, and removes the possibility of a negative inference arising from the listing of specific matters ("times, dates, numbers and similar items") that may vary from the notice; the committee substitute applies to all types of regulations.

The committee recognizes the difficulty in maintaining the balance between generality and specificity in writing notices which give members of the public sufficient information to decide whether their interests could be affected by the agency action and thus whether to make their opinions known to the agency. It would appear that almost any statutory language, short of a provision that omits a notice requirement altogether or one that requires the notice to contain the regulation verbatim, will necessitate an administrative decision on an issue such as the content of "reasonable notice".

Barry W. Jackson, Chairman

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99801

April 16, 1970

Barry:

You will find attached a new proposed CS for HB 786. This resulted from the discussion between Av Gross, Tom Wardell and Keith Goltz, yesterday, and it looks o.k. to me. The only difference between this one and the one I prepared a week or so ago is that it deletes the reference to "express terms", which they believe has led the court to require that the "informative summary" be something approaching the express terms.

There is also attached a new committee report, based on my earlier one, but including two examples written by Av Gross and a new paragraph on the board's two-meeting procedure (written by me, and concurred in, I believe, by the attorney general's office). Keith Goltz suggests deleting the reference to the attorney general's office in the first paragraph (but I think the reference is accurate and should be left in, as further evidence of the nature of the problem the committee was dealing with in preparing the committee substitute).

A.

Art

HOUSE JOURNAL

Judiciary Committee Report

on

CS for HOUSE BILL NO. 786

The original HB-786 was directed at solving certain problems the Board of Fish and Game has been having in its regulation-adopting procedures. The main problem has been the interpretation of "informative summary" in AS 44.62.200(3); notice of proposed regulations is required to contain either the express terms or an informative summary of them. As a result of certain rulings of the superior court in the Third Judicial District, and, apparently, certain opinions and advice from the Department of Law, under the present language of the statute, the board feels that its notice of proposed regulations must be very detailed and specific and that a regulation it adopts may not vary at all from the notice given for that regulation, especially when dealing with such things as the bag limits on game animals and the starting times and dates for fishing seasons.

The Judiciary Committee believes that such a restrictive approach is not desirable, and since this administrative difficulty has arisen there should be some clarification of the law. Two objectives must be borne in mind when dealing with a notice requirement for administrative regulations: (1) the need to give the public reasonable notice of agency action; and (2) the need to allow some administrative flexibility. The committee substitute attempts to meet these objectives, providing some guidance for the agencies and protection for the public.

By way of example, the committee believes that notice by an agency that it is going to consider regulations setting a limit on bear in a particular area of the state should be sufficient to support agency action setting any limit, or no limits, in that area. Similarly, notice that the agency will consider a regulation opening the fishing season on a particular date is sufficient notice to support any date, since the subject matter of the regulation (opening the season) remains the same. The committee substitute is directed toward clarification of any confusion that may exist on this point. Moreover, the CS removes two items of uncertainty in the original bill, and removes the possibility of a negative inference arising from the listing of specific matters ("times, dates, numbers, and similar items") that may vary from the notice; the committee substitute applies to all types of regulations.

The committee recognizes the difficulty in maintaining the balance between generality and specificity in writing notices which give members of the public sufficient information to decide whether their interests could be affected by the agency action and thus whether to make their opinions known to the agency. It would appear that almost any statutory language, short of a provision that omits a notice requirement altogether or one that requires the notice to contain the regulation

verbatim, will necessitate an administrative decision on an issue such as the content of "reasonable notice."

The committee notes that the Board of Fish and Game seems to feel that two meetings are required for the adoption of its regulations, the first one being an information-gathering session. This does not appear to be required by law, but is, rather, a matter of policy of the board. Neither the original bill nor the committee substitute deals with this matter, except to the extent that the board should be able to write a notice that would be adequate to permit information-gathering and regulation-adopting at a single meeting. It is the committee's intent that this matter of the number of meetings be left to the discretion of the board. It would appear that the board could adopt meeting procedures, consistent with the law, which would facilitate achieving the objectives stated above.

Barry W. Jackson
Chairman
House Judiciary Committee

HB 787

RESOLUTION NO. 679

A RESOLUTION TO SUPPORT AND ENCOURAGE THE PASSAGE OF HOUSE BILL NO. 787 IN THE LEGISLATURE OF THE STATE OF ALASKA, SIXTH LEGISLATURE - SECOND SESSION.

WHEREAS, the Local Government and Judiciary has prepared and introduced House Bill No. 787 relating to the authority of certain classes of cities and organized boroughs with respect to urban renewal; and

WHEREAS, Legislature of the State of Alaska, Sixth Legislature - Second Session has now before it this House Bill No. 787 under consideration; and

WHEREAS, it is the opinion of the City Council of the City of Fairbanks, Alaska, that such legislation would be favorable to certain classes of cities and organized boroughs to have the power with respect to the planning or undertaking of an urban renewal project in the area which the municipality or public body is authorized to act;

NOW, THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FAIRBANKS, ALASKA, AS FOLLOWS:

SECTION 1. That the City Council supports House Bill No 787 and encourages the Legislature of the State of Alaska, Sixth Legislature - Second Session to favorably consider the passage of this legislation.

SECTION 2. That a copy of this resolution be sent to each member of the Legislature of the State of Alaska, Sixth Legislature - Second Session.

PASSED and *APPROVED* this 20th day of April, 1970.

H. A. BOUCHER, Mayor

ATTEST:

WALLIS C. DROZ, City Clerk

HB-801

HUGHES, THORSNESS, LOWE, GANTZ & CLARK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
807 G STREET
ANCHORAGE, ALASKA 99501

JOHN C. HUGHES
DAVID H. THORSNESS
ROBERT C. LOWE
RICHARD O. GANTZ
MURPHY L. CLARK
ROBERT C. ERWIN

JAMES M. POWELL
BRIAN J. BRUNDIN
GARY W. GANTZ
MARCUS R. CLAPP
KENNETH P. JACOBUS

AREA CODE 907
TELEPHONE 279-4522

April 16, 1970

Representative William L. Hensley
Chairman, Health, Welfare & Education
Committee
House of Representatives
Juneau, Alaska 99801

RE: House Bill No. 801

Dear Willie:

The provisions of House Bill No. 801 have caused some discussion within the University and among the Regents. In particular, we are concerned, not in the aim expressed, but the method of implementing it.

I think we are all in agreement that higher education can be helped and strengthened by the State contracting with private institutions for educational or other services. But I think the sole authority for such contracting, on behalf of the State, should rest in the Board of Regents, and not with the Commissioner of Education. The Regents are now charged with post-secondary education throughout the State and the fragmentation of that responsibility would I think be violative of the constitutional scheme, and it most certainly would lay a basis for problems to develop.

This is not to say that the Regents are the only ones who have any "smarts" regarding post-secondary education. But the scheme is presently to centralize the effort in that area and I believe fragmenting it could only cause duplication, waste, and lead to controversy. And the present set up has shown it is workable and it does not lead necessarily to centralization of effort.

As example, we have recently met with the Board of Education for the State, and we continually coordinate with local boards of education regarding the community college programs throughout the State. This partnership of effort, which finds central direction through the Regents, is working exceedingly well. It would certainly be a mistake to set up separate boards for each community college, for example.

Similarly, we are now engaged in a very progressive and rewarding effort with Alaska Methodist University to provide a consortium of universities in the Anchorage area. To be successful, we will have to make substantial contractual arrangements with AMU for joint use of facilities, sharing of faculty, movement of students between programs and the like. I look for this effort to be equally as or more successful than the joint effort regarding community colleges. Again, however, it would cause nothing but problems if the right to make such contracts was decentralized from the Regents in any way.

You know of the recent efforts between the Regents and Commissioner Hartman and the State Board of Education regarding the programming and management of funds for vocational education through the Commissioner's office and to the community colleges. With such splendid cooperation in this and other areas, there seems no reason to me why similar cooperative efforts could not be continued in the contracting with private institutions. That is if the Commissioner had such a program, it should be no problem to get contracts as needed through the Regents of the University. In doing so, the essential centralization of planning and coordination would be maintained.

I would hope, therefore, that your Committee would not favor enacting House Bill 801. I think no legislation is required, as the Regents already have such authority to enter into such contractual arrangements.

Very truly yours,

Brian J. Brundin, Regent

BJB:kf

HB 803
File 803

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
111 FOURTH STREET
JUNEAU, ALASKA 99801
TELEPHONE 586-6145

DICKERSON REGAN
SUPERVISING ATTORNEY

ANCHORAGE OFFICE
WILLIAM H. JACOBS
EXECUTIVE DIRECTOR
425 "G" STREET, SUITE 630

April 23, 1970

Representative Barry W. Jackson
Chairman, House Judiciary Committee

Dear Mr. Jackson:

I was shocked to hear from you this morning that the House Judiciary Committee has indicated an unwillingness to consider H.B. 803, relating to the jurisdiction of superior courts.

My dismay is best seen in the light of some past history. Since March 31, 1970, when this bill was first introduced by the Committee, I have been scheduled to appear at least seven times to testify in support of the bill. On several of those occasions I waited for the duration of the committee session, only to be told that there would be no time for consideration of the bill, even though other public witnesses had been heard. On two occasions I extended my stay in Juneau to find that at the eleventh hour that the meeting had been postponed, or that H.B. 803 would not be taken up.

The House Judiciary Committee has been as generous as any other legislative committee in considering bills we have proposed on behalf of indigent clients in Alaska. You have always evidenced an open mind to those proposals, and for that the Committee is to be commended.

It is not too late for action on H.B. 803. The Senate has already passed a substantially similar bill, S.B. 297, and would, I am certain, be willing to concur in a House version which closely parallel it. The Senate bill passed last year, in April, by a vote of 19-1.

Although this legislation does not provide new substantive rights, it is extremely important in terms of the procedures by which violations of the state anti-discrimination statutes can be corrected and enforced. It would provide that individuals complaining of violations be permitted to file an action in state superior court.

The State Human Rights Commission has specifically endorsed this legislation on two separate occasions, December 10, 1969, and March 6, 1970.

HB 803

I urge the Committee to take this bill up at the earliest possible date. Unfortunately I will not be able to remain in Juneau for the remainder of the legislative session. However, should the Committee reconsider, Dick Regan of our Juneau office is available to appear before you at any time on this bill.

Respectfully,

Philip B. Byrne

Philip B. Byrne
Deputy Director

cc: All Members, House Judiciary Committee

HB-803

Comments Of
Alaska Legal Services Corporation
In Support of S.B. 297

This proposal was originally drafted by Alaska Legal Services attorneys and jointly introduced by Senators Josephson, Begich, Miller, Brad Phillips, and Rader. (S.B. 297) It passed the Senate April 7, 1969, with one dissenting vote, and has been referred to the State Affairs and Judiciary Committees of the House.

The State Commission for Human Rights exercises jurisdiction over all violations of existing State anti-discrimination laws. Specifically, its jurisdiction relates to discrimination in employment, whether by an employer, labor organization or employment agency; places of public accomodation; housing; financial practices; and state operations. (A.S. 18.80.210-255). Primary enforcement responsibility is vested in the State Commission for Human Rights. (A.S. 18.80.010 et seq.) The Commission, upon the receipt of a complaint from an aggrieved individual or upon its own motion (A.S. 18.80.100) may initiate informal proceedings to achieve conciliation (A.S. 18.80.110) and, if appropriate, issue a cease and desist order against the action and individual or firm as to whose action the hearing was conducted. (A.S. 18.80.120-130). In such proceedings

the Commission, and not the complainant, would exercise control of the presentation. The complainant or the respondent may seek judicial review of the Commission's action (A.S. 18.80.135(a)). Enforcement of the cease and desist order may be judicially obtained, but only at the instance of the Commission (A.S. 18.80.135(b)). In addition to the above, enforcement may be had through criminal prosecution of a person who engages in action prohibited by the substantive provisions of the anti-discrimination laws. (A.S. 18.80.270).

As provisions are now written, it is unclear whether an individual is required to resort to the Commission for Human Rights for relief from discriminatory conduct, or if he is free to seek redress directly through the courts. A second problem is that the terms of the present act do not indicate that relief may be sought as a member of a class, or that the Commission may act against a pattern of discrimination within an industry, labor union, etc., rather than merely dealing with individual instances of discrimination.

The proposed addition specifically states that the Superior Courts of Alaska shall have jurisdiction over causes of action arising under the Alaska discrimination laws, including any collateral issues which are a part of the discriminatory conduct complained of. This would include a pattern of discrimination which might otherwise not be cured if the issues were limited to specific discriminatory acts. For example, an individual who instituted an action against a company to redress racial discrimination would be able to maintain a class action and obtain relief as to all members

of his class, including those who work in a different department.

It further provides for notification to the Commission whenever such a suit is filed, and that the Commission may either intervene in the suit as a party, or inform the Court that it is already acting on the discriminatory act giving rise to the lawsuit. In case of the latter, the court will defer action on the suit until the Commission has determined the issues before it. A limitation of forty-five days in this case is included to ensure the prompt settlement of these issues. The act empowers the Court to enter a preliminary injunction pending Commission action.

If the plaintiff's lawsuit is deferred to Commission action, the plaintiff is given the status of an "aggrieved" party in the event of an adverse decision so as to authorize his participation in or prosecution of an appeal from the Commission's order.

These amendments will serve three basic functions:

(1) an individual will be free to pursue his own remedies rather than rely upon Commission action in cases where the Commission is unable to give his problem prompt attention;

(2) class actions directed at patterns or practices will be permitted, rather than requiring enforcement to focus on individual or isolated acts; and

(3) the Commission's enforcement powers will be strengthened by the power to intervene in broad scale attacks upon discrimination.

We believe these amendments to be doubly important because of the limited staff and budget with which the Commission is currently required to operate.

This proposal was unanimously endorsed by the Board of Directors of Alaska Legal Services Corporation with the stipulation that a provision be added setting a nominal damage figure at $250. This could be accomplished by adding a sentence at the end of Section 18.80.340 as follows:

> Upon a judgment for the plaintiff in a case brought under this chapter, the court shall award nominal damages of $250.00 unless actual damages exceeding that amount have been established.

File HB 809 (this bill 809 is coming to us. DW

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

April 20, 1970

The Honorable Lester Bronson
Chairman, House Commerce Committee
Alaska State Legislature
Juneau, Alaska 99801

Re: HB 809 and SB 565 - An Act Relating to Personal Property Protection Motor Vehicle Insurance

Dear Representative Bronson:

Reference is made to House Bill 809 which is now pending before your committee.

The Department of Revenue opposes HB 809 as it presently reads for several reasons. A brief summary of some of these reasons follows:

1. Line 23 on page 26 of HB 809 defines department as being the Department of Public Safety. While that department administers the drivers license statutes, the Department of Revenue administers the Motor Vehicle Registration statutes. As such the Department of Revenue would be deeply involved in handling registration of vehicles and insurance under the act. It is not believed that the bill as presently worded distinguishes this sufficiently in the administration of the act.

2. Line 8 of page 27 modifies AS 28.10.050(a) by adding a new paragraph (6) which requires the Department of Revenue obtain from each application for registration proof that the security required by the bill has been obtained. Line 10 on page 27 of the bill amends AS 28.10.100 by stating that the Department of Revenue shall refuse to register the vehicle if the security is not in effect on the vehicle. The present registration procedure does not require any supporting documentation such as this required for financial responsibility. The necessity of handling and to some degree auditing these insurance policies as a prerequisite to licensing would virtually double the cost of administration, and in the instance of the mail-out renewal program would prove even more costly as the Department of Revenue would have to write the taxpayer and request insurance proof whenever it was not received with the mailed-in application. (Because certain sized forms are used at present in filing and insurance policies are generally not printed on that size paper, the bill would require a virtual duplication of files in the Motor Vehicle Division. This will greatly increase the costs of administration.)

Since few insurance policies cover the calendar year and the 5-month grace period we will have many insurance policies expiring and being renewed. Shifts of policies from one company to another and cancellation will increase the cost of labor and material considerably.

3. Because insurance policies vary in their wording and their coverage it would appear necessary to design a standard insurance policy which everyone must follow. To do this the Attorney General's office would be given the power under the statute to design such a policy. Otherwise it would be virtually impossible for our present staff and licensing agents, who are untrained in the interpretation of insurance policies, to ascertain whether a vehicle is properly insured at the time of registration.

4. Lines 6 through 8 on page 26 of HB 809 provide that if a person fails to make payment within 30 days because of an injury or damage shall be grounds for suspension or revocation of the motor vehicle registration and operators license. Revocation of the motor vehicle registration should theoretically be revoked in the Division of Motor Vehicles, but locating the registered owner, cancelling his registration certificate and obtaining the plates back is a far more difficult thing to accomplish. The person and/or vehicle may be out of the state or their whereabouts may not be known.

It is requested that the Department of Revenue be given the opportunity to appear before your committee anc clarify these and other factors involved in the administration of HB 809.

Very truly yours,

Vernon L. Snow
Deputy Commissioner

VLS/ge
cc: John Beard
Representative Barry Jackson
Paul Goodrich
Phil Wall
R. D. Stevenson

HB 856

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

May 8, 1970

Honorable Barry Jackson
Chairman
House Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Dear Representative Jackson:

This note accompanies a draft of HB 856 which takes into consideration the amendments proposed by you and members of your committee. They are as follows.

(1) In subsection (a) it will be noted that amendment has been made which would allow the ABC Board to require accommodations greater than 10 rooms for issuance or transfer of a license if in its discretion it felt that 10 rooms would not be a sufficient facility. This provision has the advantage of keeping the size requirements low enough to encourage smaller facilities while providing certain control over possible abuse under the section.

(2) Members of the committee expressed concern that tourist accommodations might be constructed but not used under a sec. 260 license, thus effectively circumventing the quota requirements. It was also noted that a facility should not have the tourist accommodations open on a part year basis but keep the dispensary open all year. Subsection (b) represents a relatively straight forward approach to these problems by requiring the tourist accommodations to be open and suitable for occupation whenever the bar is open. AS 04.10.320(b) (Duration of Licenses) provides for a one-half year license for seasonal operations which would be available to facilities desiring it.

(3) Subsection (c) makes sec. 270 applicable where a license would operate within an organized borough or city and would require assembly or council approval for issuance. This, of course, gives the localities affected some control over what "extra" licenses might be issued within their boundaries.

I hope these amendments meet with your approval.

Sincerely,

G. KENT EDWARDS
ATTORNEY GENERAL

By: William Edward Spear
Assistant Attorney General

GKE:WES:em

CS for

DRAFT OF HOUSE BILL NO. 856

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to alcoholic beverage licensing to encourage tourist trade."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 04.10.260 is amended to read:

Sec. 04.10.260. LICENSING TO ENCOURAGE TOURIST TRADE. (a) The board may, in its discretion, approve the issuance or transfer of a license [INTO AN AREA OUTSIDE AN INCORPORATED MUNICIPALITY] without regard to the quota provisions [of secs. 210 - 290] of this chapter where it appears that the issuance or transfer will encourage the construction or improvement of a hotel, motel, resort or similar business related to the tourist trade having a minimum accomodation of 10 rooms. However, the board may in its discretion require a minimum accomodation of more than 10 rooms as a requirement for a license issuance or transfer under this section.

(b) The accommodations required in (a) shall be available and suitable for commercial occupation at all times during which alcoholic beverages are dispensed in accordance with a license under this section.

(c) An application for the issuance or transfer of a license under (a) of this section is subject to the provisions of sec. 270 of this chapter if the license applied for would be issued within an incorporated municipality.

FORM SA-18

File
HB-857

MEMORANDUM State of Alaska

TO: The Honorable Barry Jackson
Chairman
House Judiciary Committee
Alaska State Capital Building

DATE : April 28, 1970

FROM: John K. Robertson, Director
Division of Banking, Securities,
Small Loans & Corporations
Department of Commerce

SUBJECT: Summary of Trust Company Bill

In less than a year, the Department has chartered one trust company and is currently considering two other applications. In addition, several application forms have been furnished to interested persons. Prior to this period, the Trust Act (AS 06.25) had never been used. We believe, in some instances at least, the sudden interest in the Act is due largely to the general banking privileges provided under Sec. 06.25.100, low capital requirements and the absence of supervisory and regulatory provisions.

As mentioned, the Department is now considering the "applications" of two trust companies. These "applications" consist of Articles of Incorporation filed under Title 10, List of Stockholders, Affidavit showing $25,000 in paid capital, Directors Oaths and the receipts showing a deposit of securities with the Department of Revenue. According to the statutes, after the trust company has furnished this information, the Department "shall" issue a Certificate authorizing the trust company to engage in business. In other words, in reality, there is no application or "consideration" of the application by the Department. Therefore, the purpose of the proposed trust company bill is to protect the public by preventing weak and unqualified entries into the state's financial system as well as establishing a legal framework within which the Department may provide continuing regulation and supervision.

The following is a brief explanation of the bill by section:

Sec. 1. Beginning capital requirements are increased from $25,000 to $100,000 and the par value is reduced from $100 to $1 per share. This would bring minimum capital requirements into conformance with those established for commercial banks (tends to eliminate weak applicants). Reducing the par value to $1 will allow broader distribution of the capital stock.

Sec. 2. Under the existing statute, a trust company may engage in the general banking business without having demonstrated its ability to do so. The amendments contained in this section would result in a qualification procedure for trust companies, essentially the same as for commercial banks. In other words, standards, i.e., public need and convenience, economic justification, and management capability would be applied. Membership in the Federal Deposit Insurance Corporation would be required of all trust companies engaging in the general banking business. Deposit insurance would not be required of trust companies involved solely in the trust business since the FDIC does not insure a trust company unless it receives deposits not connected with its trust accounts.

Sec. 3. Sec. 06.25.085 is a new section applying certain provisions of

the banking code (AS 06.05) to the regulation, operation, and supervision of trust companies. Specifically, those provisions are:

Article I - Banking Code

Powers of the Department over State Banks
Examination by the Department
Bank Reports to the Department

Article II - Banking Code

Handling Deposit Accounts
Reserves against Deposits
Legal Limits and other Limitations on Loans
Liability of Directors
Authorized Investments
Limitation on Borrowing
Investment in Banking Premises and Equipment

Article III - Banking Code

Issue of Capital Notes and Debentures
Application and Approval for Change of Location
Limitation on Payment of Dividends and Restoration of Surplus
Approval of Conversion, Merger, or Consolidations
Prohibited Practices
Department May Seek Injunction

The Trust Company Act is completely void of these operating and supervisory criteria. Such guide lines are essential to trust company management as well as the Department.

Sec. 4. Sec. 06.25.105 is new and provides branching privileges to those trust companies qualifying for deposit insurance.

Sec. 5. AS 06.25.230 is amended, providing that a trust company which is a member of the Federal Deposit Insurance Corporation is not required to maintain the 20% capital reserve. However, it should be noted, that insured trust companies are required to maintain deposit reserves as required under Sec. 200 of the Banking Code.

Sec. 6. AS 06.25.250, covering deposit reserves is repealed as being superfluous since insured trust companies are required to maintain deposit reserves under Sec. 200 of the Banking Code and non-insured trust companies are required to maintain capital reserves under AS 06.25.230.

Sec. 7. Sec. 06.25.255 is new and provides that the Department may restrict or prohibit a trust company from offering a service which it is not qualified to offer.

Sec. 8. Sec. 06.25.315 is new and establishes standards for regulation and supervision of trust companies similar to those set out in the Banking Code.

AB660

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

March 18, 1970

HB 860

The Honorable Barry Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Re: Juror's List - AS 09.20.050

Dear Representative Jackson:

Pursuant to your verbal request that the Departments of Revenue, Fish and Game, and Administration present you with their views respecting possible legislation to clarify problems that have arisen in the administration of Chapter 67 SLA 1969 (AS 09.20.050), I have contacted those other departments. It is our and their recommendation that the legislature consider taking the following action to solve the problems involved in administering Chapter 67 SLA 1969.

1. Since the voters list is made up according to precinct and the precincts have geographical limits within court districts, use of the voters list alone would solve most of the problems. We suggest you consider repealing Chapter 67 SLA 1969 and re-enactment of the prior statute as the simplest course.

2. If the list of voters is not broad enough, we recommend use of the voters registration list since it would increase the number of names available for jurors. Chapter 67 SLA 1969 could be amended to refer only to that list.

3. We question the apparent court system's interpretation of Chapter 67 that a single composite list with no duplications in names is to be furnished. The difficulty in furnishing such a list is finding a common denominator. Voters do not give their social security numbers and that number is not always present in the case of fishing licenses or income tax returns. Unless a common number can be assigned to an individual the only way that a single list could be prepared without duplication of names is to list persons by the sound of their names. Since individuals use their names and initials differently on different documents and many people have the same name or initials duplication occurs.

It is also difficult to present to the courts a list of names which will not contain duplication because of addresses. For example, voters may list their home address whereas the same person may use his mailing address on his income tax return or fishing license.

If Chapter 67 SLA 1969 is to be implemented, three separate lists will be submitted.

4. It is recommended that Chapter 67 be amended to require that the list of residents filing income tax returns and residents purchasing hunting and fishing licenses cover the even numbered years and be submitted by July 1 of the following odd numbered year. The voters list comes from general elections which fall in even numbered years. This would permit the court system and the departments involved to handle the problem of setting up jury lists only once every two years rather than once every year and would reduce the expense of preparing such lists.

If Chapter 67 is to remain in its basic format it is recommended that the statute be amended to provide that the list of persons purchasing resident fishing or hunting licenses cover those purchasing licenses during the previous year. At present it is not clear whether the statute speaks of the current year or the previous year. The Department of Fish and Game advises that the list it is currently preparing is of persons purchasing resident fishing licenses during 1970. A list for 1969 is not prepared. Administratively it would be more practical to furnish the list for the prior year rather than to furnish periodic lists during the year covering new licenses sold during the current year.

5. If Chapter 67 remains, it is recommended that it be amended to read that the income tax return list includes those persons filing returns having an Alaska address with no reference to residency. If this change is not made it is suggested that the term "resident" be defined for the purpose of determining whose income tax returns should be included because the definition of "resident" varies.

AS 09.20.010 states the qualifications of a juror to include that of being a resident of the state. No definition of resident is found in that chapter. However, AS 09.20.050 does refer to voters. AS 15.05.010(3) states that in order to vote the person must have been a resident of the state for at least one year before the election.

AS 16.05.940(14) of the fish and game statute gives an expanded definition of a resident. It reads:

> "(14) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained his voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of this chapter, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of this chapter, and a person who is an alien but who for three years has maintained a permanent place of abode in the state is a resident for the purposes of this chapter;"

Although the income tax chapter (AS 43.20.010) refers to residents and

nonresidents, those terms are not defined in the act. The California definition of a resident for income tax purposes is the general rule followed by most states. It reads as follows:

> "Section 17014. "Resident" includes:
>
> (a) Every individual who is in this State for other than a temporary or transitory purpose.
>
> (b) Every individual domiciled in this State who is outside the State for a temporary or transitory purpose.
>
> Any individual who is a resident of this State continues to be a resident even though temporarily absent from the State."

Some persons file resident tax returns who are sometimes temporarily out of the State and have non-Alaska mailing addresses. Others may file resident returns after they have left the State, covering periods in which they were residents in the State. Chapter 67 SLA 1969 would require the Department of Revenue to include all of those individuals on the list furnished to the court system.

Many persons move into the State during the year and make Alaska their permanent residence. When they file their income tax returns they are considered residents for that part of the year they are in Alaska (part time residents.) Their returns list Alaska addresses. Was it the intent of the legislature that the returns filed by part year residents be included in the list furnished to the court if (1) the return shows an Alaska address, or (2) the person claims to be a part year resident with or without an Alaska address?

Not all income tax returns are filed by April 15 following the year of the taxable period. If a complete list is to be furnished by the Department of Revenue the time for this to be submitted should probably be the close of the year following the tax year.

6. The Supreme Court in Green v. State of Alaska File No. 1177 states on page 19 and 20 of its Opinion as follows:

> "In the Third Judicial District selection of juries under the 1969 law will not have to be made before April 30, 1971. But in the First Judicial District, where the last list of jurors was prepared under the original act in January, 1969, the new law will have to be followed by January, 1971. We refer to this matter of implementing the 1969 law in order to advise the executive and legislative branches of our government that if the necessary lists cannot be obtained prior to January, 1971 at the latest, properly constituted juries cannot be selected, with resulting judicial chaos and a severe impairment of the administration of justice."

Since the final date for filing income tax returns is April 15 and in many instances extensions are granted, it will not be possible for the Department of Revenue to furnish a 1970 income tax list to the Third Judicial District by April 30, 1971. The earliest date covering most 1970 returns would be July 1, 1971. It is also questionable whether a list of holders of 1970 fishing and hunting licenses for the year 1970 can be furnished by January, 1971 to the First Judicial District. The Supreme Court did not specify when lists will be required for the Second and Fourth Districts.

If Chapter 67 is not repealed and the previous section re-enacted, it is recommended that the aforesaid changes be made to the act and the date to provide the first lists not be set before July 1, 1971.

Very truly yours,

Vernon L. Snow

Vernon L. Snow
Deputy Commissioner

VLS/ge
cc: Members House Judiciary Committee
Commissioner Downes
Commissioner Noerenberg
John Beard
Vern Roberts
Keith Angier
Phil Wall

Introduced: 5/5/70
Referred: Rules

IN THE HOUSE BY THE JUDICIARY COMMITTEE

HOUSE BILL NO. 860

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the preparation of jury lists."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.20.050 is amended to read:

Sec. 09.20.050. JURY LIST. (a) At such times as the presiding judge of the superior court in each judicial district may designate, but not later than September 1 of each odd-numbered year [LESS THAN ONCE EVERY TWO YEARS], the clerk of the superior court in each judicial district shall prepare a list of the names of residents of the district who are qualified by law for jury service. The list shall contain the names of all persons who purchased a resident hunting or fishing license during the preceding year, all persons [RESIDENTS] who filed a state income tax return for the preceding year which showed an Alaskan address, and all persons who have registered to vote in this state [AS WELL AS THOSE PERSONS WHO VOTED IN THE PRECEDING GENERAL ELECTION]. If the superior court is located in different cities in the same judicial district, the clerk of the court located in each city shall prepare, at the times designated by the judge but no later than September 1 of each odd-numbered year [AT LEAST EVERY TWO YEARS], a list of names of persons qualified for jury service [. THE LIST SHALL CONTAIN THE NAMES OF ALL PERSONS WHO PURCHASED A RESIDENT HUNTING OR FISHING LICENSE, ALL RESIDENTS WHO FILED A STATE INCOME TAX RETURN FOR THE PRECEDING YEAR, AS WELL AS THOSE PERSONS WHO VOTED IN THE PRECEDING GENERAL ELECTION] and who are residents of that portion of the judicial district designated by the presiding judge.

(b) The jury list shall be based on the list of persons [, PREPARED BY THE DEPARTMENT OF REVENUE OR THE DEPARTMENT OF FISH AND GAME,] who purchased a resident hunting or fishing license during the preceding year, as prepared by the Department of Fish and Game, the list of persons who filed a resident state income tax return for the preceding year, as prepared by the Department of Revenue, and the [VOTING] list of registered voters, as prepared by the secretary of state. The departments and the secretary of state shall prepare their respective lists by judicial district, and shall submit them to the presiding judge of the superior court in each district no later than July 1 of each odd-numbered year [FROM THE PRECEDING GENERAL ELECTION. A QUESTIONNAIRE FOR PROSPECTIVE JURORS MAY BE ADOPTED AND SUBMITTED TO THEM BY THE ADMINISTRATIVE DIRECTOR OF COURTS].

(c) A copy of the jury list shall be transmitted only to each district judge and each superior court judge within the judicial district and shall be used to summon jurors residing within the immediate area of the court and for no other purpose.

(d) A questionnaire for prospective jurors may be adopted and submitted to them by the administrative director of the court system.

* Sec. 2. Jury lists in existence on the effective date of this Act may be used until September 1, 1971; however, these should be corrected and supplemented before September 1, 1971 to the extent reasonably possible in accordance with this Act, as determined by the presiding judge of the superior court in each judicial district.

NO. 1 SENATE BILLS

SCR-27

March 6, 1970

Mel J. Personett, Commissioner
Department of Public Safety
Pouch "N"
Juneau, Alaska 99801

Subject: SCR-27 - Hitchhiking

Dear Commissioner Personett:

After our meeting with you on Thursday, March 5, regarding SCR-27, it was the desire of the committee to relay our expression on this resolution. The committee wishes to see the Department of Public Safety reinstate the old regulation on hitchhiking. Based on your commitment to try and accomplish this, the committee has placed SCR-27 in a "Hold" status.

Sincerely,

Barry W. Jackson
Chairman
House Judiciary Committee

BWJ/mm

FORM SA-1B

SCR-27

MEMORANDUM State of Alaska

TO: Representative Barry Jackson, Chairman
House Judiciary Committee

DATE : March 24, 1970

FROM: Commissioner Mel J. Personett
Department of Public Safety

SUBJECT: Progress Report - SCR 27

We are currently reviewing all of 13 AAC in view of both SCR 27 and miscellaneous comments from the public and the legal profession.

We anticipate public notice and hearings within the next month or so.

As stated before, the hitchhiking section will be revised to read as previous to the 1969 revision.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

LEGISLATIVE AFFAIRS AGENCY

April 24, 1970

M E M O R A N D U M

TO : Rep. Mildred Banfield, Chairman
Subcommittee on Dept. of Public Safety Regulations
House Judiciary Committee

FROM : Arthur H. Peterson, Revisor of Statutes

SUBJECT: Recently proposed changes in regulations of the Department of Public Safety

One of the main legislative concerns about the public safety regulations has been the new (as of December 31, 1969) hitchhiking regulation. This regulation, currently in effect, reads as follows:

> "13 AAC 02.180. PEDESTRIAN SOLICITING RIDE OR BUSINESS. A person may not stand on or along a highway for the purpose of soliciting a ride, employment, business or a contribution from the occupant of a vehicle."

Since this is such a broad, flat prohibition of hitchhiking, it was suggested by the House Judiciary Committee that if any regulation on this matter is necessary the pre-December 31, 1969 provision should be re-adopted. That provision reads as follows:

> "104.67 PEDESTRIANS SOLICITING RIDES OR BUSINESS. No person shall stand in a roadway in a manner that will distract a driver's attention for the purpose of soliciting a ride, employment or business from the occupant of any vehicle."

The proposed amendment would have 13 AAC 02.180 read as follows:

> "13 AAC 02.180. PEDESTRIAN SOLICITING RIDE OR BUSINESS. A person may not stand on or along a roadway in a manner that will distract a driver's attention for the purpose of soliciting a ride, employment, business or a contribution from the occupant of a vehicle."

This amendment changes "highway" to "roadway", adds "in a manner that will distract a driver's attention" and retains

"or a contribution" which is in the current regulation. And it retains the words "or along", referring to the roadway. "Highway" is a broader term than "roadway" (see 13 AAC 10.115 and 13 AAC 10.280), with the latter meaning just the main traveled portion of a highway; so this part of the amendment is a step in the direction the legislature desired; however, this will have no effect because the words "or along" are retained, thus defeating the legislative intent. The "in a manner . . ." language was taken from the pre-December 31, 1969 provision, and would be helpful if it were not for the "or along". Why the "or a contribution" was put in the current regulation and retained in the proposed one I don't know.

The effect of the regulation, with the proposed amendments, would be to continue the prohibition on hitchhiking (because if you are standing "along" a roadway hitchhiking, your purpose is to attract [or "distract"?] a driver's attention to your need for a ride). It also prohibits such things as hailing a bus, setting up a roadside vegetable or lemonade stand, and soliciting contributions for the blind. It is my opinion, and I believe this was concurred in by Commissioner Personett in his testimony before the House Judiciary Committee (at least with regard to hitchhiking), that there is no need for such broad prohibitions in Alaska. The Department of Public Safety's determination to impose such prohibitions, in the face of the Senate's passage of SCR 27 and the House Judiciary Committee's recommendations on the matter, appears unjustifiable.

It might also be noted that the history note at the end of the proposed 13 AAC 02.180 identifies the amendments as being at the request of the legislature. This does not conform to the Drafting Manual for Administrative Regulations (to which adherence is required by AS 44.62.060(a)), and I don't know why this was done. It should, of course, be deleted before the regulation is printed for distribution in the Alaska Administrative Register.

Another main concern of the committee was the problem involving buses stopping on the highway, prohibited by 13 AAC 02.-340(a). The proposed amendments add an exemption in sec. 340(b) for school bus drivers loading or unloading school children, and add a new subsection establishing a presumption that it was the registered owner who left a vehicle stopped, parked or standing in violation of a statute or traffic regulation. It does not appear that any of the proposed amendments deals with the problem of buses other than school buses stopping on the highway, and the committee's intent in this regard does not appear to have been implemented.

Another matter that has been called to my attention is the group of regulations relating to motorcycles. It has been

suggested that some of these regulations were adopted for the purpose of harrassing motorcycle operators rather than meeting the legitimate needs of the public welfare and safety. For example, 13 AAC 04.280(a)(2) and 295 require motorcycles and motor scooters to be equipped with a windshield which rises at least 15 inches above the handlebars (unless the operator is wearing goggles or a face shield); when this is read in conjunction with 13 AAC 04.290, which prohibits handlebars from being more than 15 inches above the seat, we find that the top of the windshield of a motorcycle with handlebars on the same level as the seat would have to be 15 inches above the seat whereas the top of the windshield of a motorcycle with handlebars 15 inches above the seat would have to be 30 inches above the seat. It is not apparent how this promotes the public welfare or safety. Moreover, some of the requirements alone pose problems; goggles limit vision, as do helmets (13 AAC 04.280(a)(3)) which also muffle sound; a helmet requirement affects only the wearer and not the public, and thus is a criminal restriction serving no public interest; I have been told that, even with regard to the helmet wearer, safety experts do not agree that he is safer with one on, and some courts have held such a requirement invalid. (I have not researched the matter, but please see the attached Law Week notes which offer cases on both sides of the issue.) It seems likely that the safety experts would disagree about the 15-inch handlebar height requirement too. Also, 13 AAC 04.280(a)(1) requires motorcycles and motor scooters to have two rear-view mirrors whereas other vehicles (except for buses and certain large vehicles) need only have one (see 13 AAC 04.220). It is up to the legislature to decide whether regulations of such questionable necessity and even questionable validity should be allowed to stand; AS 44.62.320 provides for legislative annulment of administrative regulations.

AHP:hg
Enclosure

cute these defendants for an aggravated offense under 49 U.S.C. § 322 (c), which adds the element of using any false or fictitious document or other fraudulent device to evade or defeat the Act or its regulations. The defendant contends that in order to show a violation of this aggravated provision, the government must prove fraudulent intent within the context of the common law elements of criminal fraud. However, it is the opinion of this court that Congress, in imposing an aggravated fine for the use of false documents in connection with infractions of I.C.C. rules and regulations, did not intend to create a statutory equivalent of common law fraud. Rather, as a malum prohibitum offense, proof is required to show that the defendants used false documents knowingly and willfully as part of a course of conduct which sought to evade or defeat an I.C.C. regulation. Proof of specific intent to defraud the I.C.C. is not prerequisite to a finding of guilt. A construction of the Act requiring proof of fraudulent intent, or other common law elements of the crime of fraud, 'would result in limitations neither expressed in the statute nor justified in the light of the purpose' of the Act. See United States v. Luxon, 166 F.Supp. 25, 29 (E.D.Ky. 1958), for a similar construction of a statute penalizing the making of a false statement, knowing it to be false, to the Commodity Credit Corporation, for the purpose of influencing action or obtaining money and therefore defeating the statutory purposes of 15 U.S.C. § 714. That provision was held not to evoke the common law elements of fraud. For these reasons, this court concludes that a specific intent to defraud the I.C.C. is not a required element of a 49 U.S.C § 322 (c) offense."

The contention that because freight bills are not required documents for contract carriers under ICC regulations there was no evasion of the regulations by the false bills is invalid. Section 322(c) proscribes any false or fictitious documents used to evade or defeat any ICC regulation. The failure of ICC audits of Indiana Trucking's books and records in 1957 and 1964 to uncover these irregularities has no bearing on this prosecution. There is no evidence that during those periods the practice of using East Chicago, Indiana, as point of origin on freight bills was being followed, and the audits were concerned with accounting rather than operational irregularities. Even if employees of the ICC had such knowledge and the defendants were misled by nonaction on the part of the ICC, neither principles of estoppel nor any other equitable consideration entitles the defendants to immunity from statutory and regulatory proscriptions. A prior ICC proceeding which considered the conduct complained of in this prosecution is not binding in its finding of a "lack of subterfuge." That proceeding was a denial of Indiana Trucking's application for an extension of authority to cover the unauthorized transportation involved in this prosecution, and did not direct itself to the question of knowing and willful use of false documents to defeat or evade ICC regulation.

—USDC NIll; U.S. v. Indiana Trucking, Inc., 5/16/69.

Motor Vehicles

STATE REGULATIONS—

Illinois requirement that motorcyclists and passengers wear protective head gear unconstitutionally exceeds state's police powers since object of requirement is to protect persons riding motorcycles rather than public safety.

[*Text*] "If the evil sought to be remedied by the statute affects public health, safety, morals or welfare, a means reasonably directed toward the achievement of those ends will be held to be a proper exercise of the police power. • • •

"However, the legislature may not, of course, under the guise of protecting the public interest, interfere with private rights." People v. City of Chicago, 413 Ill. 83, 91.

Statutes similar to the one in question have been tested in other jurisdictions. In Rhode Island (State ex rel. Colvin v. Lombardi, 241 A.2d 625), the court held that the legislation was justified in order to assure that flying stones or other windblown objects would not strike the operator and cause a momentary loss of control of the vehicle which could then endanger other traffic."

There have been similar decisions in Massachusetts, North Dakota and Connecticut.

[*Text*] "In Michigan, (American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72) the court held a statute requiring a "crash helmet" for both operator and passenger to be unconstitutional. Likewise in Louisiana, (Everhardt v. City of New Orleans, 208 So. 2d 423) the court struck down a statute calling for operators and passengers to wear "safety helmets."

Our statute requires both the operator and each passenger on a motorcycle to wear protective headgear. In the case of a passenger it is clear that the "protective headgear" serves no function of safeguarding the motoring public. The helmet would presumably prevent cranial injuries, or lessen their severity, for the wearer; but its effect on other motorists is most obscure.

The appellant, however, was operating the motorcycle when arrested. In order to determine the purpose and function of the statute in regard to an operator, the entire statutory plan must be considered. • • •

"The Illinois statute contains two requirements: "protective headgear" and a transparent shield or goggles.

"When we consider both of these sections together, the legislative intent becomes clear. The manifest function of the headgear requirement in issue is to safeguard the person wearing it—whether it is the operator or a passenger—from head injuries. Such a laudable purpose, however, cannot justify the regulation of what is essentially a matter of personal safety.—Kluczynski, J.

—Ill SupCt; Illinois v. Fries, 5/23/69.

Municipal Corporations

TORTS—

Victims of police and mob action in Chicago riots have no statutory or common law remedies against city or county.

One plaintiff was allegedly shot by police suppressing mob action and another was injured when a car was set upon by a mob. More than two hundred actions are now pending against the city and the county based on the statutes involved here.

[*Text*] "In 1967 the General Assembly enacted statutes which expressly repealed section 1-4-8 of the Illinois Municipal Code and section 25-3 of the Criminal Code which are the two statutes upon which liability in these cases is predicated. Both of the repealing acts were approved by the Governor. (Laws of 1967, Vol. 2, pp. 3286, 2365.)"

However, the same sessions later enacted a bill amending the repealed section. This amending act was part of a package of 174 bills designed to make formal, technical changes in certain sections for the sake of consistency in publication. We do not think that the legislature intended, by a bill purporting to make no change of substance, to re-enact the repealed section. The legislative purpose of repeal is unmistakable.

The plaintiff nevertheless argued that the repeals can not apply retroactively to bar their actions. This state's Statutory Construction Act provides that no new law shall be construed to repeal a former law, "expressly repealed" or not, under which any right has accrued before the effective date of a new law.

[*Text*] "[T]he Statutory Construction Act does not apply to ex-

Motor Vehicles

STATE REGULATION—

North Dakota requirement that motorcyclist wear crash helmet does not unconstitutionally deprive him of personal freedom.

A motorcyclist who was charged with the offense of failing to wear a crash helmet while riding a motorcycle has asserted that the statute requiring the wearing of a crash helmet deprives him of his personal freedom and his rights guaranteed by the Due Process Clauses of both federal and state Constitutions.

Michigan, [American Motorcycle Assn. v. Davids, II Mich. App. 351, 36 LW 2707] and Louisiana have found similar statutes to involve an invalid exercise of the police power of the state based on a test whether there is a "real and substantial relationship between the exercise of those powers • • • and the public health, safety, morals, or the general welfare." This is the proper test, but as in Commonwealth v. Howie 238 N.E.2d 373, 36 LW 2770, and Colvin v. Lombardi, 241 A.2d 625, 36 LW 2732, we reach the opposite result. The safety factor of objects striking the operator of a motorcycle in such a manner as to momentarily cause him to lose control and to menace other vehicles on the highway makes the relationship between the police power and the public safety self-evident. Moreover, we are not convinced that the legislature may not take reasonable measures to prevent persons from becoming public charges in hospital as a result of their disregard of obvious safety precautions.—Erickstad, J.

Teigen, Ch.J., and Knudson, J., dissent.

—ND SupCt; State v. Odegaard, 2/25/69.

Negligence

CONTRIBUTORY NEGLIGENCE—

Oklahoma's requirement that auto seat belts be installed does not render injured passenger's failure to use belts contributory negligence.

[*Text*] "Exhaustive research by counsel, and independent research and investigation by the court, has disclosed no Oklahoma decision on the problem. • • •

"For the reasons advanced in Robinson v. Bono, 285 F.Supp. 423 (D.C. Or. 1968), Miller v. Miller, 160 S.E. 2d 65 (N.C. 1968) and Brown v. Kendrick, 192 So.2d 49 (Fla. App. 1966), I conclude Oklahoma would not allow such failure to be presented either as evidence of contributory negligence, or in mitigation of damages. Such conclusion finds some support in Oklahoma's definition of proximate cause set forth in Cheatham v. Van Dalsen, 350 P.2d 593 (1960) • • •.

"[T]here must be at least some indication that the plaintiff was under a duty to use a seat belt to provide for his own safety, and that failure to use it was a cause of plaintiff's injury, before the Court is required to submit the issue to the jury. The holding here is that, as a matter of law, there is no such duty, nor could such failure be a proximate cause of injury, and submission to the jury of the issue is not required."—Arnow, J.

—USDC NFla; Woods v. Smith, 2/28/69.

Torts

CHARITABLE INSTITUTIONS—

North Carolina Supreme Court's prospective abolition of charitable hospital immunity does not preclude holding hospital liable, to extent of its insurance, for negligence predating abolition.

The complaint alleges that on June 6, 1964, a paying patient of the defendant James Walker Memorial Hospital was frightened when a rat ran across her feet and caused her to fall into a bathtub. Her action to recover for the resulting injuries is based on the hospital's negligence in allowing rats on its premises, and the Orkin Exterminating Company's negligence in failing to rid the premises of rats as required by its contract with the hospital. The district court granted the defendant's motions for summary judgment.

This cause of action arose before the Supreme Court of North Carolina overruled its long-standing doctrine of immunity for charitable hospitals in Rabon v. Rowan Memorial Hospital, Inc., 269 N.C. 1, 152 S.E.2d 485, 35 LW 2485 (1967), limiting the decision's applicability to causes of action arising after January 20, 1967. The question is whether this action is barred by the charitable immunity doctrine or whether it may be prosecuted to the extent that the hospital's trust funds are protected by insurance. Insurance was not involved in Rabon, and no North Carolina court has been presented with the question subsequent to that case.

It is not to be supposed that the North Carolina courts have failed to take into account the underlying philosophy of Rabon, which is to compensate those injured by the negligence of employees of charitable hospitals while at the same time safeguarding these institutions from the dissipation of trust funds. The court refused full retroactive application of the new rule only after expressing concern over the danger to the trust funds of inadequately insured hospitals. Surely this is a clear implication that the new rule of liability for employee's negligence should be operative where this hazard is not present. Nebraska and Illinois, which the Rabon court said it followed, make the immunity unavailable to the extent of insurance protection in causes of action arising prior to abolition of the immunity. Where the hospital has insured itself against the risk, the only possible beneficiary from preserving the immunity would not be the charitable hospital but the paid insurer.

The lack of privity between the plaintiff and Orkin is no defense. It is clear that the hospital was under a legal duty to exercise reasonable care in regard to the safety of its patients, and that Orkin, under its contract, had undertaken to perform a certain aspect of this duty in the hospital's behalf.—Sobeloff, J.

—CA 4; Hill v. James Walker Memorial Hospital, 3/11/69.

CONFLICT OF LAWS—

Indiana's Guest Statute is inapplicable to Missouri action by Missouri passenger against estate of Missouri driver for Indiana collision during their vacation trip.

The driver, her husband, and the passenger, all Missouri residents, were returning from a trip to New York City when the accident occurred on the Indiana turnpike. Missouri does not have a guest statute, but Indiana does. We remand to permit the passenger to submit her case against the driver's estate to the jury on the theory that the relationship between the parties was governed by Missouri law and that the Indiana Guest Statute was not applicable.

The passenger recognizes that Missouri has been following a so-called lex loci delicti rule in the choice of law to be applied. Under this rule, the court applies the law of the place where the tort was committed in everything except procedure, which is governed by the law of the forum. But the passenger claims that Missouri is the state which has the dominant interest in a host-guest relationship between Missouri residents arising from the operation of a Missouri automobile on a trip which began and which ended in Missouri.

The lex loci rule has the advantage of certainty and ease of application. The only exceptions have been where the forum court concluded that the law of the place of the wrong was against the established public policy of the forum state. There has also been an occasional tendency in difficult cases to construe a matter as procedural rather than substantive and on that basis

reference to § 84.01, allow the class of sub-subcontractors to be entitled to a mechanics' lien. • • •

"However, we must construe the Mechanics' Lien Act according to general equitable principles so as to best protect the interest of those enhancing realty, since it is that class for whose benefit the mechanics' lien exists. • • •

"[R]evisions of the Mechanics' Lien Act, § 84, Fla.Stat. F.S.A. (1061), omitted the term, "sub-subcontractor", or any reference to another provision containing such term, from the section defining those entitled to the mechanics' lien. However, the underlying reason for the subsequent revisions was not to change the scope of person entitled to the statutory protection; rather, the revisions were enacted to remedy procedural defects which had led to "hidden liens" being placed against an owner by persons not in privity, without notice to the owner.

"Moreover, the definition section[s] of all the foregoing statutes have continued to include 'sub-subcontractor' in their terminologies."—Henry, J.

—Fla CtApp 3rd Dist; Ceco Corp. v. Goldberg, 2/25/68.

Motor Vehicles

STATE REGULATION—

Wisconsin's ban on unusual handlebars and requirement that motorcyclists wear safety devices does not unconstitutionally interfere with cyclist's "right to be left alone."

[*Text*] "To the cycling enthusiast the freedom to drive or ride his cycle, hatless or helmetless, is meaningful. • • • Resistance to wearing a prescribed safety helmet is an understandable human reaction. Perhaps almost all of us have a secret admiration for the pint-sized guard on a major football team who, years ago, went out on the gridiron, sans helmet, to face giant-sized opponents. • • •

"It has been suggested that this leaves to the courts '• • • essentially a balancing test between the rights infringed and the benefits to the general welfare with the balance strongly weighed in favor of the general welfare at the start.'

"We are uneasy with this balancing and weighing concept of the judicial role in testing the constitutionality of a police power statute. • • • There is too much of a temptation to a putting of a judicial thumb on the scales with judges substituting their own evaluation of alternatives for that of the legislature. We would hold that, once within the area of proper exercise of police power, it is for the legislature to determine what regulations, restraints or prohibitions are reasonably required to protect the public safety and only the abrogation of a basic and substantial individual liberty would justify judicial intervention to set aside the legislative enactments. • • •

"Over and above the interest the state has in protecting other users of the highways from the danger of involvement in an accident, we further hold that other users of the highway have a definite and legitimate interest in seriousness of the consequences of accidents as well as in the frequency of such mishaps. • • •

"[Although] we do not reach the question of whether it is invariably and inescapably fatal to a public safety statute that it seeks only to protect persons against the consequences of their own actions • • • it is enough to observe that the concept that it is my neck and I have a right to risk it when and where I please has had some limitations placed upon its application." • • •

"There is in the law no sanction for self-destruction, and certainly there is no right on the part of anyone to use public highways for risking or courting or seeking such self-destruction. Protection of the safety of all users of the highway even against the consequences of their own actions is a legitimate use of the police powers of the state. • • •

"[The right of the individual to be left alone by government was] capsulized by a great jurist, Louis Dennitz Brandeis, in these words.

" 'The makers of the Constitution sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized man.'

"However, Justice Brandeis hardly intended that such right to be left alone would include the right to camp on a cloverleaf or do one's thing on an expressway. There is no place where any such right to be let alone would be less assertable than on a modern highway."—Hansen, J.

—Wis SupCt; Bisenius v. Karns, 3/7/69.

Physicians and Surgeons

ADVERTISING—

Optometrist's circulars to labor unionists promising optical services at volume discounts are not permissible information on "medical service plan," but health service advertising forbidden by California Business and Professions Code.

An optometrist started an optical service for members of the Los Angeles County Federation of Labor AFL-CIO and their families in which a specific price schedule for eye examination, glasses and contact lenses was adopted. The plan which the optometrist called Union Vision Service charged prices lower than the California Vision Service, a nonprofit corporation which also provided optometric service to unions. Under the schedule glasses would cost $21 per pair less than the average cost in Los Angeles County. He then distributed literature to the union members highlighting the large savings to users of the service and stating that some eye examinations would even be free. He also advertised in a union newspaper. As a result, he obtained access to 515,000 union members and within 18 months attracted 71,000 patients.

The Board of Optometry charged the optometrist with violating the Business and Professions Code. The California Corporation Code does permit the formation of nonprofit corporations for the purpose of defraying or assuming the cost of professional services of licensees of the healing arts, but what is involved here is the method of operation of U.V.S.

Section 651 of the Code makes it unlawful for an optometrist to represent that his service is being rendered at a discount or "is otherwise less than the average fee or price then regularly charged under like conditions by persons so licensed or by other persons for such commodities or services." The optometrist argues that because his operation was like no other he could not be found to have made his offer at prices lower than those "regularly charged under like conditions." "It would be a perversion of the intent of Section 651 to permit advertising under the banner of 'equal treatment for less money' simply because the advertiser can show that in some fashion quite immaterial to the patient, the conditions which permit him to render less expensive service are unlike those of his fellow practitioners with whom he compares himself."

Section 651.3 of the Code prohibits a physician from advertising in any manner which refers to the cost of the price to be paid to him or for any commodities sold by him or for any services performed by him except when it involves "the furnishing of information regarding benefits available and charges therefor, under the coverage of any hospital or medical service of insurance plan." The optometrist claims that he was merely furnishing information concerning benefits and charges under the coverage of a medical service plan. 'Neither this section as a whole nor the proviso has ever been construed. No statutory or judicial def-

involved there, they are not analogous to the exclusion of Negroes from an all white union by a system of nepotism."—Dyer, J.

—CA 5; Asbestos Workers v. Vogler, 1/15/69.

Landlord and Tenant

EVICTION—

Pennsylvania Rent Withholding Act does not immunize from eviction tenants who failed to pay rent into escrow fund.

The Motion to quash the writ of eviction is refused.—Montgomery, J.

Concurrence. The Act provides that the right of the landlord to collect rent shall be suspended for a 6-month period after certification by the appropriate authority that the dwelling is unfit for human habitation. During this suspension period, the rent withheld shall be deposited by the tenant in an escrow account for repairs required to make the building habitable.

The Act specifically does not affect any of the terms of the landlord and tenant relationship save that the tenant need not pay rent to the landlord if he pays it into an escrow account. The duty of the tenant to pay his rent on a timely basis is undisturbed by the statute. Accordingly, the final sentence of the Act which reads "No tenant shall be evicted for any reason whatsoever while the rent is deposited in escrow" must be read to mean that during the 6-month period the tenant is protected against eviction under the Act only if he pays his rent into the escrow account in a timely manner specified by the lease arrangement.

Tenants who seek the protection of the Act in avoiding eviction must have consistently paid their rent into the escrow fund in a timely manner.

[*Text*] "This case leaves unresolved some of the very difficult questions raised by the statute. For example, it is unclear from the face of the statute:

"1) whether a landlord of a building certified as unfit for human habitation may refuse to renew the lease arrangement of a tenant who has paid his rent in a timely fashion.

"2) under what conditions and authority may moneys deposited in an escrow account pursuant to the statute be used to effect repairs of the dwelling premises.

"3) may escrow payments be made indefinitely until the dwelling is sufficiently repaired with periodic six months disbursements of the accumulated rents to the contributing tenants to the escrow account.

"These questions as well as others bound to arise are best settled by future legislative amendment, although in the absence of such action, it will be the duty of the courts to frame a solution based upon their interpretation of the statute as written. C.f. Note, Rent Withholding in Pennsylvania, 30 Pitt. L. Rev. 148 (1968)."—Hoffman, J.

—Pa SuperCt; National Council of Mechanics v. Roberson 1/28/68.

Motor Vehicles

PARKING LOTS—

Operator of self-service Illinois parking lot is not bailee liable to patron whose car was stolen.

In recent years a new type of self-service parking lot has developed particularly at the larger airports, such as the one from which the car here was stolen. A motorist gains admission to the lot through an entrance gate where he takes a machine-dispensed ticket from an automatic dispenser. The motorist parks in an individual parking place of his choice. There is nothing to prevent his moving the car about within the parking lot. He retains the keys and upon his return drives to an exit gate where he sees the attendant for the first time and pays the parking fee.

This is a case of first impression in this court although there is a great variety of holdings in the area of the liability of operators of parking lot facilities. They usually resolve themselves into two categories, the first where the owner parks his car in a place designated by an attendant or chosen by himself retains the keys and does not actually deliver the car to the lot owner. This constitutes a lease of space. In the second classification a bailment is created where the keys are left in the parked vehicle and tickets are issued identifying the car for redelivery. Precise categorization is not easy. However, in this case it is apparent that no bail or bailee relationship has been established. There was no agreement, either express or by implication, that may be gathered from the circumstances surrounding this transaction. To establish it, there must not only be a delivery of possession but there must also be an acceptance, either actual or constructive, which did not exist here. True, temporary possession in the sense that the motorist leaves the vehicle on the lot may be said to have been given up, but the actual control is retained by taking the keys. There is no acceptance of the vehicle by the lot owner.—House, J.

—Ill SupCt; Wall v. Airport Parking Co. of Chicago, 1/25/69.

STATE REGULATION—

Connecticut's requirement that motorcyclist use crash helmet is not interference with individual's constitutionally-created "zone of privacy."

The gravamen of the argument is the statute is unconstitutional in that it has no relation to public health, welfare and safety, but merely to the health, welfare and safety of the individual.

The cyclist contends that the Fourteenth Amendment, taken in conjunction with the Third, Fourth and Fifth Amendments creates what has been called a "zone of privacy," and that by virtue of the Ninth Amendment, government power is limited by many unenumerated rights of the people. One of the unenumerated rights protected by the "zone of privacy" is the right of an individual to conduct his or her own affairs as he or she chooses as long as such action does not injure or offend other members of society. However, we are of the opinion that the purpose sought to be achieved by requiring protective headgear is a proper subject for legislation. The legislature may enact laws prohibiting that which is harmful to the welfare of the public as long as they are reasonable, even though they may interfere with the liberty of the individual. Whatever infringement of rights incidental to the valid exercise of police power is not unreasonable when the sole object of the legislation is to promote public welfare.

There is also a weakness in the contention that the state has no power to punish an act which harmed no one but the actor. We are of the opinion that the statute prevents a danger that is antisocial—the inherent danger of injury to others in the operation of a motorcycle.

The operation of a motor vehicle including a motorcycle is a privilege which may be denied, and not a right. The legislature may require the operator to waive certain rights and privileges for the protection of other motorists legally upon the highway.—Wise, J.

—Conn CirCt AppDiv; Connecticut v. Burzycki, 1/17/69.

Municipal Corporations

ZONING—

"Halfway House" for rehabilitation of ex-convicts does not qualify as "institution of educational, religious, or philanthropic nature" that would be permissible use in residential zone of Arkansas City.

The Arkansas Release Guidance Foundation, was incorporated as a nonprofit corporation. Thirteen property owners in the vicinity of the Foundations property filed petitions

SCR-27

June 1, 1970

Mel J. Personett, Commissioner
Department of Public Safety
Pouch "N"
Juneau, Alaska 99801

Dear Commissioner Personett:

After hearing testimony on both sides of the matter, and after reviewing the material you submitted, the House Judiciary Committee requests that the department hold hearings and consider revision or repeal of the following regulations pertaining to motorcycles. 13 AAC 04.280, 285(b), 290, 295, and 300.

While not taking a position on the constitutionality of any of these regulations, the committee is aware that there is a split of judicial opinion and that in some states the helmet requirement has been held invalid as an invasion of the right to privacy. Moreover, during the recent hearings held on these regulations by this committee, no evidence was presented which conclusively established that these requirements promoted either individual safety or the public safety. To the contrary, although examples were given of situations in which a helmet or face shield might be helpful, other examples were given of when they would be a definite hazard; also, windshields and mirrors on "trail bikes" appear to be hazards rather than safety features. There was testimony that a mirror on a motorcycle was of little utility because of vibration; and you agreed that the requirement of two mirrors in 13 AAC 04.280(a) (1) is unnecessary.

The regulation on the height of "handlebars or grips" (13 AAC 04.290) is ambiguous as well as being subject to criticism as an undue restriction on design variation. If there is a certainty that a design variation will result in motorcycles with a steering arrangement that poses a clear threat to the public safety, a regulation something like the following would be more appropriate: "No person may operate a motorcycle or motor scooter on which the handlegrips are at a height which does not reasonably allow for safe control of the vehicle." When the present language is read in conjunction with the regulation on windshields (13 AAC 04.295) some ludicrous results can occur.

With regard to 13 AAC 04.300, the committee believes it is a good idea, and a proper action for the benefit of the public, to specify standards

for the construction of protective headgear, goggles, etc. When a person decides that he wants to wear a helmet, for example, he should be able to rely on the safety of those offered for sale or rent. Since this section refers to the requirement that these items be worn at all times and in all circumstances, this section should be re-written. Also, the reference to sec. 280(a) (3) in 13 AAC 04.285(a) should be deleted.

The committee notes that the federal safety standard on motorcycles (1) does not require a windshield, face shield or goggles—just "eye protection"; (2) does not specify handlebar height or windshield height; and (3) does not require two mirrors.

The committee is concerned about the fact that these regulations, of at least questionable validity, of questionable benefit to the safety of the public and even to the individual, may be selectively enforced to provide a means of harassing a particular segment of the population. We do not believe that this is sound state policy. We expect that the revised regulations will be clearly valid and protective of the public safety, and that to the extent they are designed to protect the individual, due consideration has been given to the right to privacy and the policy which underlies that constitutional right.

Yours truly,

Barry W. Jackson, Chairman
Judiciary Committee
Alaska House of Representatives

BWJ:tmc

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

LEGISLATIVE AFFAIRS AGENCY

April 27, 1970

M E M O R A N D U M

TO : Rep. Mildred Banfield, Chairman
Subcommittee on Dept. of Public Safety Regulations
House Judiciary Committee

FROM : Arthur H. Peterson, Revisor of Statutes

SUBJECT: Recently proposed changes in regulations of the Department of Public Safety (addendum to April 24, 1970 memorandum)

This is a summary of the proposed changes accompanying the department's April 20 notice. My April 24 memorandum to you discusses Items (1), (2) and (3) (regarding hitchhiking, school buses, and a presumption as to certain violations, respectively).

Item (4), by inserting "may not be . . . state highway but" in the first line, prohibits operating a snow vehicle on the roadway, which is only an implication under the present language; it also changes "six feet" to "three feet", so that the vehicle may be operated three feet or more from the edge of the roadway.

Item (5) repeals the prohibition on persons under 14 from operating snow vehicles. AS 05.30 deals with snow vehicles.

Item (6) deletes "or have in his possession an open or unsealed receptacle containing an" which presently appears after the word "drink". Item (7) repeals a provision dealing with "open or unsealed receptacle".

Item (8) deletes the references to 13 AAC 04.155, which is repealed in Item (9). That section presently allows snow removal vehicles of the Department of Highways to use blue flashing lights.

Item (10) adds the words "or certified". That addition is legally unnecessary in light of AS 01.10.060(11), but perhaps it is helpful as a clarification in this regulation.

AHP:hg

Introduced: 2/16/70
Referred: Judiciary

IN THE SENATE BY MILLER

SENATE CONCURRENT RESOLUTION NO. 27

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

Annulling a regulation adopted by the Department of Public Safety.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

WHEREAS under AS 44.62.320, the Legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of an agency or department;

BE IT RESOLVED that by this Resolution the Alaska Legislature annuls the Department of Public Safety Regulation relating to a "pedestrian soliciting ride or business," 13 AAC 02.180.

NOTICE OF PROPOSED CHANGES
IN THE
REGULATIONS OF THE DEPARTMENT OF PUBLIC SAFETY

Notice is hereby given that the Department of Public Safety, under authority vested by AS 18.60.175, proposes to amend regulations in Title 13 of the Alaska Administrative Code as follows:

Title 13, Chapter 20 Article 1. Rescue and Relief of Lost Persons, is amended in its entirety.

The regulations deal with the following topics:

(a) Declaration of intent (of the regulations)
(b) Expenditure limitations (for rescue and relief parties)
(c) Approval of expenditures (what is required for approval)
(d) Commissioner's designee (to authorize search)
(e) Property purchased (becomes state property)
(f) Report of search (requires written report of search operation)
(g) Definitions (used in regulations)

Since it is not practical to print the entire regulations in this notice, interested persons may inspect them at a regional headquarters office of the State Troopers at Anchorage, Fairbanks, or Juneau or obtain a reasonable number of copies by a written request addressed to the Department of Public Safety, Pouch N, Juneau, Alaska.

Notice is also given that any person interested may present oral or written statements or arguments relevant to the action proposed at hearings to be held at Room 423, Capitol Building, Juneau, Alaska; 830 Water Street, Ketchikan, Alaska; 702 East 30th Avenue, Anchorage, Alaska; 1616 Cushman Street, Fairbanks, Alaska; and Alaska State Trooper Office, Nome, Alaska, at 9:00 a.m. on June 1, 1970.

The Department of Public Safety, upon its own motion or at the instance of an interested person, may at the hearing or after it adopt the above proposals substantially as above set out without further notice.

Date April 20, 1970

Mel J. Personett, Commissioner
Department of Public Safety

NOTICE OF PROPOSED CHANGES
IN THE
REGULATIONS OF THE DEPARTMENT OF PUBLIC SAFETY

Notice is hereby given that the Department of Public Safety, under authority vested by AS 28.05.030 and AS 28.20.020 proposes to amend and repeal certain regulations in Title 13 of the Alaska Administrative Code as follows:

(1) 13 AAC 02.180 is amended to read:

13 AAC 02.180. PEDESTRIAN SOLICITING RIDE OR BUSINESS. A person may not stand on or along a roadway in a manner that will distract a driver's attention for the purpose of soliciting a ride, employment, business or a contribution from the occupant of a vehicle. (Eff. before 7/28/59; am 12/15/61, reg. 3; am 8/10/66, reg. 22; am 12/31/69, reg. 31; at Leg. request, am. / / reg.)

Authority: AS 28.05.030

(2) 13 AAC 02.340 (b) is amended to read:

(b) This section does not apply to the driver of a school bus stopped to load or unload a school child or to the driver of a vehicle which is disabled while on a highway in a manner and to an extent that it is impossible to avoid stopping and temporarily leaving the disabled vehicle in that position; provided, if the vehicle is left unattended, the operator shall leave a notice in or on the vehicle which is visible to a person outside the vehicle or leave the hood of the vehicle in a raised position either of which indicates the vehicle is temporarily disabled. This section does not allow a vehicle to be left unattended in or on a bridge, causeway or tunnel or in a hazardous position on a roadway.

(3) 13 AAC 02.340 is amended by adding a new subsection to read

(c) A vehicle that is stopped, parked or standing in violation of a statute or traffic regulation is considered to have been stopped, parked or left standing by the registered owner of the vehicle, unless at the time of the violation a police officer observes the vehicle being stopped, parked or left standing by a driver who is not the registered owner, in which case any action by the officer shall be directed to that driver. (Eff. before 7/28/59; am 12/15/61, reg. 3; am 8/10/66, reg. 22; am 12/31/69, reg. 31; am / / , reg.)

Authority: AS 28.05.030
Cross Reference: 14 AAC 04.790g
(parking at airports)

(4) 13 AAC 02.455 (c) is amended to read:

(c) A snow vehicle may not be operated on the roadway of a state highway but may be operated on a path or shoulder adjacent to the roadway of a state

highway, provided the snow vehicle is driven three feet or more from the extreme edge of the roadway.

(5) 13 AAC 02.455(g) is repealed.

(6) 13 AAC 02.545(a) is amended to read:

13 AAC 02.545. DRINKING WHILE DRIVING. A person may not drink an intoxicating beverage while operating a motor vehicle.

(7) 13 AAC 02.545(b) is repealed.

(8) 13 AAC 04.145(b) and (c) are amended to read:

(b) Except as required or authorized in §§ 90, 100 and 150(b) of this chapter, a person may not drive or move a vehicle or equipment with a lamp or device displaying a red or blue light visible from directly in front of the center of the vehicle or equipment.

(c) A flashing light is prohibited except as required or authorized in §§35, 90, 95, 100(a), 105, 110(d) and 150(b) of this chapter. (Eff. before 7/28/59; am 12/15/61, reg. 3; am 8/10/66, reg. 22; am 12/31/69, reg. 31; am. / / , reg.)

Authority AS 28.05.030

(9) 13 AAC 04.155 is repealed, and existing 13 AAC 04.160 is repositioned as 13 AAC 04.155.

(10) 13 AAC 08.105 is amended to read:

13 AAC 08.105. FORM OF NOTICE. A written notice, including a notice of suspension, is considered delivered to that person 10 days after it is registered or certified and deposited in the United States mail, postage prepaid, addressed to that person at his last known address as shown by the most recent records of the department. (Eff. 12/31/69, reg. 31; am. / / , reg.)

Authority: AS 28.20.020
Cross Reference: AS 28.20.050(c) & (d)
AS 28.20.090(a)
AS 28.20.400(c)

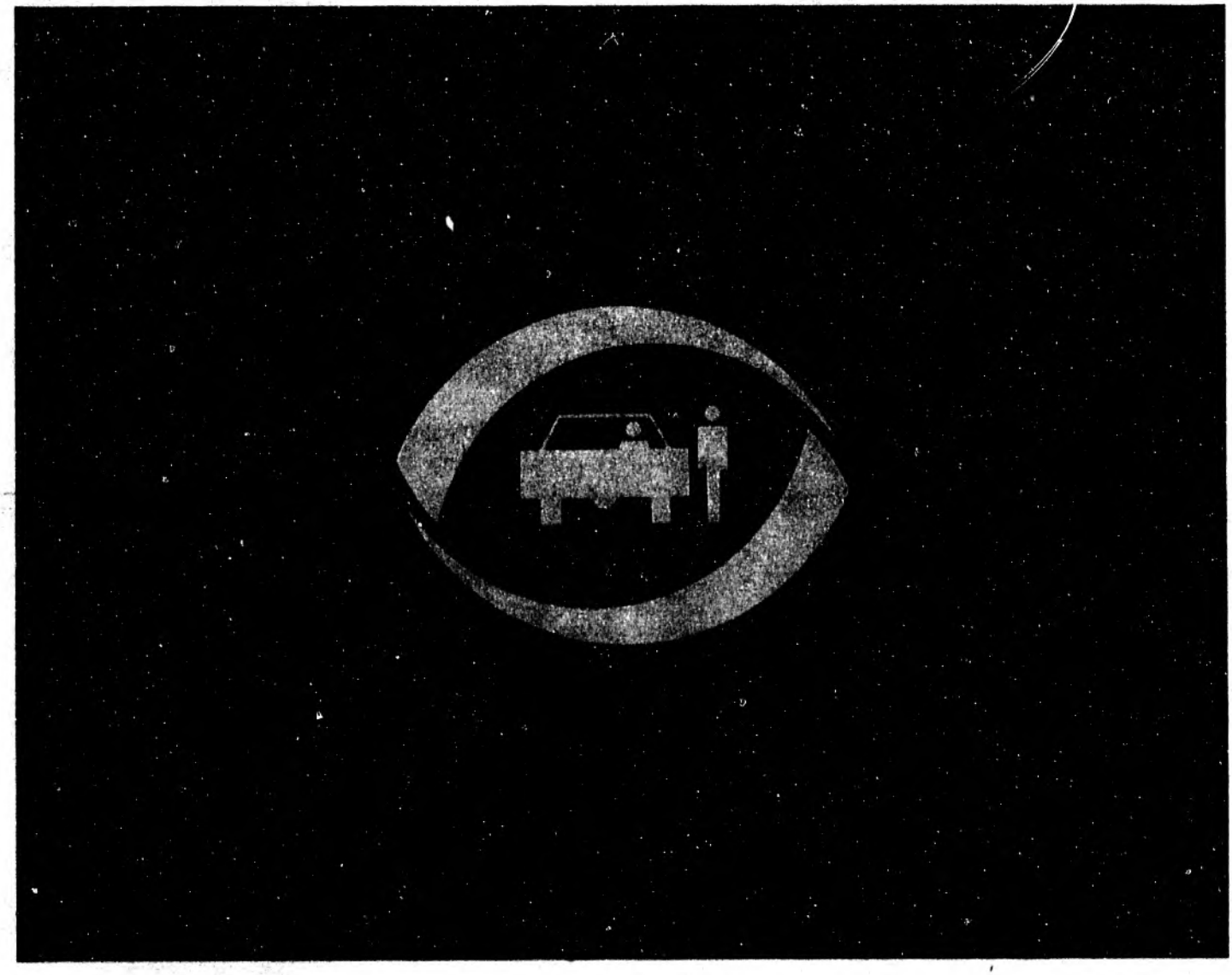
Notice is also given that any person interested may present oral or written statements or arguments relevant to the action proposed at a hearing to be held at Room 423 of the Capital Building, Juneau, Alaska; 830 Water Street, Ketchikan, Alaska; 702 East 30th Avenue, Anchorage, Alaska; 1616 Cushman Street, Fairbanks, Alaska; and the Alaska State Trooper office, Nome, Alaska, at 9:00 a.m. on June 1, 1970.

The Department of Public Safety, upon its own motion or at the instance of any interested person, may at the hearing or after it adopt the above proposals substantially as above set out without further notice.

Date April 20, 1970

Mel J. Personett, Commissioner
Department of Public Safety

Highway Safety Program Standards



U. S. Department of Transportation ● Federal Highway Administration ● National Highway Safety Bureau

HIGHWAY SAFETY PROGRAM STANDARDS

HIGHWAY SAFETY PROGRAM STANDARD 1 PERIODIC MOTOR VEHICLE INSPECTION

Each State shall have a program for periodic inspection of all registered vehicles or other experimental, pilot, or demonstration program approved by the Secretary, to reduce the number of vehicles with existing or potential conditions which cause or contribute to accidents or increase the severity of accidents which do occur, and shall require the owner to correct such conditions.

I. The program shall provide, as a minimum, that:

A. Every vehicle registered in the State is inspected either at the time of initial registration and at least annually thereafter, or at such other time as may be designated under an experimental, pilot, or demonstration program approved by the Secretary.

B. The inspection is performed by competent personnel specifically trained to perform their duties and certified by the State.

C. The inspection covers systems, sub-systems, and components having substantial relation to safe vehicle performance.

D. The inspection procedures equal or exceed criteria issued or endorsed by the National Highway Safety Bureau.

E. Each inspection station maintains records in a form specified by the State, which include at least the following information:

1. class of vehicle
2. date of inspection
3. make of vehicle
4. model year
5. vehicle identification number
6. defects by category
7. identification of inspector
8. mileage or odometer reading

F. The State publishes summaries of records of all inspection stations at least annually, including tabulations by make and model of vehicle.

II. The program shall be periodically evaluated by the State and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 2 MOTOR VEHICLE REGISTRATION

Each State shall have a motor vehicle registration program, which shall provide for rapid identification of each vehicle and its owner; and shall make available pertinent data for accident research and safety program development.

I. The program shall be such that every vehicle operated on public highways is registered and the following information is readily available for each vehicle:

A. Make
B. Model year
C. Identification number (rather than motor number)
D. Type of body
E. License plate number
F. Name of current owner
G. Current address of owner
H. Registered gross laden weight of every commercial vehicle

II. Each program shall have a records system that provides at least the following services:

A. Rapid entry of new data into the records or data system.

B. Controls to eliminate unnecessary or unreasonable delay in obtaining data.

C. Rapid audio or visual response upon receipt at the records station of any priority request for status of vehicle possession authorization.

D. Data available for statistical compilation as needed by authorized sources.

E. Identification and ownership of vehicle sought for enforcement or other operation needs.

III. This program shall be periodically evaluated by the State, and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 3 MOTORCYCLE SAFETY

For the purposes of this standard a motorcycle is defined as any motor-driven vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding tractors and vehicles on which the operator and passengers ride within an enclosed cab.

Each State shall have a motorcycle safety program to insure that only persons physically and mentally qualified will be licensed to operate a motorcycle; that protective safety equipment for drivers and passengers will be worn; and that the motorcycle meets standards for safety equipment.

I. The program shall provide as a minimum that:

A. Each person who operates a motorcycle:

1. Passes an examination or reexamination designed especially for motorcycle operation.

2. Holds a license issued specifically for motorcycle use or a regular license endorsed for each purpose.

B. Each motorcycle operator wears an approved safety helmet and eye protection when he is operating his vehicle on streets and highways.

C. Each motorcycle passenger wears an approved safety helmet, and is provided with a seat and footrest.

D. Each motorcycle is equipped with a rear-view mirror.

E. Each motorcycle is inspected at the time it is initially registered and at least annually thereafter, or in accordance with the State's inspection requirements.*

II. The program shall be periodically evaluated by the State for its effectiveness in terms of reductions in accidents and their end results, and the National Highway Safety Bureau shall be provided with an evaluation summary.

*See Periodic Motor Vehicle Inspection Standard

HIGHWAY SAFETY PROGRAM STANDARD 4 DRIVER EDUCATION

Each State, in cooperation with its political subdivisions, shall have a driver education and training program. This program shall provide at least that:

I. There is a driver education program available to all youths of licensing age which:

A. Is taught by instructors certified by the State as qualified for these purposes.

B. Provides each student with practice driving and instruction in at least the following:

1. Basic and advanced driving techniques including techniques for handling emergencies.

2. Rules of the road, and other State laws and local motor vehicle laws and ordinances.

3. Critical vehicle systems and sub-systems requiring preventive maintenance.

4. The vehicle, highway and community features:

a. that aid the driver in avoiding crashes,

b. that protect him and his passengers in crashes,

c. that maximize the salvage of the injured.

5. Signs, signals, and highway markings, and highway design features which require understanding for safe operation of motor vehicles.

6. Differences in characteristics of urban and rural driving including safe use of modern expressways.

7. Pedestrian safety.

C. Encourages students participating in the program to enroll in first aid training.

II. There is a State research and development program including adequate research, development and procurement of practice driving facilities, simulators and other similar teaching aids for both school and other driver training use.

III. There is a program for adult driver training and retraining.

IV. Commercial driving schools are licensed and commercial driving instructors are certified in accordance with specific criteria adopted by the State.

V. The program shall be periodically evaluated by the State, and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 5 DRIVER LICENSING

Each State shall have a driver licensing program: (a) to insure that only persons physically and mentally qualified will be licensed to operate a vehicle on the highways of the State, and (b) to prevent needlessly removing the opportunity of the citizen to drive. The program shall provide, as a minimum, that:

I. Each driver holds only one license, which identifies the type(s) of vehicle(s) he is authorized to drive.*

II. Each driver submits acceptable proof of date and place of birth in applying for his original license.

III. Each driver:

A. Passes an initial examination demonstrating his:

1. Ability to operate the class(es) of vehicle(s) for which he is licensed.

2. Ability to read and comprehend traffic signs and symbols.

3. Knowledge of laws relating to traffic (rules of the road) safe driving procedures, vehicle and highway safety features, emergency situations that arise in the operation of an automobile, and other driver responsibilities.

4. Visual acuity, which must meet or exceed State standards.

B. Is reexamined at an interval not to exceed four years, for at least visual acuity and knowledge of rules of the road.

IV. A record on each driver is maintained which includes positive identification, current address, and driving history. In addition, the record system shall provide the following services:

A. Rapid entry of new data into the system.

B. Controls to eliminate unnecessary or unreasonable delay in obtaining data which is required for the system.

C. Rapid audio or visual response upon receipt at the records station of any priority request for status of driver license validity.

D. Ready availability of data for statistical compilation as needed by authorized sources.

E. Ready identification of drivers sought for enforcement or other operational needs.

V. Each license is issued for a specific term, and must be renewed to remain valid. At time of issuance or renewal each driver's record must be checked.

VI. There is a driver improvement program to identify problem drivers for record review and other appropriate actions designed to reduce the frequency of their involvement in traffic accidents or violations.

VII. There is:

A. A system providing for medical evaluation of persons whom the driver licensing agency has reason to believe have mental or physical conditions which might impair their driving ability.

B. A procedure which will keep the driver license agency informed of all licensed drivers who are currently applying for or receiving any type of tax, welfare or other benefits or exemptions for the blind or nearly blind.

C. A medical advisory board or equivalent allied health professional unit composed of qualified personnel to advise the driver license agency on medical criteria and vision standards.

VIII. The program shall be periodically evaluated by the State and the National Highway Safety Bureau shall be provided with an evaluation summary. The evaluation shall attempt to ascertain the extent to which driving without a license occurs.

HIGHWAY SAFETY PROGRAM STANDARD 6 CODES AND LAWS

Each State shall develop and implement a program to achieve uniformity of traffic codes and laws throughout the State. The program shall provide at least that:

I. There is a plan to achieve uniform rules of the road in all of its jurisdictions.

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*See Motorcycle Safety Standard

II. There is a plan to make the State's unified rules of the road consistent with similar unified plans of other States. Toward this end, each State shall undertake and maintain continuing comparisons of all State and local laws, statutes and ordinances with the comparable provisions of the Rules of the Road section of the Uniform Vehicle Code.

HIGHWAY SAFETY PROGRAM STANDARD 7 TRAFFIC COURTS

Each State in cooperation with its political subdivisions shall have a program to assure that all traffic courts in it complement and support local and statewide traffic safety objectives. The program shall provide at least that:

I. All convictions for moving traffic violations shall be reported to the State traffic records system.

II. **Program Recommendations**

A. All individuals charged with moving hazardous traffic violations are required to appear in court.

B. Traffic courts are financially independent of any fee system, fines, costs, or other revenue such as posting or forfeiture of bail or other collateral resulting from processing violations of motor vehicle laws.

C. Operating procedures, assignment of judges, staff and quarters insure reasonable availability of court services for alleged traffic offenders.

D. There is a uniform accounting system regarding traffic violation notices, collection of fines, fees and costs.

E. There are uniform rules governing court procedures in traffic cases.

F. There are current manuals and guides for administration, court procedures, and accounting.

HIGHWAY SAFETY PROGRAM STANDARD 8 ALCOHOL IN RELATION TO HIGHWAY SAFETY

Each State, in cooperation with its political subdivisions, shall develop and implement a program to achieve a reduction in those traffic accidents arising in whole or in part from persons driving under the influence of alcohol. The program shall provide at least that:

I. There is a specification by the State of the following with respect to alcohol related offenses:

A. Chemical test procedures for determining blood-alcohol concentrations.

B. (1) The blood-alcohol concentrations, not higher than .10 percent by weight, which define the terms "intoxicated" or "under the influence of alcohol," and

(2) A provision making it either unlawful, or presumptive evidence of illegality, if the blood-alcohol concentration of a driver equals or exceeds the limit so established.

II. Any person placed under arrest for operating a motor vehicle while intoxicated or under the influence of alcohol is deemed to have given his consent to a chemical test of his blood, breath, or urine for the purpose of determining the alcohol content of his blood.

III. To the extent practicable, there are quantitative tests for alcohol:

A. On the bodies of all drivers and adult pedestrians who die within four hours of a traffic accident.

B. On all surviving drivers in accidents fatal to others.

IV. There are appropriate procedures established by the State for specifying:

A. The qualifications of personnel who administer chemical tests used to determine blood, breath, and other body alcohol concentrations.

B. The methods and related details of specimen selection, collection, handling, and analysis.

C. The reporting and tabulation of the results.

V. The program shall be periodically evaluated by the State, and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 9 IDENTIFICATION AND SURVEILLANCE OF ACCIDENT LOCATIONS

Each State, in cooperation with county and other local governments, shall have a program

for identifying accident locations and for maintining surveillance of those locations having high accident rates or losses.

I. The program shall provide, as a minimum, that:

A. There is a procedure for accurate identification of accident locations on all roads and streets.

1. To identify accident experience and losses on any specific sections of the road and street system.

2. To produce an inventory of:

a. High accident locations.

b. Locations where accidents are increasing sharply.

c. Design and operating features with which high accident frequencies or severities are associated.

3. To take appropriate measures for reducing accidents.

4. To evaluate the effectiveness of safety improvements on any specific section of the road and street system.

B. There is a systematically organized program:

1. To maintain continuing surveillance of the roadway network for potentially high accident locations.

2. To develop methods for their correction.

II. The program shall be periodically evaluated by the State and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 10 TRAFFIC RECORDS

Each State, in cooperation with its political subdivisions, shall maintain a traffic records system. The statewide system (which may consist of compatible sub-systems) shall include data for the entire State. Information regarding drivers, vehicles, accidents, and highways shall be compatible for purposes of analysis and correlation. Systems maintained by local governments shall be compatible with, and capable of furnishing data to the State system. The State system shall be capable of providing summaries, tabulations and special analyses to local governments on request.

The record system shall include: (a) certain basic minimum data and (b) procedures for statistical analyses of these data.

The program shall provide as a minimum that:

I. Information on vehicles and system capabilities includes (conforms to Motor Vehicle Registration Standard):

A. Make

B. Model year

C. Identification number (rather than motor number)

D. Type of body

E. License plate number

F. Name of current owner

G. Current address of owner

H. Registered gross laden weight of every commercial vehicle

I. Rapid entry of new data into the records or data system

J. Controls to eliminate unnecessary or unreasonable delay in obtaining data

K. Rapid audio or visual response upon receipt at the records station of any priority request for status of vehicle possession authorization

L. Data available for statistical compilation as needed by authorized sources

M. Identification and ownership of vehicles sought for enforcement or other operational needs

II. Information on drivers and system capabilities includes (conforms to Driver Licensing Standard):

A. Positive identification

B. Current address

C. Driving history

D. Rapid entry of new data into the system

E. Controls to eliminate unnecessary or unreasonable delay in obtaining data which is required for the system

F. Rapid audio or visual response upon receipt at the records station of any priority request for status of driver license validity

G. Ready availability of data for statistical compilation as needed by authorized sources

H. Ready identification of drivers sought for enforcement or other operational needs

III. Information on types of accidents includes:

A. Identification of location in space and time

B. Identification of drivers and vehicles involved

C. Type of accident

D. Description of injury and property damage.

E. Description of environmental conditions

F. Causes and contributing factors, including the absence of or failure to use available safety equipment.

IV. There are methods to develop summary listings, cross tabulations, trend analyses and other statistical treatments of all appropriate combinations and aggregations of data items in the basic minimum data record of drivers and accident and accident experience by specified groups.

V. All traffic records relating to accidents collected hereunder shall be open to the public in a manner which does not identify individuals.

VI. The program shall be periodically evaluated by the State and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 11 EMERGENCY MEDICAL SERVICES

Each State, in cooperation with its local political subdivisions, shall have a program to insure that persons involved in highway accidents receive prompt emergency medical care under the range of emergency conditions encountered. The program shall provide, as a minimum, that:

I. There are training, licensing, and related requirements (as appropriate) for ambulance and rescue vehicle operators, attendants, drivers, and dispatchers.

II. There are requirements for types and numbers of emergency vehicles including supplies and equipment to be carried.

III. There are requirements for the operation and coordination of ambulances and other emergency care systems.

IV. There are first aid training programs and refresher courses for emergency service personnel, and the general public is encouraged to take first aid courses.

V. There are criteria for the use of two-way communications.

VI. There are procedures for summoning and dispatching aid.

VII. There is an up-to-date, comprehensive plan for emergency medical services, including:

A. Facilities and equipment

B. Definition of areas of responsibility

C. Agreements for mutual support

D. Communications systems

VIII. This program shall be periodically evaluated by the State and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 12 HIGHWAY DESIGN, CONSTRUCTION AND MAINTENANCE

Every State in cooperation with county and local governments shall have a program of highway design, construction, and maintenance to improve highway safety. Standards applicable to specific programs are those issued or endorsed by the Federal Highway Administrator.

I. The program shall provide, as a minimum that:

A. There are design standards relating to safety features such as sight distance, horizontal and vertical curvature, spacing of decision points, width of lanes, etc., for all new construction or reconstruction, at least on expressways, major streets and highways, and through streets and highways.

B. Street systems are designed to provide a safe traffic environment for pedestrians and motorists when subdivisions and residential areas are developed or redeveloped.

C. Roadway lighting is provided or upgraded on a priority basis at the following locations:

1. Expressways and other major arteries in urbanized areas.

2. Junctions of major highways in rural areas.

3. Locations or sections of streets and highways having high ratios of night-to-day motor vehicle and/or pedestrian accidents.

4. Tunnels and long underpasses.

D. There are standards for pavement design and construction with specific provisions for high skid resistance qualities.

E. There is a program for resurfacing or other surface treatment with emphasis on correction of locations or sections of streets and highways with low skid resistance and high or potentially high accident rates susceptible to reduction by providing improved surfaces.

F. There is guidance, warning and regulation of traffic approaching and traveling over construction or repair sites and detours.

G. There is a systematic identification and tabulation of all rail-highway grade crossings and a program for the elimination of hazards and dangerous crossings.

H. Roadways and the roadsides are maintained consistent with the design standards which are followed in construction, to provide safe and efficient movement of traffic.

I. Hazards within the highway right-of-way are identified and corrected.

J. There are highway design and construction features wherever possible for accident prevention and survivability including at least the following:

1. Roadsides clear of obstacles, with clear distance being determined on the basis of traffic volumes, prevailing speeds, and the nature of development along the street or highway.

2. Supports for traffic control devices and lighting that are designed to yield or break away under impact wherever appropriate.

3. Protective devices that afford maximum protection to the occupants of vehicles wherever fixed objects cannot reasonably be removed or designed to yield.

4. Bridge railings and parapets which are designed to minimize severity of impact, to retain the vehicle, to redirect the vehicle so that it will move parallel to the roadway, and to minimize danger to traffic below.

5. Guardrails, and other design features which protect people from out-of-control vehicles at locations of special hazard such as playgrounds, schoolyards and commercial areas.

K. There is a post-crash program which includes at least the following:

1. Signs at freeway interchanges directing motorists to hospitals having emergency care capabilities.

2. Maintenance personnel trained in procedures for summoning aid, protecting others from hazards at accident sites, and removing debris.

3. Provisions for access and egress for emergency vehicles to freeway sections where this would significantly reduce travel time without reducing the safety benefits of access control.

II. This program shall be periodically evaluated by the State for its effectiveness in terms of reductions in accidents and their end results, and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 13 TRAFFIC CONTROL DEVICES

Each State, in cooperation with its county and local governments, shall have a program relating to the use of traffic control devices (signs, markings, signals, etc.) and other traffic engineering measures to reduce traffic accidents.

I. The program shall provide, as a minimum, that:

A. There is a method:

1. To identify needs and deficiencies of traffic control devices.

2. To assist in developing current and projected programs for maintaining, upgrading, and installing traffic control devices.

B. Existing traffic control devices on all streets and highways are upgraded to conform with standards issued or endorsed by the Federal Highway Administrator.

C. New traffic control devices are installed on all streets and highways, based on engineering studies to determine where devices are needed for safety. Such devices conform with standards issued or endorsed by the Federal Highway Administrator.

D. There are programs for preventive maintenance, repair, and daytime and nighttime inspection of all traffic control devices.

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E. Fixed or variable speed zones are established, at least on expressways, major streets and highways, and through streets and highways, based on engineering and traffic investigations.

II. This program shall be periodically evaluated by the State and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 14 PEDESTRIAN SAFETY

Every State in cooperation with its political subdivisions shall develop and implement a program to insure the safety of pedestrians of all ages. The program shall provide, as a minimum, that:

I. There is a continuing statewide inventory of pedestrian-motor vehicle accidents, identifying specifically:

A. The locations and times of all such accidents.

B. The age of all of the pedestrians injured or killed.

C. Where feasible, to determine whether the exterior features of the vehicle produced or aggravated an injury.

D. The color and shade of clothing worn by pedestrians when injured or killed, and the visibility conditions which prevailed at the time.

E. The extent to which alcohol is present in the blood of fatally injured pedestrians 16 years of age and older.

F. Where possible, to determine, the extent to which pedestrians involved in accidents have physical or mental disabilities.

II. There are established statewide operational procedures for improving the protection of pedestrians through reduction of potential conflicts with vehicles:

A. By application of traffic engineering practices including pedestrian signals, signs, markings, parking regulations and other pedestrian and vehicle traffic control devices.

B. By land-use planning in new and redevelopment areas for safe pedestrian movement.

C. By provision of pedestrian bridges, barriers, sidewalks and other means of physically separating pedestrian and vehicle pathways.

D. By provision of environmental illumination at high pedestrian volume and/or potentially hazardous pedestrian crossings.

III. There is established a statewide program for familiarizing drivers with the pedestrian problem and with ways to avoid pedestrian collisions.

A. The program content shall include emphasis on:

(1) Behavior characteristics of the three types of pedestrians most commonly involved in accidents with vehicles: (i) children; (ii) persons under the influence of alcohol; (iii) the elderly

(2) Accident avoidance techniques that take into account the hazardous conditions, and behavior characteristics displayed by each of the three high risk pedestrian groups listed in subparagraph (1).

B. Emphasis on this program content shall be included in:

(1) all driver education and training courses

(2) driver improvement courses

(3) driver license examinations

IV. There are statewide programs for training and educating all members of the public as to safe pedestrian behavior on or near streets and highways.

A. For children, youths and adults enrolled in schools, beginning at the earliest possible age.

B. For the general population via the public media.

V. There is a statewide program for the protection of children walking to and from school, entering and leaving school buses, and in neighborhood play.

VI. There is a statewide program for establishment and enforcement of traffic regulations designed to achieve orderly pedestrian and vehicle movement and to reduce vehicle-pedestrian conflicts.

VII. This program shall be periodically evaluated by the States, and the National Highway Safety Bureau shall be provided with an evaluation summary.

HIGHWAY SAFETY PROGRAM STANDARD 15 POLICE TRAFFIC SERVICES

Every State in cooperation with its political subdivisions shall have a program to insure efficient and effective police services utilizing traffic patrols: to enforce traffic laws; to prevent accidents; to aid the injured; to document the particulars of individual accidents; to supervise accident cleanup and to restore safe and orderly traffic movement.

I. The program shall provide as a minimum that there are:

A. Uniform training procedures in all aspects for police supervision of vehicular and pedestrian traffic related to highway safety, including use of appropriate instructional materials and techniques for recruit, advanced, in-service and special course training.

B. Periodic in-service training courses for uniformed and other police department employees assigned to traffic duties dealing with:

(1) administration and management of police, vehicular and pedestrian traffic services.

(2) analysis, interpretation and use of traffic records data.

(3) insurance of prompt reliable post-accident response, including skilled aid to the injured.

(4) accomplishing post-accident responsibilities.

C. Procedures for the selective assignment of trained police personnel to supervise vehicular and pedestrian traffic duties including enforcement patrols in hazardous or congested areas based on time and location of:

(1) traffic volume.

(2) accident experience.

(3) traffic violation frequency.

(4) emergency and service needs.

D. Procedures for investigating, recording and reporting accidents pertaining to:

(1) the human, vehicular, and highway causative factors in individual accidents.

(2) the human, vehicular, and highway causative factors of injuries and deaths, including failure to use safety belts.

(3) the efficiency of the post-accident response.

E. Procedures for recognizing and reporting, to the appropriate agencies, hazardous highway defects and conditions, including:

(1) condition of drivers.

(2) operational condition of motor vehicles.

(3) defective signs, signals, controls, construction and maintenance deficiencies.

a. Data listed in (3) above shall be readily available to the public.

F. Appropriate agreements by the State and its political subdivisions regarding primary responsibility and authority for police traffic supervision, and cooperative responsibilities where concurrent jurisdictional boundaries and problems exist, and appropriate participation of each law enforcement agency in the comprehensive highway safety program of the State and its political subdivisions.

II. The programs shall be periodically evaluated by the State, and the National Highway Safety Bureau shall be provided with an evaluation summary.

III. Nothing in this standard shall preclude the use of personnel other than police officers in carrying out the minimum requirements in accordance with laws and policies established by State and/or local governments.

HIGHWAY SAFETY PROGRAM STANDARD 16 DEBRIS HAZARD CONTROL AND CLEANUP

Each State in cooperation with its political subdivisions shall have a program which provides for rapid, orderly, and safe removal from the roadway of wreckage, spillage, and debris resulting from motor vehicle accidents, and for otherwise reducing the likelihood of secondary and chain-reaction collisions, and conditions hazardous to the public health and safety.

I. The program shall provide as a minimum that:

A. Operational procedures are established and implemented for:

(1) enabling rescue and salvage equipment personnel to get to the scene of accidents rapidly and to operate effectively on arrival:

a. on heavily traveled freeways and other limited access roads;

b. in other types of locations where wreckage or spillage of hazardous materials on or adjacent to highways endangers the public health and safety;

(2) extricating trapped persons from wreckage with reasonable care—both to avoid injury or aggravating existing injuries;

(3) warning approaching drivers and detouring them with reasonable care past hazardous wreckage or spillage;

(4) safe handling of spillage or potential spillage of materials that are:

a. radioactive
b. flammable
c. poisonous
d. explosive
e. otherwise hazardous.

(5) removing wreckage or spillage from roadways or otherwise causing the resumption of safe, orderly traffic flow.

B. Adequate numbers of rescue and salvage personnel are properly trained and retrained in the latest accident cleanup techniques.

C. A communications system is provided, adequately equipped and manned, to provide coordinated effort in incident detection, and the notification, dispatch, and response of appropriate services.

II. The program shall be periodically evaluated by the State, and the National Highway Safety Bureau shall be provided with an evaluation summary.

U. S. C. A.

"Sec. 2. Only at the request of a State, a political subdivision thereof, or a Federal department or agency, shall the Secretary furnish information contained in the register established under the first section of this Act, and such information shall be furnished only to the requesting party and only with respect to an individual applicant for a motor vehicle operator's license or permit.

"Sec. 3. As used in this Act, the term 'State' includes each of the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, the Canal Zone, and American Samoa."

ORDER NO. 10858

573, as amended by Ex.Ord.No.10968, Oct. 10, de under this section, which established the afety, was revoked by section 16 of Ex.Ord. set out as a note under section 1652 of Title

ORDER NO. 10898

by Ex.Ord.No.10986, Jan. 12, 1962, 27 F.R. 430; ov. 28, 1967, 32 F.R. 16247

RTMENTAL HIGHWAY SAFETY BOARD

(4) The Postmaster General.
(5) The Secretary of Labor.
(6) The Secretary of Health, Education, and Welfare.
(7) The Chairman of the Interstate Commerce Commission.
(8) The Administrator of General Services.

• • • • • •

(d) Four members of the Board shall constitute a quorum thereof.

• • • • • •

and highway and traffic safety were transferred to and vested in the Secretary of Transportation by Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a) (1), (6) of Title 49, Transportation.

hway purposes of lands or interests in

Government patent by which United States withdrew from entry tract of land for use by state as highway right-of-way, which was valid on its face, could not be collaterally attacked by landowners claiming fee ownership of land in area of highway right-of-way. Id.

1. Approval of application

Application by state for right-of-way across unimproved and unreserved lands consisting of map of right-of-way area was in effect, upon approval of application, patent from United States government. Allison v. State, 1966, 420 P.2d 289, 101 Ariz. 418.

ne to airport

and highway and traffic safety were transferred to and vested in the Secretary of Transportation by Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a) (1), (6) of Title 49, Transportation.

ic enhancement

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3 per centum of the funds apportioned ays for any fiscal year shall be allocated

to that State out of funds appropriated under authority of this subsection, which shall be used for landscape and roadside development within the highway right-of-way and for acquisition of interests in and improvement of strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such highways, including acquisition and development of publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public, without being matched by the State. The Secretary may authorize exceptions from this requirement, upon application of a State and upon a showing that such amount is in excess of the needs of the State for these purposes. Any funds not used as required by this subsection shall lapse.

There is authorized to be appropriated to carry out this subsection, out of any money in the Treasury not otherwise appropriated, not to exceed $120,000,000 for the fiscal year ending June 30, 1966, not to exceed $120,000,000 for the fiscal year ending June 30, 1967, and not to exceed $20,000,000 for the fiscal year ending June 30, 1970. The provisions of chapter 1 of this title relating to the obligation, period of availability, and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this subsection after June 30, 1967.

As amended Pub.L. 89-574, § 8(b), Sept. 13, 1966, 80 Stat. 768; Pub.L. 90-495, § 6(f), Aug. 23, 1968, 82 Stat. 818.

1968 Amendment. Subsec. (b). Pub.L. 90-495 added provisions authorizing an appropriation of not to exceed $20,000,000 for the fiscal year ending June 30, 1970.

1966 Amendment. Subsec. (b). Pub.L. 89-574 substituted provisions making applicable to the funds authorized to be appropriated to carry out this subsection after June 30, 1967, the provisions of chapter 1 of this title relating to the obligation, period of availability, and expenditure of Federal-aid primary highway funds for provisions prohibiting the use of any part of the Highway Trust Fund in carrying out this subsection.

Effective Date of 1968 Amendment. Amendment by Pub.L. 90-495 effective Aug. 23, 1968, see section 37 of Pub.L. 90-495, set out as a note under section 302 of this title.

Transfer of Functions. All functions, powers, and duties of the Secretary of Commerce and other officers and offices of the Department of Commerce under this title and under specific related laws and parts of laws set out in the notes in this title relating generally to highways and highway and traffic safety were transferred to and vested in the Secretary of Transportation by Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a) (1), (6) of Title 49, Transportation.

Legislative History. For legislative history and purpose of Pub.L. 89-574, see 1966 U.S.Code Cong. and Adm.News, p. 2800. See, also, Pub.L. 90-495, 1968 U.S. Code Cong. and Adm.News, p. 3482.

§ 320. Bridges on Federal dams

Transfer of Functions. All functions, powers, and duties of the Secretary of Commerce and other officers and offices of the Department of Commerce under this title and under specific related laws and parts of laws set out in the notes in this title relating generally to highways and highway and traffic safety were transferred to and vested in the Secretary of Transportation by Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a) (1), (6) of Title 49, Transportation.

CHAPTER 4.—HIGHWAY SAFETY

Sec.
401. Authority of the Secretary.
402. Highway safety programs.
403. Highway safety research and development.
404. National Highway Safety Advisory Committee.

Library references: Automobiles ⇐5(1) et seq.; Highways ⇐105 et seq.; C.J.S. Highways § 14 et seq., 571; C.J.S. Motor Vehicles § 232.

§ 401. Authority of the Secretary

The Secretary is authorized and directed to assist and cooperate with other Federal departments and agencies, State and local governments, private industry, and other interested parties, to increase highway safety.

Added Pub.L. 89-564, Title I, § 101, Sept. 9, 1966, 80 Stat. 731.

Transfer of Functions. All functions, powers, and duties of the Secretary of Commerce and other officers and offices of the Department of Commerce under this title and under specific related laws and parts of laws set out in the notes in

this title relating generally to highways and highway and traffic safety were transferred to and vested in the Secretary of Transportation by Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a) (1), (d) of Title 49, Transportation

National Highway Safety Agency; Creation; Appointment of Director; Duties of Director. Section 201 of Pub.L. 89-564, as amended by Pub.L. 89-670, § 8 (b), Oct. 15, 1966, 80 Stat. 943; Pub.L. 90-35, § 10(b), Sept. 11, 1967, 81 Stat. 224, provided that: "The Secretary shall carry out the provisions of the Highway Safety Act of 1966 (including chapter 4 of title 23 of the United States Code) [enacting this chapter, amending sections 105 and 307 of this title, repealing sections 135 and 313 of this title and enacting material set out as notes under this section and sections 303, 307, 402 and 403 of this title] through a National Highway Safety Bureau (hereinafter referred to as the 'Bureau'), which he shall establish in the Department of Commerce [Transportation]. The Bureau shall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall be a citizen of the United States, and shall be appointed with due regard for his fitness to discharge efficiently the powers and the duties delegated to him. The Director shall have no pecuniary interest in or own any stock in or bonds of any enterprise involved in (1) manufacturing motor vehicles or motor vehicle equipment, or (2) constructing highways, nor shall he engage in any other business, vocation, or employment. The Director shall perform such duties as are delegated to him by the Secretary. On highway matters the Director shall consult with the Director of Public Roads. The President is authorized to carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 [section 1381 et seq. of Title 15, Commerce and Trade] through the Bureau and Director authorized by this section."

Annual Report to Congress on Administration of Highway Safety Act of 1966. Section 202 of Pub.L. 89-564 provided that:

"(a) The Secretary shall prepare and submit to the President for transmittal to the Congress on March 1 of each year a comprehensive report on the administration of the Highway Safety Act of 1966 (including chapter 4 of title 23 of the United States Code) [which enacted this chapter, amended sections 105 and 307 of this title, repealed sections 135 and 313 of this title, and enacted material set out as notes under this section and sections 303, 307, 402, and 403 of this title] for the preceding calendar year. Such report should include but not be restricted to (1) a thorough statistical compilation of the accidents and injuries occurring in such year; (2) a list of all safety standards issued or in effect in such year; (3) the scope of observance of applicable Federal standards; (4) a statement of enforcement actions including judicial decisions, settlements, or pending litigation during the year; (5) a summary of all current research grants and contracts together with a description of the problems to be considered by such grants and contracts; (6) an analysis and evaluation of completed research activities and technological progress achieved during such year together with the relevant policy recommendations flowing therefrom; (7) the effectiveness of State highway safety programs (including local highway safety programs) and (8) the extent to which technical information was being disseminated to the scientific community and consumer-oriented material was made available to the motoring public.

"(b) The annual report shall also contain such recommendations for additional legislation as the Secretary deems necessary to promote cooperation among the several States in the improvement of highway safety and to strengthen the national highway safety program."

Submission to Congress by January 10, 1968, of Detailed Estimates of Cost of Carrying Out Highway Safety Act of 1966. Section 207 of Pub.L. 89-564 provided that: "In order to provide the basis for evaluating the continuing programs authorized by this Act [which enacted this chapter, amended sections 105 and 307 of this title, repealed sections 135 and 313 of this title, and enacted material set out as notes under this section and sections 303, 307, 402, and 403 of this title], and to furnish the Congress with the information necessary for authorization of appropriations for fiscal years beginning after June 30, 1969, the Secretary, in cooperation with the Governors or the appropriate State highway safety agencies, shall make a detailed estimate of the cost of carrying out the provisions of this Act. The Secretary shall submit such detailed estimate and recommendations for Federal, State, and local matching funds to the Congress not later than January 10, 1968."

Short Title. Section 208 of Pub.L. 89-564 provided that: "This Act [which enacted this chapter, amended sections 105 and 307 of this title, repealed sections 135 and 313 of this title, and enacted material set out as notes under this section and sections 303, 307, 402, and 403 of this title] may be cited as the 'Highway Safety Act of 1966'."

National Highway Safety Bureau, Administration of National Traffic and Motor Vehicle Safety Act through the Bureau and its Director, see Ex.Ord. No.11357, June 6, 1967, 32 F.R. 8225, set out as a note under section 1392 of Title 15, Commerce and Trade.

Legislative History. For legislative history and purpose of Pub.L. 89-564, see 1966 U.S.Code Cong. and Adm.News, p. 2741.

§ 402. Highway safety programs

(a) Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary. Such uniform standards shall be expressed in terms of performance criteria. Such uniform standards shall be promulgated by the Secretary so as to improve driver performance (including, but not limited to, driver education, driver testing to determine proficiency to operate motor vehicles, driver examinations (both physical and mental) and driver licensing) and to improve

pedestrian performance. In addition such uniform standards shall include, but not be limited to, provisions for an effective record system of accidents (including injuries and deaths resulting therefrom), accident investigations to determine the probable causes of accidents, injuries, and deaths, vehicle registration, operation, and inspection, highway design and maintenance (including lighting, markings, and surface treatment), traffic control, vehicle codes and laws, surveillance of traffic for detection and correction of high or potentially high accident locations, and emergency services. Such standards as are applicable to State highway safety programs shall, to the extent determined appropriate by the Secretary, be applicable to federally administered areas where a Federal department or agency controls the highways or supervises traffic operations. The Secretary shall be authorized to amend or waive standards on a temporary basis for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis by one or more States, where the Secretary finds that the public interest would be served by such amendment or waiver.

(b) (1) The Secretary shall not approve any State highway safety program under this section which does not—

(A) provide that the Governor of the State shall be responsible for the administration of the program.

(B) authorize political subdivisions of such State to carry out local highway safety programs within their jurisdictions as a part of the State highway safety program if such local highway safety programs are approved by the Governor and are in accordance with the uniform standards of the Secretary promulgated under this section.

(C) provide that at least 40 per centum of all Federal funds apportioned under this section to such State for any fiscal year will be expended by the political subdivisions of such State in carrying out local highway safety programs authorized in accordance with subparagraph (B) of this paragraph.

(D) provide that the aggregate expenditure of funds of the State and political subdivisions thereof, exclusive of Federal funds, for highway safety programs will be maintained at a level which does not fall below the average level of such expenditures for its last two full fiscal years preceding the date of enactment of this section.

(E) provide for comprehensive driver training programs, including (1) the initiation of a State program for driver education in the school systems or for a significant expansion and improvement of such a program already in existence, to be administered by appropriate school officials under the supervision of the Governor as set forth in subparagraph (A) of this paragraph; (2) the training of qualified school instructors and their certification; (3) appropriate regulation of other driver training schools, including licensing of the schools and certification of their instructors; (4) adult driver training programs, and programs for the retraining of selected drivers; and (5) adequate research, development and procurement of practice driving facilities, simulators, and other similar teaching aids for both school and other driver training use.

(2) The Secretary is authorized to waive the requirement of subparagraph (C) of paragraph (1) of this subsection, in whole or in part, for a fiscal year for any State whenever he determines that there is an insufficient number of local highway safety programs to justify the expenditure in such State of such percentage of Federal funds during such fiscal year.

(c) Funds authorized to be appropriated to carry out this section shall be used to aid the States to conduct the highway safety programs approved in accordance with subsection (a), shall be subject to a deduction not to exceed 5 per centum for the necessary costs of administering the provisions of this section, and the remainder shall be apportioned among the several States. For the fiscal years ending June 30, 1967, June 30, 1968,

and June 30, 1969, such funds shall be apportioned 75 per centum on the basis of population and 25 per centum as the Secretary in his administrative discretion may deem appropriate and thereafter such funds shall be apportioned as Congress, by law enacted hereafter, shall provide. On or before January 1, 1969, the Secretary shall report to Congress his recommendations with respect to a nondiscretionary formula for apportionment of funds authorized to carry out this section for the fiscal year ending June 30, 1970, and fiscal years thereafter. After December 31, 1969, the Secretary shall not apportion any funds under this subsection to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section. Federal aid highway funds apportioned on or after January 1, 1970, to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State is implementing an approved highway safety program. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of the preceding sentence to a State. Any amount which is withheld from apportionment to any State under this section shall be reapportioned to the other States in accordance with the applicable provisions of law.

(d) All provisions of chapter 1 of this title that are applicable to Federal-aid primary highway funds other than provisions relating to the apportionment formula and provisions limiting the expenditure of such funds to the Federal-aid systems, shall apply to the highway safety funds authorized to be appropriated to carry out this section, except as determined by the Secretary to be inconsistent with this section. In applying such provisions of chapter 1 in carrying out this section the term "State highway department" as used in such provisions shall mean the Governor of a State for the purposes of this section.

(e) Uniform standards promulgated by the Secretary to carry out this section shall be developed in cooperation with the States, their political subdivisions, appropriate Federal departments and agencies, and such other public and private organizations as the Secretary deems appropriate.

(f) The Secretary may make arrangements with other Federal departments and agencies for assistance in the preparation of uniform standards for the highway safety programs contemplated by subsection (a) and in the administration of such programs. Such departments and agencies are directed to cooperate in such preparation and administration, on a reimbursable basis.

(g) Nothing in this section authorizes the appropriation or expenditure of funds for (1) highway construction, maintenance, or design (other than design of safety features of highways to be incorporated into standards) or (2) any purpose for which funds are authorized by section 403 of this title. Added Pub.L. 89–564, Title I, § 101, Sept. 9, 1966, 80 Stat. 731, and amended Pub.L. 90–495, § 13, Aug. 23, 1968, 82 Stat. 822.

1968 Amendment. Subsec. (c). Pub.L. 90-495 substituted "December 31, 1969" for "December 31, 1968" as the last day on which the Secretary may apportion funds to States which are not implementing highway safety programs approved by the Secretary and substituted "January 1, 1970" for "January 1, 1969" as the date after which funds apportioned to States not having approved safety programs shall be reduced until a safety program is implemented.

Effective Date of 1968 Amendment. Amendment by Pub.L. 90-495 effective Aug. 23, 1968, see section 37 of Pub.L. 90-495, set out as a note under section 502 of this title.

Transfer of Functions. All functions, powers, and duties of the Secretary of Commerce and other officers and offices of the Department of Commerce under this title and under specific related laws and parts of laws set out in the notes in this title relating generally to highways and highway and traffic safety were transferred to and vested in the Secretary of Transportation by Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a) (1), (6) of Title 49, Transportation.

Authorization of Appropriations. Section 104 of Pub.L. 89-564 provided that: "For the purpose of carrying out section 402 of title 23, United States Code [this section], there is hereby authorized to be appropriated the sum of $67,000,000 for the fiscal year ending June 30, 1967; $100,000,000 for the fiscal year ending June 30, 1968; and $100,000,000 for the fiscal year ending June 30, 1969."

Report to Congress by July 1, 1967, on Initial Standards. Section 203 of Pub. L. 89-564 provided that: "The Secretary of Commerce shall report to Congress, not later than July 1, 1967, all standards to be initially applied in carrying out section 402 of title 23 of the United States Code [this section]."

Study of Relationship Between Consumption of Alcohol and Highway Safety; Report to Congress On or Before July 1, 1967. Section 201 of Pub.L. 89-564 provided that: "The Secretary of Commerce shall make a thorough and complete study of the relationship between the consumption of alcohol and its effect upon highway safety and drivers of motor vehicles, in consultation with such other government and private agencies as may be necessary. Such study shall cover review and evaluation of State and local laws and enforcement methods and procedures relating to driving under the influence of alcohol, State and local programs for the treatment of alcoholism, and such other aspects of this overall problem as may be useful. The results of this study shall be reported to the Congress by the Secretary on or before July 1, 1967, and shall include recommendations for legislation if warranted."

National Highway Safety Bureau. Provisions of section to be carried out by National Highway Safety Bureau in the Department of Transportation headed by a Director, see section 201 of Pub. L. 89-564, set out as a note under section 401 of this title.

Legislative History. For legislative history and purpose of Pub.L. 89-564, see 1966 U.S.Code Cong. and Adm.News, p. 2741. See, also, Pub.L. 90-495, 1968 U.S. Code Cong. and Adm.News, p. 3182.

§ 403. Highway safety research and development

The Secretary is authorized to use funds appropriated to carry out this section to carry out safety research which he is authorized to conduct by subsection (a) of section 307 of this title. In addition, the Secretary may use the funds appropriated to carry out this section, either independently or in cooperation with other Federal departments or agencies, for (1) grants to State or local agencies, institutions, and individuals for training or education of highway safety personnel, (2) research fellowships in highway safety, (3) development of improved accident investigation procedures, (4) emergency service plans, (5) demonstration projects, and (6) related activities which are deemed by the Secretary to be necessary to carry out the purposes of this section. Added Pub.L. 89–564, Title I, § 101, Sept. 9, 1966, 80 Stat. 733.

Transfer of Functions. All functions, powers, and duties of the Secretary of Commerce and other officers and offices of the Department of Commerce under this title and under specific related laws and parts of laws set out in the notes in this title relating generally to highways and highway and traffic safety were transferred to and vested in the Secretary of Transportation by Pub.L. 89-670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a) (1), (6) of Title 49, Transportation.

Authorization of Additional Appropriations. Authorization of appropriation of additional sum of $10,000,000 for the fiscal year ending June 30, 1967, $20,000,000 for the fiscal year ending June 30, 1968, and $25,000,000 for the fiscal year ending June 30, 1969, for the purpose of carrying out this section and section 307(a) of this title, see section 105 of Pub.L. 89-564, set out as a note under section 307 of this title.

Form and Use of Reports of Highway Traffic Accidents or Research Projects in Court; Availability to Public. Section 106 of Pub.L. 89-564 provided that: "All facts contained in any report of any Federal department or agency or any officer, employee, or agent thereof, relating to any highway traffic accident or the investigation thereof conducted pursuant to chapter 4 of title 23 of the United States Code [this chapter] shall be available for use in any civil, criminal, or other judicial proceeding arising out of such accident, and any such officer, employee, or agent may be required to testify in such proceedings as to the facts developed in such investigation. Any such report shall be made available to the public in a manner which does not identify individuals. All completed reports on research projects, demonstration projects, and other related activities conducted under sections 307 and 403 of title 23, United States Code [this section and section 307 of this title], shall be made available to the public in a manner which does not identify individuals."

National Highway Safety Bureau. Provisions of section to be carried out by National Highway Safety Bureau in the Department of Transportation headed by a Director, see section 201 of Pub.L. 89-564, set out as a note under section 401 of this title.

§ 404. National Highway Safety Advisory Committee

(a) (1) There is established in the Department of Transportation a National Highway Safety Advisory Committee, composed of the Secretary or an officer of the Department appointed by him, who shall be Chairman, the Federal Highway Administrator, and thirty-five members appointed by the President, no more than four of whom shall be Federal officers or employees. The appointed members, having due regard for the purposes of this chapter, shall be selected from among representatives of various State and local governments, including State legislatures, of public and private interests contributing to, affected by, or concerned with highway safety, including the national organizations of passenger car,

bus, and truck owners, and of other public and private agencies, organizations, or groups demonstrating an active interest in highway safety, as well as research scientists and other individuals who are expert in this field.

(2) (A) Each member appointed by the President shall hold office for a term of three years, except that (i) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (ii) the terms of office of members first taking office after the date of enactment of this section shall expire as follows: Twelve at the end of one year after the date such committee members are appointed by the President, twelve at the end of two years after the date such committee members are appointed by the President, and eleven at the end of three years after the date such committee members are appointed, as designated by the President at the time of appointment, and (iii) the term of any member shall be extended until the date on which the successor's appointment is effective. None of the members appointed by the President who has served a three-year term, other than Federal officers or employees, shall be eligible for reappointment within one year following the end of his preceding term.

(B) Members of the Committee who are not officers or employees of the United States shall, while attending meetings or conferences of such Committee or otherwise engaged in the business of such Committee, be entitled to receive compensation at a rate fixed by the Secretary, but not exceeding $100 per diem, including traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized in section 5 of the Administrative Expenses Act of 1946 (5 U.S.C. 73b–2) for persons in the Government service employed intermittently. Payments under this section shall not render members of the Committee employees or officials of the United States for any purpose.

(b) The National Highway Safety Advisory Committee shall advise, consult with, and make recommendations to, the Secretary on matters relating to the activities and functions of the Department in the field of highway safety. The Committee is authorized (1) to review research projects or programs submitted to or recommended by it in the field of highway safety and recommend to the Secretary, for prosecution under this title, any such projects which it believes show promise of making valuable contributions to human knowledge with respect to the cause and prevention of highway accidents; and (2) to review, prior to issuance, standards proposed to be issued by order of the Secretary under the provisions of section 402(a) of this title and to make recommendations thereon. Such recommendations shall be published in connection with the Secretary's determination or order.

(c) The National Highway Safety Advisory Committee shall meet from time to time as the Secretary shall direct, but at least once each year.

(d) The Secretary shall provide to the National Highway Safety Committee from among the personnel and facilities of the Department of Commerce such staff and facilities as are necessary to carry out the functions of such Committee.

Added Pub.L. 89–564, Title I, § 101, Sept. 9, 1966, 80 Stat. 733, amended Pub.L. 90–150, Nov. 24, 1967, 81 Stat. 507.

References in Text. The date of enactment of this section, referred to in subsec. (a) (2) (A), is September 9, 1966.

Section 5 of the Administrative Expenses Act of 1946 (5 U.S.C. 73b–2), referred to in subsec. (a) (2) (B), was classified to section 73b–2 of Title 5, and is now classified to sections 5703 and 5707 of Title 5, Government Organization and Employees.

1967 Amendment. Subsec. (a) (1). Pub.L. 90–150, § 1(1), substituted "Department of Transportation" for "Department of Commerce", increased number of Committee appointees from twenty-nine to thirty-five, and provided for selection of members from representatives of national organizations of passenger car, bus, and truck owners.

Subsec. (a) (2) (A). Pub.L. 90–150, § 1(2), substituted provisions for expiration of term of office of initial appointees one, two, and three years after date of appointment for twelve, eleven, and eleven members, respectively, for former provisions for such expiration one, two, and three years following enactment date of Sept. 9, 1966, for ten, ten, and nine members, respectively, and prohibited reappointment within one year after end of preceding term of member serving a three-year term of office.

Transfer of Functions. All functions, powers, and duties of the Secretary of Commerce and other officers and offices of the Department of Commerce under this title and under specific related laws and parts of laws set out in the notes in this title relating generally to highways and highway and traffic safety were transferred to and vested in the Secretary of Transportation by Pub.L. 89–670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See section 1655(a) (1), (6) of Title 49, Transportation.

Legislative History: For legislative history and purpose of Pub.L. 90–150, see 1967 U.S.Code Cong. and Adm.News, p. 541.

CHAPTER 5.—HIGHWAY RELOCATION ASSISTANCE

Sec.
501. Declaration of policy.
502. Assurances of adequate relocation assistance program.
503. Administration of relocation assistance program.
504. Federal reimbursement.
505. Relocation payments.
506. Replacement housing.
507. Expenses incidental to transfer of property.
508. Relocation services.
509. Relocation assistance programs on Federal highway projects.
510. Authority of Secretary.
511. Definitions.

§ 501. Declaration of policy

Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so displaced in accordance with the provisions of this title.

Added Pub.L. 90–495, § 30, Aug. 23, 1968, 82 Stat. 830.

Effective Date. Section effective Aug. 23, 1968, see section 37 of Pub.L. 90–495, set out as a note under section 502 of this title.

Short Title. Section 1 of Pub.L. 90–495 provided that: "This Act [enacting this chapter and sections 135, 139, 140, and 141 of this title, amending sections 101, 101 note, 103, 101, 108, 112, 113, 115, 116, 120, 125, 128, 129, 131, 135, 136, 138, 205, 310, and 402 of this title, section 630 of Title 15, Commerce and Trade, and section 1653 of Title 49, Transportation, repealing section 133 of this title, and enacting provision set out as notes under this section and sections 101, 101, 108, 125, 131, 502, and 510 of this title] may be cited as the 'Federal-Aid Highway Act of 1968'."

Eminent Domain. Section 32 of Pub.L. 90–495 provided that: "Nothing contained in chapter 5 of title 23, United States Code [this chapter], shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages not in existence on the date of enactment of such chapter 5 [Aug. 23, 1968]."

Legislative History. For legislative history and purpose of Pub.L. 90–495, see 1968 U.S.Code Cong. and Adm.News, p. 3182.

§ 502. Assurances of adequate relocation assistance program

The Secretary shall not approve any project under section 106 or section 117 of this title which will cause the displacement of any person, business, or farm operation unless he receives satisfactory assurances from the State highway department that—

(1) fair and reasonable relocation and other payments shall be afforded to displaced persons in accordance with sections 505, 506, and 507 of this title;

(2) relocation assistance programs offering the services described in section 508 of this title shall be afforded to displaced persons; and

(3) within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families

QUESTION PRESENTED

Whether a State requirement that any person riding upon or operating a motorcycle on the streets or highways of the State shall wear upon his head a protective head device of a type approved by the State is unconstitutional under the Fourteenth Amendment.

BACKGROUND

Twenty-three U.S.C. § 402(a) (P. L. 89-564, the Highway Safety Act of 1966) requires each State to have a highway safety program approved by the Secretary of Transportation and in accordance with uniform standards promulgated by him.

Highway Safety Program Standard 4.4.3 released by the Secretary on June 26, 1967, and entitled Motorcycle Safety, (23 C.F.R. Part 204) requires each State to have a motorcycle safety program providing as a minimum, inter alia, that when a motorcycle is being operated on streets and highways, each motorcycle operator and passenger shall wear an approved safety helmet. Latest available information [1/] indicates that as of September 1, 1969, 41 states had enacted motorcycle protective headgear statutes ("headgear legislation" hereafter) of this type providing criminal penalties upon violation. Additionally an unknown number of cities may have enacted similar municipal ordinances.

As of January 1, 1970, there have been decisions in response to 43 known separate court challenges of State and municipal headgear legislation. In 31 instances legislation has been upheld, and in 12 it has been declared unconstitutional. [2/] Headgear legislation has been upheld by 11 State Supreme Courts (Vermont, Missouri, Florida, Washington, Oregon, North Carolina, Rhode Island, Massachusetts, Louisiana, North Dakota, and Wisconsin), 12 appellate courts (three in New York, two in New Jersey, and one each in Hawaii, Pennsylvania, Texas, Maryland, Ohio, Washington, and Connecticut), and 8 trial courts (two each in Pennsylvania, Kansas and New York, one each in South Dakota and Minnesota). Headgear legislation has been declared unconstitutional by 1 State Supreme Court (Illinois), 3 appellate courts (one each in Idaho, Arizona and Michigan), and 8 trial courts (two in New York, and one each in Ohio, Florida, Missouri, Kentucky, Colorado, and Michigan).

1/ Insurance Institute of Highway Safety, Legislative Review 1970, p. 20.

2/ This figure is computed on the basis of the last known decision in each case. Such decision, of course, may represent an appellate reversal, or be subject to reversal on appeal.

Additionally, it is the opinion of the Attorney General of Oklahoma that the State's headgear legislation is unconstitutional and the opinion of the Attorney General of New Mexico that a proposed city ordinance would be invalid if applied to citizens over 18 years of age.

The Supreme Court has never agreed to review one of these cases on the merits. However, in June 1969 the Court in Bisenius v. Karns dismissed an appeal (89 S. Ct. 2033 (1969)) attacking the constitutionality of the Wisconsin statute "for want of a substantial federal question". Such a disposition means that the Court viewed the decision below, upholding constitutionality, to be correct.

I

THE UNITED STATES SUPREME COURT VIEWS A STATE SUPREME COURT DECISION UPHOLDING CONSTITUTIONALITY OF HEADGEAR LEGISLATION TO BE CORRECT

During its 1968-69 term, the United States Supreme Court denied two petitions for certiorari in cases upholding headgear legislation 1/ and dismissed an appeal in a third case "for want of a substantial federal question", Bisenius v. Karns, 165 N.W. 2d 377 (S. Ct. Wisc. 1969), appeal dismissed, 89 S. Ct. 2033 (1969). The appellant had attacked Wisconsin's headgear legislation (§ 347.485(1)(a) Stats.) as a restriction upon individual liberty and as exceeding the police power of the state, alleging that both violated the due process clause of the Fourteenth Amendment.

The Supreme Court's dismissal of appeal "for want of substantial federal question" means that the Court views the decision below to be correct, and that no substantial question on the merits was raised. 2/

The issues raised in Bisenius are essentially the same as those raised in other suits challenging the constitutionality of headgear legislation.

1/ Everhardt v. City of New Orleans, 217 So. 2d 400 (S. Ct. La. 1968) reversing 208 So. 2d 423 (La. App. 1968), cert. denied 89 S Ct. 1775 (1969); Mass. v. Howie, 238 N.E. 2d 373 (S. Jud. Ct. Mass. 1968), cert. denied 89 S. Ct. 485 (1968).

2/ Stern and Gressman, Supreme Court Practice 195 (3rd ed. 1962)

II

THE PRESUMPTION IN FAVOR OF THE CONSTITUTIONALITY OF A STATUTE IS ESPECIALLY APPOSITE WHEN A STATE STATUTE IMPLEMENTS THE EXPRESS COMMAND OF THE CONGRESS OF THE UNITED STATES.

There is a "long established presumption in favor of the constitutionality of a statute", Brandeis J., Ashwander v. Tennessee Valley Authority, 297 U.S. 288 at 354, (1936). This presumption has been recognized by the Supreme Court since the earliest days of the United States. Calder v. Bull, 3 Dall. 386, 399, (1798). In the words of Mr. Chief Justice Waite: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt." Sinking-Fund Cases, 99 U.S. 700, 718, (1879). Accord: Marshall C.J., Dartmouth College v. Woodward, 4 Wheat. 518, 625 (1818); Washington, J., Ogden v. Saunders, 12 Wheat. 213, 270 (1827).

This presumption applies to an Act of a State legislature as well as an Act of Congress, and "all reasonable doubts will be resolved in favor of the lawful exercise of their powers by the representatives of the people." State of North Carolina v. Anderson, 164 S.E. 2d 48 (1968) upholding that State's helmet legislation. The presumption extends to a city ordinance as well. Everhardt v. City of New Orleans 217 So. 2d 400 (S. Ct. La. 1968), reversing 208 2d 423 (La. App. 1968) cert. denied 89 S. Ct. 1775 (1969).

The presumption of constitutionality seems especially apposite when a State enacts legislation as a complement to an Act of Congress. The Highway Safety Act of 1966 (P. L. 89-564) was enacted "To provide for a coordinated national highway safety program through financial assistance to the States to accelerate highway traffic safety programs . . . ." It requires that "Each State shall have a highway safety program . . . designed to reduce traffic accidents and deaths . . . ." These programs "shall be in accordance with uniform standards promulgated by the Secretary." 23 U.S.C. § 402 a)

Pursuant to the authority granted him by the Act the Secretary released Highway Safety Program Standard 4.4.3 (23 C.F.R. Part 204, Highway Safety Program Standard No. 3) title "Motorcycle Safety." The purpose of the Standard was

> "To assure that motorcycles, motorcycle operators, and their passengers meet standards which contribute to safe operation and protection against injuries."

The background of the Standard shows the imperative need for such a Standard:

> "Deaths and injuries from motorcycle accidents doubled between 1963 and 1965. This fact is particularly alarming when it is understood that most of those killed and injured were young people under the age of 25. Motorcycle registrations have jumped from 574,080 in 1960 to 1,914,700 in 1966. By 1970 the annual increase is expected to reach 1 million per year. Motorcycle safety takes on grave dimensions in view of the fact that since 1960 the rate of motorcycle fatalities has increased at about the same rate as the number of motorcycles."

The Standard requires that "Each State shall have a motorcycle safety program to insure . . . that protective safety equipment for driver and passengers will be worn," specifically, "as a minimum," that

> "B. Each motorcycle operator wears an approved safety helmet and eye protection when he is operating his vehicle on streets and highways.
>
> "C. Each motorcycle passenger wears an approved safety helmet . . . ."

This, then, is the Federal Standard that the State legislation was enacted to implement at the express command of the Congress.

III

THE POLICE POWER OF A STATE INCLUDES THE POWER TO REQUIRE A MOTORCYCLIST TO WEAR PROTECTIVE HEADGEAR.

Headgear legislation stems from the police power of a State. The police power includes the power to enact laws within constitutional limits to promote the public safety and health, but from its nature it is incapable of exact definition. See e.g. Berman v. Parker 348 U.S. 26 (1954). It is one of the least limitable of governmental powers, and a proper exercise thereof may involve limitation of the use and enjoyment of private property without violation of the due process clause of the Constitution. See e.g. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1945).

The public streets, roads, and highways of a State are the property of all the people of a State, and a State has plenary power over the regulation of the use of such for the safety and best interests of the public. The Supreme Court has recognized and given sanction to the State exercise of its police power over use of the public way for more than 40 years:

> "Motor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all . . . who use its highways."
> Hess v. Pawloski, 274 U.S. 352, at 356 (1927).

Protection of a motorcyclist and his passenger while on the public roads then is within the legitimate concern of the State and not an area reserved to the individual. Legislation requiring the use of protective headgear by both cyclist and passenger is reasonably related to the end envisioned of reducing deaths and injuries to cyclists and passengers upon the public roads. Therefore State headgear legislation is a valid exercise of the police power by a State. See Massachusetts v. Howie, 238 N.E. 2d 373 (S. Jud. Ct. Mass., 1968); 89 S. Ct. 485 cert. denied 1968); State v. Edwards, Case No. 582370, Mun. Ct. Hennepin Cty. Minn. (1968).

IV

A STATE STATUTE REQUIRING A MOTORCYCLIST AND PASSENGER TO WEAR PROTECTIVE HEADGEAR DOES NOT VIOLATE THE FOURTEENTH AMENDMENT.

A. EVEN IF THE PRIMARY OBJECT OF HEADGEAR LEGISLATION IS TO PROTECT AN INDIVIDUAL FROM HIMSELF, SUFFICIENT PUBLIC INTEREST EXISTS TO JUSTIFY THIS STATUTE AND THERE IS NO VIOLATION OF THE DUE PROCESS CLAUSE.

If headgear legislation bears no relationship to the general welfare but has the sole effect of requiring an individual to protect himself from himself, it will establish a restriction upon personal liberty such as to constitute a denial of due process.

But such legislation is based upon sufficient public interest to constitute a valid exercise of the State police power.

The unprotected motorist presents a potential traffic hazard to the public at large. Unlike the operator of an enclosed motor vehicle a cyclist without a helmet is unprotected against falling objects such as tree branches. He is also unprotected against flying stones or gravel from the wheels of other moving vehicles. If struck in the head an unprotected cyclist could be so affected as to lose control of the vehicle and be the cause of death or injury to himself and other users of the highway. Everhardt v. City of New Orleans, supra; State ex rel. Colvin v. Lombardi, 241 A. 2d 625 (S. Ct. R. I. 1968).

Further, once a cyclist, passenger, or other person is injured because of the action of an unprotected cyclist, there is a tangible effect upon the public. There is an effect upon insurance rates, public hospital services, income tax revenues because of lost manhours of employment, public services to the disabled, and national defense since many motorcyclists are young men.

Severe injuries may result in an individual becoming a public charge; his death may call into force the State's welfare responsibility for his widow and children. State v. Lombardi, supra; People v. Newhouse, 287 N.Y.S. 2d 713 (1968).

The interdependence of the acts of an individual and the interest of the State has long been recognized. "The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer." New York Central R. Co. v. White, 243 U.S. 188 at 206-07 (1916). Accordingly States have legislated in many situations where there is a demonstrable risk to an individual which can be substantially reduced by requiring himto take certain protective measures. State laws prohibiting self-maiming and attempted self-destruction are well known. Additionally many States require safety devices to be worn by window cleaners, eye protection for welders, hard hats for those involved in demolition work, life preservers to be worn while water skiing, and nets protecting aerial performers from the effects of accidental falls. Headgear legislation belongs to this class of legislation.

B. HEADGEAR LEGISLATION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE SINCE THE DISTINCTION BETWEEN MOTORCYCLES AND OTHER VEHICLES IS BASED UPON SUBSTANTIAL DIFFERENCES AND THEREFORE REASONABLE IN LIGHT OF ITS PURPOSE.

Headgear legislation restricts the liberty of only one class of users of the public highway: motorcyclists and their passengers. There is no similar restriction upon the liberty of operators and passengers of other motor vehicles.

But headgear legislation does not violate the equal protection clause because the distinction between motorcycles and other vehicles such as bicycles and automobiles is based upon substantial differences and is reasonable in light of its purpose:

> "The power-driver cycle is a unique machine. It is capable of moderate to high speeds by motor vehicle standards, with the hazards inherent in speeds at which the vehicle is driven. A bicycle is limited in its speed by the nature of the power which propels it. An automobile differs from a motorcycle in

providing a shell surrounding the motorists. Both bicycles and automobiles can be dangerous to the riders, but the hazards of speed on the one hand and lack of an enclosure on the other hand do distinguish the motorcycle from both the bicycle and the automobile and make the hazard of operation distinguishable from both the bicycle and the automobile. Just because both the bicyclist and the motorist are subjected to hazards of head and face injuries does not mean that in order to make Sec. 347.485 valid it must apply to bicyclists and motorists. The degrees of hazards differ and therein lies the distinction. A classification is not unreasonable because it does not affect everyone who has any exposure to an evil." Bisenius v. Karns, Case No. 124423(Cty. Ct. Wisc. 1968).

C. HEADGEAR LEGISLATION DOES NOT VIOLATE THE DUE PROCESS CLAUSE SINCE IT IS CLEAR AND DEFINITE ENOUGH TO GIVE UNEQUIVOCAL WARNING OF THE RULE TO BE OBEYED.

Even though headgear legislation may require the wearing of a helmet of a type approved by a designated State official, such a statute is sufficiently definite, clear, and positive to give unequivocal warning to citizens of the rule which is to be obeyed.

A statute does not have to specify precise helmet performance requirements in order to be clear and definite, since the use and nature of protective helmets in industry, athletics, and the military service is known generally to the public. People v. Schmidt, 54 Misc. 2d 702, 283 NYS 2d 290 (1967). It is sufficient that the regulations, or proposed regulations of the designated State official "indicates that the requirements will be definite and certain with standards based upon tests to be made of the various headgear." Bisenius v. Karns, Case No. 124423 (Cty. Ct. Wisc. 1968).

D. HEADGEAR LEGISLATION DOES NOT VIOLATE THE DUE PROCESS CLAUSE SINCE IT LAWFULLY DELEGATES POLICE POWER TO AN ADMINISTRATIVE OFFICIAL.

The established rule is that the legislature may delegate to a subordinate body the discretionary power to execute and administer a law, provided a reasonably clear standard is formulated to govern the exercise of discretion by the subordinate body. The test is the completeness of the statute so that no part of the legislative function is left to the judgment of a delegate. People v. Carmichael, 288 NYS 2d 931 (1968) rev. 279 NYS 2d 272 (1967). Even though a standard by its nature is a general one it is valid if it is capable of reasonable application under the circumstances. Headgear legislation constitutes a lawful delegation of the police power since it describes the job to be done, who must do it, and the scope of his authority. Bowles v. Willingham, 321 U.S. 502, 575 (1944).

Numerous examples of legislative delegation of powers pertaining to vehicle and traffic standards can be found in State laws. In New York, for example, the Commissioner of Motor Vehicles may make rules and regulations prescribing standards of brake efficiency, brake linings, hydraulic brake fluid, commercial vehicle lighting, emergency equipment, school bus equipment, splash guards, safety belts and shoulder harnesses, and traffic hazard warning devices. 3/

3/ Subject to sec. 103(d) of P.L. 89-563 (The National Traffic and Motor Vehicle Safety Act of 1966).

APPENDIX
I

MOTORCYCLE PROTECTIVE HEADGEAR STATUTES

A typical statute requiring use of protective headgear by motorcycle operators and/or passengers might read:

> No person shall ride upon or operate a motorcycle on the streets or highways of this State (city) without wearing upon his head a protective head device (crash helmet, safety headgear, protective helmet) of a type approved by the Director of Public Safety (Commissioner, City Council Department of Health).[1]

The following 40 States have enacted statutes of this type:

Alabama	Kentucky	North Dakota
Arizona	Louisiana	Ohio
Arkansas	Maine	Oklahoma
Colorado	Maryland	Oregon
Connecticut	Massachusetts	Pennsylvania
Delaware	Minnesota	Rhode Island
Florida	Missouri	South Carolina
Georgia	Nebraska	South Dakota

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[1] The legislature of Michigan, in response to a decision of the Court of Appeals on April 30, 1968, holding its protective headgear statute unconstitutional, enacted a new statute on June 12, 1968, which reads:

> A motorcycle and a motor driven cycle shall be equipped with, and carry when it is being operated, a number of crash helmets equal to the number of drivers and passengers carried during operation. Helmets shall be approved by the department of State police. The department shall promulgate rules for the implementation of this section in accordance with the provisions of [here follows a lengthy citation]

Hawaii	New Hampshire	Tennessee
Idaho	New Jersey	Texas Utah
Illinois	New Mexico (under 18)	Vermont
Indiana	New York	Washington
Kansas	North Carolina	Wisconsin

The factual situations in the cases are virtually identical: the operator of a motorcycle was apprehended while operating a motorcycle upon the public streets without wearing on his head a protective head device as required by law.

APPENDIX

II

Courts and Cases

The following is a listing and citation of motorcycle protective headgear legislation opinions known as of January 1, 1970

I. United States Supreme Court

1. Krafft v. New York, 90 S. Ct. 198 (1969), certiorari denied.

2. Bisenius v. Karns, 89 S. Ct. 2033 (1969), appeal dismissed "for want of a substantial federal question."

3. Everhardt v. City of New Orleans, 89 S. Ct. 1775 (1969), certiorari denied.

4. Massachusetts v. Howie, 89 S. Ct. 485 (1968), certiorari denied.

II. State

A. Supreme or Highest Courts

1. State v. Solomon, _____ A. 2d _____ (S. Ct. Vt. 1969) upholding 23 V.S.A. § 1256.

2. State v. Darrah, _____ S.W. 2d _____ (S. Ct. Mo. 1969) upholding § 301.010 R.S. Mo. and reversing 1968 decision of Sedalia Mun. Ct.

3. State v. Eitel, 227 So. 2d 489 (S. Ct. Fla. 1969), reversing Small Claims - Magistrate Cts., Palm Beach Cases Nos. 68M-7013/14, 68M-7234 (1968) and upholding F. S. 317.981.

4. State v. Laitinen, 459 P. 2d 789 (S. Ct. Wash. 1969) holding constitutional RCW 46.37.530(3).

5. State v. Fetterly 456 P. 2d 996 (S. Ct. Oreg. 1969), holding constitutional ORS 483.443(1).

6. People v. Fries, 250 NE. 2d 149 (S. Ct. Ill., 1969) Docket No. 41624, holding unconstitutional Ill. Rev. Stat. 1967, ch. 971/2 Par. 189c(a).

7. State v. Anderson, 166 S.E. 2d 49 (S. Ct. N.C. 1969), affirming 164 S.E. 2d 48 (1968) reversing decision of Superior Ct., Guilford Cty., and upholding G.S. 20-140.2(b).

8. Bisenius v. Karns 165 N.W. 2d 377 (S. Ct. Wisc., 1969) upholding § 347.485 (1) and (2), Stats., 1967. Appeal dismissed, 89 S. Ct. 2033 (1969).

9. State v. Olegaard 165 N.W. 2d 677 (S. Ct., N.D., 1969), upholding N.D.C.C. § 39-21-48.

10. Everhardt v. City of New Orleans 217 So. 2d 400 (S. Ct. La. 1968), reversing 209 So. 2d 423 (La. App. 1968), upholds city ordinance which is similar to state statute, R.S. 32:190. Cert. denied 89 S. Ct. 1775 (1969).

11. Massachusetts v. Howie, 238 N.E. 2d 373 (S. Jud. Ct. Mass., 1968), Memorandum decision upholding Massachusetts statute. Cert. denied 89 S. Ct. 485 (1968).

12. State ex rel Colvin v. Lombardi 241 A. 2d 625 (S. Ct. R. I., 1968), upholding G. L. 1956, § 31-10.

B. Appellate Courts

1. Commonwealth v. Arnold, (Pa. Super. Ct. 1969) upholding P. L. 58, section 625.1 as amended, and reversing Clearfield Cty. Ct. (1969) decision.

2. State v. Betts (Warren Cty. Ct., Ohio, 1969) holding unconstitutional § 4511.53 Revised Code.

3. People v. Krafft (Onondaga Cty. Ct. 1969) upholding subdivision 6, section 381 of Vehicle and Traffic Law; cert. denied, 90 S. Ct. 198 (1969).

4. People v. Thoreson, (Maricopa Cty. Ct. 1969), holding Arizona law unconstitutional.

5. State v. _____ (Seneca Cty. Ct., Ohio, 1969) upholding § 4511.53 Revised Code (See Cycle News East, Nov. 4, 1967, p. 30).

6. People v. Albertson, Dist. Ct. (1969) holding Idaho statute unconstitutional, reversing Cty. Ct.

7. State v. Krammes, 252 A.2d 223 (1969) upholding N.J. S.A. 39: 3-76.7.

8. Ex Parte Smith, 441 S.W. 2d 544 (1969) upholding Art. 6701c-3 V.A.C.S., Texas.

9. State v. Myers, (Balto. Cty. Ct. 1969), affirming 1968 decision of Magistrate Ct. upholding Md. headgear and goggle legislation.

10. State v. Burayeki, 37 Law Week 2448, Conn. Cir. Ct. App. Div. (1969) File No. MV 10-63528 AP upholding Conn. Gen Stat. § 14 289(c), petition for appeal to S. Ct. Conn. denied, 252 A2d 812 (1969).

11. State v. Mele, 247 A. 2d 176 (1968) upholding N.J.S.A. 39: 3-76.7.

12. American Motorcycle Association and Farnum v. Davids and State Police, 158 N.W. 2d 72 (Mich. Ct. of Appeals, 1968), reversing 1967 decision of Circuit Ct., Ingham Cty., and holding unconstitutional PA 1949, No. 300, § 6581(d) as added by PA 1966, No. 207 (CL 1948 § 257, 658[d].

13. People v. Carmichael, 288 N.Y.S. 2d 931 (1968) reversing 279 N.Y.S. 2d 272 (1967) and upholding subdivision 6, section 381, of Vehicle and Traffic Law.

14. State v. Zektzer, Sup. Ct. King Cty. No. 47101 (Wash. 1967) upholding Ch. 232, Sec. 4 Subd. 3, Laws of 1967, and reversing City of Seattle v. Zektzer, Seattle Mun. Ct. (1967).

15. People v. Schmidt, 283 N.Y.S. 2d 290 (Cty. Ct., Erie Cty. 1967) upholding subdivision 6, section 381 of Vehicle and Traffic Law. Appeal dismissed 295 N.Y.S. 2d 936 (1968).

C. Trial Courts

1. Sheneman v. Commonwealth (Dauphin Cty. Ct. Pa. 1969) upholding P. L. 58, section 625.1 as amended.

2. Commonwealth v. Molter, (Delaware Cty. Ct. Pa. 1969) No. S.A. #7, upholding P. L. 58, Section 625.1 as amended.

3. Colo. Motorcycle Ass'n v. Love, Hogan, (Denver Cty. Ct. 1969) holding Colo. law unconstitutional.

4. Commonwealth v. Coffman (Jefferson Cty. Ct., Ky. 1969) holding unconstitutional KRS 189.285.

5. City of Wichita v. White, Cases Nos. MC 150-151, (D. Ct. Sedgwick Cty. 1969) upholding city ordinance; on appeal Kansas Supreme Ct. (Case No. 45676).

6. S.D. Motorcycle Dealers Ass'n and Haight v. Parker, (S. D. Cir. Ct. 1968) upholding Section 4 of Chapter 215 of the 1967 Session Laws.

7. State v. Babbs, (Martin Cty. Ct., Fla. 1968) holding unconstitutional F.S. 317.981.

8. State v. Edwards, Case No. 582370 (Mun. Ct. Hennepin Cty., 1968) upholding Minn. Stat. 169.974, subd. (4)a.

9. People v. Newhouse, 287 N.Y.S. 2d 713 (City Ct. of Ithaca, N.Y. 1968) upholding subdivision 6, section 381 of Vehicle and Traffic Law.

10. People v. Daugherty, (West Plains Mun. Ct. 1968) holding Missouri Law unconstitutional.

11. People v. Wattle, (Buffalo City Ct. 1967) holding unconstitutional subdivision 6, section 381 of Vehicle and Traffic Law.

12. City of Hutchinson v. Silvey, Case No. CR 8081 (D. Ct. Reno City., Kansas 1967) upholding city ordinance.

13. People v. Bielmeyer 282 N.Y.S. 2d 797 (Buffalo City Ct. 1967) upholding subdivision 6, section 381 of Vehicle and Traffic Law.

14. State v. Duncan, No. 44835 (Wayne Cty. 1967) holding Michigan statute unconstitutional.

15. People v. Smallwood, 277 NYS. 2d 429 (Ct. Spec. Sess., Irondequoit, Monroe Cty. 1967), holding unconstitutional subdivision 6, section 381 of Vehicle and Traffic Law.

III. Opinions of States Attorneys - General

1. Opinion of Attorney - General of New Mexico, No. 69-14 Feb. 25, 1969. In response to an Attorney for the New Mexico legislative Counsel, the opinion notes cases contra position taken in No. 66-15 but states "we are unwilling to completely abandon our past position."

2. Opinion of Attorney - General of Oklahoma No. 68-267, December 31, 1968, that 470. S. Supp. 1967, /§ 40-105(b), is unconstitutional.

3. Opinion of Attorney - General of New Mexico, No. 66-15, Feb. 1, 1966. Proposed city ordinance unconstitutional as to citizens over 18.

IV. Law Review Notes and Articles

1. Constitutional Law - Validity of Safety Helmet Requirements, 71 W.Va. L. Rev. 191 (1969).

2. Constitutional Law - Police Power - Motorcycle Crash Helmet Laws' Relation to Public Welfare, 1969 Wisc. L. Rev. 320 (1969).

3. Constitutionality of Mandatory Motorcycle Helmet Legislation, 73 Dick. L. Rev. 100 (1968).

4. Constitutional Law - Due Process - Statute Requiring Motorcyclist to Wear Crash Helmet is Unconstitutional, (American Motorcycle Ass'n. v. Davids), 82 Harv. L. Rev. 469 (1968).

Virginia Highway Safety

ery is $200. At least 20 percent of all stolen vehicle crashes result in injury to one or more persons.

TESTING Two identical cars were in an experimental run from Germany into Italy, a distance of 1,000 miles. One driver was to make the best time he possibly could within reasonable bounds of safety. The other was told to take it safe and easy. The first finished only 21 minutes ahead of the other with a driving time of 20 hours and 12 minutes. The experiment was repeated over an 800 mile course and this time the difference was again 21 minutes. The fast driver used 10 more gallons of gas.

ALCOHOL In Wisconsin, a person who refuses a test under the State's implied consent law and is convicted gets an extra two days in jail and six more months of license suspension.

In Leeds, England, it was found that motorists were heating the second blood sample, which goes to the accused, and then claiming they were being deprived of evidence, since the blood could not be tested, through no fault of theirs.

In October, 1967, Britain's strict drunk driving laws, which included a roadside preliminary breath test, went into effect. The Ministry of Transport reports 22,000 less deaths and serious injuries than in a similar period. In both years, about 70 percent of the reductions were achieved between 10 p.m. and 4 a.m. when drinking and driving are most likely to be at their worst.

Cornell Aeronautical Laboratory has been experimenting with a device which measures an individual's alcohol level by the unsteadiness of his eyes as he attempts to fix his gaze on a target. It can spot a level as low as .02 percent. The device makes a pictoral record of what happens to each of the testee's eyes when he attempts to look in a shadowbox at a target light. Not a difficult operation for a sober person, it requires control of the eye muscles through the brain and a drinking person loses this control.

A recent Wisconsin survey revealed that among 16 pedestrians 16 years of age and over killed in traffic, 73 percent had been drinking and 40 percent had levels of .15 or higher. Of 422 drivers tested, 65 percent had been drinking and 37 had alcohol levels of .15 or above.

In New York State, a drinking driver left the road on a curve. His car did not overturn but plowed a 200-foot path through weeds and bushes. Moments later, a second and following drinking driver, seeing the first driver's taillights ahead, thought the newly plowed path was the highway and followed it until he crashed into the rear of the first car.

MOTORCYCLES Of our 50 states and the eight Canadian provinces protective headgear is required in 47 jurisdictions, eye protection in 33, rear view mirrors in 48 and special licenses in 40. With the passage of the necessary law this year, Virginia will meet all these standards when the law becomes effective on June 26. The Colorado Supreme Court has just ruled cyclists can be made to wear helmets and goggles.

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with a lamp on the front which shall emit a white light visible from a distance of at least 500 feet to the front and with a red reflector on the rear of a type approved by the department which shall be visible from all distances from 100 feet to 600 feet to the rear when directly in front of lawful lower beams of head lamps on a motor vehicle. A lamp emitting a red light visible from a distance of 500 feet to the rear may be used in addition to the red reflector. (REVISED, 1968.)

(b) No person shall operate a bicycle unless it is equipped with a bell or other device capable of giving a signal audible for a distance of at least 100 feet, except that a bicycle shall not be equipped with nor shall any person use upon a bicycle any siren or whistle.

(c) Every bicycle shall be equipped with a brake which will enable the operator to make the braked wheels skid on dry, level, clean pavement.

ARTICLE XIII—SPECIAL RULES FOR MOTORCYCLES (NEW, 1968.)

§ 11-1301—Traffic laws apply to persons operating motorcycles

Every person operating a motorcycle shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of any other vehicle under this act, except as to special regulations in this article and except as to those provisions of this act which by their nature can have no application.

§ 11-1302—Riding on motorcycles

(a) A person operating a motorcycle shall ride only upon the permanent and regular seat attached thereto, and such operator shall not carry any other person nor shall any other person ride on a motorcycle unless such motorcycle is designed to carry more than one person, in which event a passenger may ride upon the permanent and regular seat if designed for two persons, or upon another seat firmly attached to the motorcycle at the rear or side of the operator. (FORMERLY § 11-1103; REVISED, 1968.)

(b) A person shall ride upon a motorcycle only while sitting astride the seat, facing forward, with one leg on each side of the motorcycle.

(c) No person shall operate a motorcycle while carrying any package, bundle, or other article which prevents him from keeping both hands on the handlebars.

(d) No operator shall carry any person, nor shall any person ride, in a position that will interfere with the operation or control of the motorcycle or the view of the operator.

§ 11-1303—Operating motorcycles on roadways laned for traffic

(a) All motorcycles are entitled to full use of a lane and no motor vehicle shall be driven in such a manner as to deprive any motorcycle of the full use of a lane. This subsection shall not apply to motorcycles operated two abreast in a single lane.

(b) The operator of a motorcycle shall not overtake and pass in the same lane occupied by the vehicle being overtaken.

(c) No person shall operate a motorcycle between lanes of traffic or between adjacent lines or rows of vehicles.

(d) Motorcycles shall not be operated more than two abreast in a single lane.

(e) Subsections (b) and (c) shall not apply to police officers in the performance of their official duties.

§ 11-1304—Clinging to other vehicles

No person riding upon a motorcycle shall attach himself or the motorcycle to any other vehicle (or streetcar) on a roadway.

§ 11-1305—Footrests and handlebars

(a) Any motorcycle carrying a passenger, other than in a sidecar or enclosed cab, shall be equipped with footrests for such passenger.

(b) No person shall operate any motorcycle with handlebars more than 15 inches in height above that portion of the seat occupied by the operator.

§ 11-1306—Equipment for motorcycle riders

(a) No person shall operate or ride upon a motorcycle unless wearing protective headwear which complies with standards established by the commissioner.

(b) No person shall operate any motorcycle unless wearing

an eye-protective device of a type approved by the commissioner, except when the motorcycle is equipped with a windscreen.

(c) This section shall not apply to persons riding within an enclosed cab.

(d) The commissioner is hereby authorized to approve or disapprove protective headgear and eye-protective devices required herein, and to issue and enforce regulations establishing standards and specifications for the approval thereof. The commissioner shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by him.

ARTICLE XIV—STREETCARS [1]

(REPOSITIONED, 1968; FORMERLY ARTICLE XIII.)

§ 11-1401—Traffic laws apply to operators of streetcars

Every operator of a streetcar upon any roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this chapter and chapter 10, except regulations and provisions which by their nature can have no application. (NEW, 1968.)

§ 11-1402—Passing streetcar on left

(a) The driver of a vehicle shall not overtake and pass upon the left nor drive upon the left side of any streetcar proceeding in the same direction, whether such streetcar is actually in motion or temporarily at rest, except:

1. When so directed by a police officer;
2. When upon a one-way street; or
3. When upon a street where the tracks are so located as to prevent compliance with this section.

(b) The driver of any vehicle when permitted to overtake and pass upon the left of a streetcar which has stopped for the purpose of receiving or discharging any passenger shall reduce speed and may proceed only upon exercising due caution for pedestrians and shall accord pedestrians the right of way when required by other sections of this chapter.

[1] This article should be omitted in states where no streetcars are in operation.

§ 11-1403—Passing streetcar on right

The driver of a vehicle overtaking upon the right any streetcar stopped or about to stop for the purpose of receiving or discharging any passenger shall stop such vehicle at least five feet to the rear of the nearest running board or door of such streetcar and thereupon remain standing until all passengers have boarded such car or upon alighting have reached a place of safety, except that where a safety zone has been established, a vehicle need not be brought to a stop before passing any such streetcar but may proceed past such car at a speed not greater than is reasonable and proper and with due caution for the safety of pedestrians.

§ 11-1404—Driving on streetcar tracks

(a) The driver of any vehicle proceeding upon any streetcar track in front of a streetcar upon a street shall remove such vehicle from the track as soon as practical after signal from the operator of said streetcar.

(b) When a streetcar has lawfully entered and is crossing an intersection, no driver of a vehicle shall drive upon or across the car tracks within the intersection in front of the streetcar when there is hazard of a collision.

(c) The driver of a vehicle upon overtaking and passing a streetcar shall not turn in front of such streetcar so as to interfere with or impede its movement.

MOTOR VEHICLE LAW REVIEW

In this issue of the Bulletin, Joseph P. Hennessee, Director of AAMVA's Division of Legal Services, reports on a Colorado helmet law decision and gives a summary of a memorandum from the National Highway Safety Bureau which reviews existing helmet law decisions in the various jurisdictions.

Colorado Helmet Law Upheld

The latest in a series of motorcyle helmet cases is *The People of the State of Colorado* v. *Joseph Ball, et al*, not yet reported, which was handed down by the Colorado Supreme Court on January 26, 1970.

The facts show that defendants in error (who were plaintiffs in the trial court and are hereafter referred to as such) began a class action seeking a declaratory judgment concerning the constitutionality of the Colorado Motorcycle Helmet Law (CRS 1963, 13-S-159) enacted by the 1968 General Assembly, and seeking relief against its enforcement.

The pertinent part of the Colorado statute provides "No person shall operate any motorcycle or motor-driven cycle on a public highway in this state unless such person and any passenger therein is wearing securely fastened on his head a protective helmet designed to deflect blows, resist penetration, and spread the force of the impact, . . ."

At trial the plaintiffs presented no evidence whatsoever. The State offered in evidence documents containing statistics dealing with results of operation of motorcycles by drivers wearing helmets as compared to those with drivers not wearing helmets. No other evidence appears in the record.

At the conclusion of the trial the Court ruled that the legislative interest was to prevent motorcyclists from sustaining serious head injuries, and that the legislation was designed to protect only that certain class of persons who ride motorcycles. For this reason the trial judge ruled that the helmet statute did not relate to the health and welfare of the citizens of Colorado in general, and was, therefore, an unconstitutional exercise of the police power of the state, and enjoined the State from enforcing the "helmet" requirement. The court upheld as constitutional that portion of the statute requiring operators and passengers of motorcycles to wear a face shield, goggles, or safety glasses.

Upon appeal the Supreme Court reversed the trial court and held that the helmet requirement was constitutional.

In reaching this conclusion the Supreme Court pointed out there is a presumption that every statute is valid and constitutional, and that the burden of clearly demonstrating the unconstitutionality of a statute is upon the party asserting its invalidity. Second, in order for a statute to be within the police power of the state, the provisions of the statute must be reasonably related to the public health, safety and welfare. Whether or not the relationship is reasonable is a judicial question.

Plaintiffs argued that where a statute deprives a certain class of persons of their individual constitutional freedoms, there must be a more substantial relationship between the restrictive provisions and the public health, safety, and welfare than that provided by the test of reasonableness.

The Supreme Court did not agree. While it noted that it had characterized an individual's right to use of the public highways as an adjunct of the constitutional right to acquire, possess and protect property, it has clearly held that such a right may be limited by the proper exercise of the police power based on a reasonable relationship to the public health, safety and welfare.

In deciding that the helmet law bore no reasonable relationship to the public health, safety and welfare, the trial judge, in the opinion of the Supreme Court, failed to apply the above principles of constitutional law correctly to the facts of the case.

The trial judge concluded that the purpose of the helmet law was to prevent motorcyclists from sustaining head injuries, and that such purpose was not within the state's police power. "To say that statutes which protect the individual from serious bodily harm or death are per se unconstitutional as not bearing a reasonable relationship to the public health, safety and welfare is to apply a most shallow doctrine of the police power of the state. Such a concept would require us to hold unconstitutional hunter safety laws, laws requiring life jackets . . . laws requiring workers in certain occupations to wear protective devices, a result which we are not prepared to adopt in the name of the 'right to be left alone'."

The Court stated that the safety of other highway users might be affected by failure of motorcyclists to protect themselves against, for example, stones picked up and thrown by tires, and noted that the hypothesis that an accident might occur because of failure to wear protective helmets had been upheld as reasonable by the ruling courts in Louisiana, Massachusetts, North Carolina, North Dakota, Oregon, Rhode Island, Texas, Washington, and Wisconsin. While only the Supreme Court of Illinois has held to the contrary.

Everhardt v. *New Orleans*, 253 La. 285, 217 So.2d 400; *Commonwealth* v. *Howie*, 354 Mass. 769, 238 N.E. 2d 373, *Cert. denied* 393 U.S. 999, 895 Ct. 485, 21 L.Ed. 2d 464; *State* v. *Anderson*, 275 N.C. 168, 166 S.E. 2d 49; *State* v. *Odegaard*, 165 N.W. 2d 677 (N.D.); *State* v. *Fetterly*, —Ore.—, 456 P. 2d 966; *State* v. *Lombardi*, —R.I.—, 241 A. 2d 625; *Ex parte Smith*, —Tex.— 441 S.W. 2d 544; *State* v. *Leitenen*, —Wash.—, 459 P. 2d 789; *Bisenius* v. *Karns*, 42 Wis. 2d 42, 165 N.W. 2d 377 (dismissed on appeal by U.S. Supreme Court "for want of a substantial federal question in 89 S.Ct. 2033 (1969)"); *Contra*, *People* v. *Fries*, 42 Ill. 2d 446, 250 N.E. 2d 149.

In an assignment of cross error, plaintiffs alleged that the helmet requirement constituted an unconstitutional burden on interstate commerce.

In demolishing this argument the Court noted that 41 states now have helmet laws. In addition, it noted, the Federal Traffic and Motor Vehicle Safety Statute, 15 U.S.C.A. Sec. 1381 *et seq.*, which was passed under the commerce power for the purpose of reducing traffic accidents, deaths and injuries, is an indication that state statutes designed to reduce the death toll on the public highways are not contrary to any federal policy or interstate commerce.

Headgear Legislation Memorandum

The National Highway Safety Bureau has circulated a memorandum to the Governors of the various states in regard to whether a State requirement that any person riding upon or operating a motorcycle on the streets or highways

of the State shall wear upon his head a protective device of a type approved by the State is unconstitutional under the Fourteenth Amendment.

This memorandum is available from the National Highway Safety Bureau.

It relates that as of January 1, 1970, there have been at least 43 separate decisions in regard to headgear requirements. In 31 instances, legislation has been upheld. In 12 instances it has been held unconstitutional.

Headgear legislation has been upheld by 11 State Supreme Courts (Vermont, Missouri, Florida, Washington, Oregon, North Carolina, Rhode Island, Massachusetts, Louisiana, North Dakota and Wisconsin); 12 Appellate Courts (three in New York, two in New Jersey, and one each in Hawaii, Pennsylvania, Texas, Maryland, Ohio, Washington and Connecticut); and of Trial Courts (two each in Pennsylvania, Kansas and New York, and one each in South Dakota and Minnesota).

Headgear legislation has been declared to be unconstitutional by one State Supreme Court (Illinois), three Appellate Courts (one each in Idaho, Arizona and Michigan), and 8 trial courts (two in New York and one each in Ohio, Florida, Missouri, Kentucky, Colorado and Michigan).

Additionally, as this memorandum reports, the Attorney General of Oklahoma has issued an opinion that the Oklahoma law is unconstitutional. The Attorney General of New Mexico has ruled that a proposed city ordinance would be invalid if applied to citizens over 18 years of age.

The United States has never agreed to review one of these cases on the merits. In June, 1969, the Court in *Bisenius* v. *Karns* dismissed an appeal (89 S.Ct. 2033 (1969)) attacking the constitutionality of the Wisconsin statute "for want of a substantial federal question." During the 1968-69 term the Court denied certiorari in *Everhardt* v. *City of New Orleans*, 217 So. 2d 400 (S. Ct. La. 1968), *Cert. denied* 89 S. Ct. 1775 (1969); and *Massachusetts* v. *Howie*, 283 N.E. 2d 373 (S. Jud. Ct. Mass. 1968) *Cert. denied* 89 S. Ct. 485 (1968).

In an Appendix to the memorandum there is a listing and citation of motorcycle protective headgear legislation opinions known as of January 1, 1970. This Appendix also lists the known opinions of the States Attorneys General.

For further information it cites the following four Law Review Notes and Articles: (1) *Constitutional Law—Validity of Safety Helmet Requirements*, 71 W. Va. L. Rev. 191 (1969); (2) *Constitutional Law—Police Power—Motorcycle Crash Helmet Laws' Relation to Public Welfare*, 1969 Wisc. L. Rev. 320 (1969); (3) *Constitutionality of Mandatory Motorcycle Helmet Legislation*, 73 Dick. L. Rev. 100 (1968); and (4) *Constitutional Law—Due Process—State Requiring Motorcyclist to Wear Crash Helmet Is Unconstitutional, (American Motorcycle Ass'n. v. Davids)*, 82 Harv. L. Rev. 649.

This memorandum is a "must" for each motor vehicle department attorney. While we cannot furnish each of you with a copy of this memorandum, it is available as previously mentioned, from the National Highway Safety Bureau. Copies are already in the hands of each State Safety Coordinator, each State Attorney General, and each Regional Highway Representative. The complete listing of cases with citations is available from this office.

Arthur P. Flynn Elected First Chairman Of AAMVA Industry Advisory Committee

Arthur P. Flynn was elected the first permanent Chairman of the AAMVA Industry Advisory Committee at a meeting held in Washington, D. C. March 4th.

Flynn, National Sales Manager for State Government Markets for 3-M Company, succeeds J. Olan Cooper. Cooper, Manager of the State Relations Department of the Automobile Manufacturers Association, had served as temporary Chairman of the group since it was formed in late 1969.

The Industry Advisory Committee was created by former AAMVA President Douglas W. Toms shortly before he resigned from the Association's chief executive post to become Director of the National Highway Safety Bureau. It was formed to facilitate relationships between the member jurisdictions of AAMVA and those businesses and commercial enterprises with which they engage in regular business activity.

Cooper, who had been serving as an alternate for Russell MacCleery, Administrative Vice President of AMA, has been designated as a regular member by AAMVA President Will Bachofner. Also, President Bachofner recently announced the appointment of Leonard Schuttig, Eastern Sales Manager for the Stardust Hotel in Las Vegas, as an Advisory Committee member.

Others attending the March meeting were: John O'Hara, Vice President and Associate General Counsel, R. L. Polk & Company; Fred Jackson, Remington Rand, Office Systems Division; Rex Williams, Manager, Governmental Relations, Ryder Truck Rental; and Pat Lynch, representing Christ Rousseff, President, Dek Processes Division, Scott and Fetzer Company.

Toms Lists Priorities

(Continued from Page 1

of a program to cope with the alcohol/driving problem; and, (3) development of a proto-type safety car.

Toms said that as the result of a recent visit to the Detroit factories of the auto manufacturers he was truly impressed by the sophistication in "air bags" research to date. He predicted that "air bags" probably will become fully operational between 1973 and 1975. Also, he said he felt that "air bags" can be easily and economically "retrofit" to used vehicles.

The "alcholic" not the social drinker poses the major problem in the area of drinking and driving. The NHSB Director conceded that the approach cannot be puritanical—such as prohibition—because the motoring public will not buy it. Toms said he and Secretary Volpe have appealed to the Govenors to help. At the winter meeting of the National Governor's Conference, held in Washington in early March, Secretary told the state's chief executives that to support a hard-nosed and effective alcohol program would not be politically adverse.

Bids are now out to build two proto-type safety cars. Toms said NHSB is hoping for virgorous competition in bidding to build the car. One bid probably will be awarded to a major auto manufacturer and one will be let outside the industry—possibly in the aero-space industry.

Eventually 16 proto-types will be built. These, according to Toms, are a necessity to prove research theories. I want to make certain that something has been proved before I put my name on it, he stated.

Toms said that because of current research by the auto manufacturers that air pollution by the internal combustion engine will be no problem by 1980.

The 16 Highway Safety Program Standards are carefully being examined and suggestions have been made for updating. In addition to the re-vamping, the ones concerned with highway building: Identification and Surveillance of Accident Locations; Highway Design, Construction and Maintenance; Traffic Control Devices; and Debris Hazard Control and Clean-up likely will be placed under the Bureau of Public Roads, if the recommendations are approved by Secretary Volpe.

1969 Hwy Safety Legislation

MONTANA reduced to 48 hours the time when a vehicle may be left parked or standing upon the right-of-way of a public highway before it may be taken into custody as an abandoned vehicle. (H 370, Ch 169)

A NEW YORK law provides new provisions governing the removal and disposal of abandoned vehicles. (S 5636, Ch 829)

An enactment in TENNESSEE requires the owner of a vehicle who disposes of it as wreckage or salvage, to deliver the certificate of title to the commissioner of revenue within 72 hours, along with the manufacturer's serial plate if the vehicle was manufactured less than five years prior to the current model year. (S 827, Ch 267)

VERMONT requires the removal of junkyards by July 1, 1970, if they are visible from the main traveled way along Interstate and primary highways and cannot be effectively screened. The same law provides procedures for the disposition of junk motor vehicles. (H 69, Ch 24) Another VERMONT enactment established comprehensive provisions for the governing of junkyards and the disposal of junk motor vehicles. The State Highway Board was empowered to carry out the new law and was authorized to enter into agreements with the U. S. Secretary of Transportation to arrange for Federal cost participation. (S 81, Act 98)

A WASHINGTON law established procedures for the disposition of stolen and abandoned vehicles. A provision of the new enactment gives the director of the Motor Vehicle Department the responsibility for the ultimate disposition of abandoned vehicles and automobile hulks. (H 769, Ch 42)

Scenic Highways and Service Facilities

An enactment in FLORIDA designated the everglades parkway as an official scenic highway of the State. The new law prohibits certain advertising signs within 500 feet of either side of the right-of-way and provides procedures for removal of nonconforming signs. (H 68, Ch 371)

HAWAII requested the Department of Transportation, the Department of Planning and Economic Development and the Department of Land and Natural Resources to take whatever steps may be necessary and feasible to establish a State system of scenic drives and trails. (SCR 7) Another request to the Department of Transportation requires the holding of public hearings before granting permission to public utilities to construct utility facilities along State or Federal-aid highways. (HR 2.9)

MAINE created a Scenic Highway Board empowered to develop and adopt procedures, rules and regulations for the designation and development of a system of scenic highways and the preservation of scenic value in the highway corridor. (H 837, Ch 453)

The MICHIGAN Legislature memorialized Congress to pass necessary legislation to provide funds for a national system of scenic highways. (SCR 22)

The commissioner of highways in MINNESOTA was authorized to negotiate contracts to provide maintenance services for interstate and trunk highway rest stops and tourist information centers. (S 691, Ch 157)

NEW YORK authorized the commissioner of transportation to construct and maintain or permit the construction and/or maintenance of information centers at safety rest areas. (S 3405, Ch 503)

A House Joint Memorial in WASHINGTON requested Congress to appropriate special financing for fiscal year 1970 for the development of needed recreation facilities, visitor service facilities and scenic highways for North Cascades National Forests. (HJM 17)

UNIFORM LAWS AND MOTOR VEHICLE REGULATION

HIGHWAY SAFETY AND UNIFORM LAWS PROGRESS

Again this year substantial progress was made by the States toward compliance with the Federal Highway Safety Act of 1966 and the standards for State programs promulgated by the Department of Transportation.

Periodic Vehicle Inspection

No State enacted new laws requiring periodic inspection of motor vehicles this year. For other laws relating to periodic inspection, please see page 27 under Equipment Requirements.

Motorcycle Helmets

Legislation to require motorcycle operators and passengers to wear safety helmets has been enacted in five States this year: GEORGIA (H 409, Ch 541), MICHIGAN (H 3114), NEW MEXICO (H 349), OKLAHOMA (H 1258) and RHODE ISLAND (H 2017). The OKLAHOMA law modified previous requirements to provide that persons under age 21 must wear safety helmets and eliminates the requirement that a safety helmet be worn by all persons operating or riding on a motorcycle. A law requiring that motorcyclists wear helmets has been repealed in ILLINOIS. (S 311) Such laws have been rule unconstitutional in lower courts in IDAHO and KENTUCKY and by the Supreme Court in ILLINOIS.

Motorcycle Driver Licenses

MINNESOTA law now provides that no two-wheeled (motorcycle) endorsement shall be issued unless the person applying has been in possession of a valid

two-wheeled vehicle instruction permit for at least 30 days; and after September 1, 1970, applicants under 18 years of age must present evidence of having successfully completed a two-wheeled vehicle driver's safety course. (H 485, Ch 1123)

Special licensing for motorcycle drivers was made mandatory this year in MONTANA. (S 135, Ch 28)

Eye Protection—Motorcycles

Protection for the eyes, either by use of a windshield or some type of glasses or goggles, is required by legislation passed in four States: GEORGIA (H 409, Ch 541), MINNESOTA (H 485, Ch 1123), RHODE ISLAND (H 2017) and UTAH (S 76, Ch 69).

Passenger Footrests—Motorcycles

Foot supports for passengers are required by legislation approved in GEORGIA (H 409, Ch 541), NEW HAMPSHIRE (H 34), NEW MEXICO (H 253, H 295, H 296 and H 349, Ch 266), SOUTH CAROLINA (S 182) and UTAH (S 76, Ch 69).

Rear View Mirrors—Motorcycles

Six States passed legislation this year to require motorcycles to be equipped with at least one rear view mirror: MAINE (H 155, Ch 58), MINNESOTA (H 485, Ch 1123) NEW HAMPSHIRE (H 34), RHODE ISLAND (H 2017), SOUTH CAROLINA (S 182) and WASHINGTON (S 305, Ch 42). WASHINGTON previously required two mirrors, but now requires only that one must be mounted on the left side of the handlebar.

Implied Consent Laws

Implied consent legislation enacted in 13 States this year brings the total number of States which have enacted such legislation to 45. The only jurisdictions which do not have such legislation are ILLINOIS, MISSISSIPPI, MONTANA, WISCONSIN, WYOMING and the DISTRICT OF COLUMBIA. The States which enacted such legislation this year are: ALABAMA (S 70), ALASKA (S 23, Ch 83), ARIZONA (S 28, Ch 41), ARKANSAS (H 131, Act 106), DELAWARE (H 86), INDIANA (H 1165, Ch 64), MAINE (H 1030, Ch 439), MARYLAND (H 852, Ch 158), NEVADA (H 268, Ch 341), NEW MEXICO (S 63, Ch 30), SOUTH CAROLINA (S 24, Ch 471), TENNESSEE (S 159, Ch 292) and TEXAS (S 74). The MARYLAND law requires that an applicant for a driver license express his consent to a chemical test to determine blood alcohol concentration or he is not to be issued a license.

The presumed level of intoxication has been set at 0.10 per cent by weight of alcohol in the blood by ALABAMA (S 70), ALASKA (S 23, Ch 83), ARKANSAS (H 89, Act 17), CALIFORNIA (H 105), COLORADO (S 89), DELAWARE (H 92), IDAHO (S 1042), IOWA (H 207), NEBRASKA (LB 1997) and SOUTH CAROLINA (S 24, Ch 471). COLORADO enacted legislation which presumes impairment of driving ability at blood-alcohol concentrations by weight of alcohol from 0.05 per cent to 0.10 per cent. (S 89) MARYLAND (H 851, Ch 157) has provided presumed levels of impairment at blood-alcohol concentrations of 0.10 per cent to 0.15 per cent.

A police officer is required to advise a person suspected of driving while intoxicated that he has a choice of tests which he may take under CALIFORNIA law. (S 1065)

A CONNECTICUT enactment provides for the inclusion of private roads in the enforcement provisions relating to drunk driving. (S 374)

IDAHO permits a blood sample to be drawn from all pedestrains and motor vehicle operators who have died as a result of a vehicle accident. (S 1303, Ch 253)

MINNESOTA corrected certain language in its implied consent law pertaining to the revocation of a person's driver license upon refusal to submit to a test to determine blood alcohol concentration. (H 96)

A law requiring a coroner's report on the alcoholic content of the blood of a person who died as a result of a motor vehicle accident on public highways has been enacted by NEW MEXICO. (S 74, Ch 36)

A NEW YORK enactment provides that a police officer may require a person who has been involved in a motor vehicle accident to take a breathalyzer test and then a chemical test, if the breathalyzer test shows that the individual has consumed alcohol. (S 747, Ch 1027)

NORTH CAROLINA reworded its implied consent law and has included a penalty provision. (H 5)

NORTH DAKOTA permits the taking of blood from an unconscious person to determine blood alcohol content. (H 225)

The Dean of the University of Oklahoma Medical School or his designate shall be the chairman of the board of chemical tests for alcohol according to a law passed this year in OKLAHOMA. (S 307)

OREGON enacted legislation which authorizes the application of the implied consent law to arrests made pursuant to municipal ordinances. (S 341, Ch 579)

Driver Education

An ALABAMA enactment provides that high school students shall receive credit for driver education courses beginning in the school year 1969-70. The law also makes driver education compulsory for students who enter the tenth grade in the school year 1972-73. (S 79)

ARKANSAS transferred responsibility for certain equipment used in driver education programs from the State Police Department to the State Department of Education. (S 186, Act 184)

tests is to be revoked according to an act passed in CALIFORNIA this year. (S 1135)

GEORGIA amended the schedule of points assessed for certain traffic violations. (H 603, Ch 615)

IDAHO defined an habitual violator of traffic laws as an individual who accumulates a total of 18 points in 24 months or 24 points in 36 months. The license of such an individual is to be suspended. (S 1263)

ILLINOIS provided certain exceptions to its law requiring the suspension of a driver license after conviction for three traffic violations within a 12-month period. (S 334)

The Drinking Driver

Legislation extending laws which prohibit driving while under the influence of alcohol or while under the influence of narcotic drugs has been enacted in CALIFORNIA (H 200), INDIANA (S 215), MONTANA (H 58), NEVADA (H 233), NEW HAMPSHIRE (H 163), NEW JERSEY (H 358) and OREGON (S 464).

Other legislation enacted in CALIFORNIA authorizes a peace officer to arrest, without a warrant, anyone involved in a traffic accident whom the officer suspects was driving while intoxicated or while under the influence of any drug. (S 176, Ch 956)

The courts of MINNESOTA are permitted to stay the sentence of individuals convicted of drunken driving upon medical recommendation and on the condition that the convicted person submit to medical treatment. (H 162, Ch 741)

Motorcycle Operators

ILLINOIS enacted legislation which requires a motorcycle operator to use his headlight at all times of operation. (S 10)

MAINE provides that if a motorcycle headlamp does not provide an adequate beam such motorcycle shall be restricted to daylight operation. (H 155, Ch 58)

Legislation dealing with handlebar height was approved in five states: IOWA (H 319), MICHIGAN (H 2513), NEW MEXICO (H 253, H 295, H 296 and H 349, Ch 266), SOUTH CAROLINA (S 182) and UTAH (S 76, Ch 69). The UTAH law provides that handlebars shall be no higher than shoulder height while the other States stipulate a maximum height of 15 inches above the seat.

Laws governing the operation of motorcycles have been enacted in IOWA (H 319), NEBRASKA (LB 895), SOUTH CAROLINA (S 182), and UTAH (S 76, Ch 69). Generally these laws prohibit driving more than two abreast and require motorcyclists to drive within a lane and not abreast of another motor vehicle. The NEBRASKA law prohibits having more than two persons on a motorcycle.

Legislation providing operating restrictions for holders of learner permits has been enacted by MICHIGAN (H 2513), MINNESOTA (H 485, Ch 1123) and NEW MEXICO (H 253, H 295, H 296 and H 349 (Ch 266). The MICHIGAN law provides that as of January 1, 1970, motorcyclists must be 18 to obtain a motorcycle endorsement unless they have completed a driver training course. The MINNESOTA law provides for instruction permits for operators of two-wheel vehicles and requires that those under 18 complete a course in two-wheel vehicle driver training. NEW MEXICO law prescribes restricted licenses for those 13 years old for the operation of motor driven cycles of less than five horsepower and prohibits holders of motorcycle instruction permits from carrying passengers.

NEVADA enacted regulations governing the sale of motor driven cycles to 14 and 15 years old. (H 264, Ch 399)

Other Driver Licensing Legislation

ALABAMA has enacted legislation which permits the deposit of a driver license as security for certain traffic violations. (H 57)

A CALIFORNIA resolution provides for a Department of Motor Vehicles study on the feasibility of limiting examinations for the renewal of a driver license to a vision test only. (HCR 67)

In CONNECTICUT Spanish speaking applicants for a driver license may now take the written examination in Spanish but they must have sufficient command of English to interpret traffic control signals. (H 5519)

A person whose license has been revoked in DELAWARE because of an unpaid judgment against him may, after ten years and under certain circumstances, be issued another license. (H 53)

Nonresident migrant farm workers need not have a State driver license according to an amendment to FLORIDA's licensing requirements. (S 652)

IDAHO amended its regulations governing the revocation and suspension of driver licenses and provides that a person must have at least 20/40 vision in one eye with or without glasses according to the Snellen system, in order to be licensed to drive. (S 1263)

KANSAS enacted legislation which amends its driver license requirements and provides for a four-year driver license. (H 1143)

MAINE law requires that driver licenses be issued for a duration of two years and that first licenses shall be provisional licenses. (H 617) Another law requires eye examinations for individuals over age 65 upon renewal of their driver licenses. (S 282)

Oct. 1969 issue of Cycle Magazine
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WE CAN OWN THE WORLD!

What's a government but silly putty? It can be pushed any direction and spreads out where there's no resistance. Bike power advocates in Illinois proved that it can be done: here's their 3-step formula for helmet law repeal.

BY FRANK CONNER

• Government is like Silly Putty: push against it hard enough at one point, and it will recede from that point, flabbing out someplace else where there is less resistance. A blueprint for the successful, lawful combat of motorcyclists against government can be drawn from the activities of Illinois riders to repeal the Mandatory Helmet law.


KEVIN CALLAHAN

Illinois riders were less than enchanted with the helmet ruling. Several groups had been formed to work against restrictive legislation, and had done much valuable spadework to stir up the riders, so the climate was right for revolution, but nobody had been successful at focusing rider-discontent against the forces of government in Illinois. Then eight riders casually decided to get together to see what they could do to get the helmet law overturned. They called themselves the "Committee on Legislation," and they decided that if they wanted to succeed, they should run their campaign like a business. First they needed a product: organized enraged motorcyclists. Then they needed to get their product to the market, which was the Illinois Legislature. Finally, they needed a good sales-feature for their product. Since legislators need to get reelected periodically, the votes of the riders made the best-possible selling-feature.

How good was their product? Well, there were 110,000 registered motorcycles in Illinois, which meant that about 250,000 people (including friends, wives, or parents) were predisposed to like motorcycles and could possibly be enlisted into the fight. Potentially, the committee had a very strong product; even a tiny fraction of 250,000 votes is something that most state politicians regard with great care. How to get the product to the market? The committee didn't have enough money to contact all 110,000 riders in the state, so they decided to work through groups.

The eight members of the committee listed the various groups whose names and addresses were readily available. The committee then wrote to those groups and asked for the names of any groups or dealers who weren't as yet on the list. In such manner, the committee collected the names of about 600 dealers, AMA-affiliated clubs, outlaw clubs, dealer-associations, etc. Now the committee had enough contacts to reach a large percentage of the riders in Illinois.

As a next step, the committee put together a map of the state, showing each of the political districts, and listing the names and addresses of the three state representatives and the one state senator from each district. Thus, any rider receiving a copy of the map would know whom to write.

The committee sent quantities of these maps to each of the 600 groups, along with a request to distribute the maps to the riders in that area. Along with the map went a letter asking the rider to write to each of the three representatives and the senator from his district, requesting repeal of the helmet law. The letter to the riders suggested some reasons why the law was unsatisfactory, but the committee felt that the campaign would be successful only if the riders wrote their own letters, stating their own beliefs. In addition, the committee got as many of the 600 groups as possible to send two members each to visit all of the legislators from their respective districts. This would give the legislators an unmistakable indication as to the amount of voting power that Illinois riders could swing.

Having gotten this far, the Committee on Legislation found that they had all sorts of access to news media. At first, they began to make use of the media, but then they decided that they should leave it strictly alone, because they would be hurting—not helping—their enterprise by attracting the attention of the public to their cause. The general public either doesn't care about motorcycling, or is opposed to it; the committee decided to let sleeping dogs lie.

As the next step, the committee needed to get somebody in the legislature to introduce a bill to repeal the helmet law. Who better than the man who had originated the helmet law? That particular legislator happened to live in the same town as one of the eight committee members, so the committee went to work there right away, getting the local motorcycling groups to begin visiting and writing to that legislator to inform him of their displeasure (Continued on page 62)

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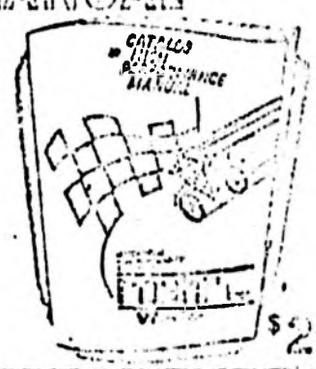


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WORLD *Continued from page 43*

with his law. He saw the light of day and introduced a new bill to repeal his helmet law.

The committee than sent to each state legislator a rational list of reasons why the helmet law was unsatisfactory. The committee said, in effect: "We don't have our hands out for anything; all we want is not to be discriminated against. Repeal of the helmet law will have no adverse effect upon the state. We feel so strongly about this issue that if you disregard us, you will not like what happens at the next election."

Then the letters from riders began to pour in. Some of the riders who wrote to their legislators made no attempt to mince words in expressing their dissatisfaction with the helmet law. The committee was not at all unhappy with that state of affairs; it gave the legislators a much better understanding of the riders' and voters' unhappiness. Then began the personal confrontations between riders and legislators. The committee felt that the outlaw groups were particularly effective in getting their message across. The legislators were amazed and appalled; they hadn't even been aware of the existence of motorcyclists before, except as scapegoats who could be put down with impunity. Now the scapegoats were threatening to bite them. Taking a leaf from the SDS handbook, various motorcycle groups were murmuring about putting 50,000 motorcyclists into Springfield during the summer if the helmet law were not repealed. It was not--apparently--an empty threat.

The repeal bill went first to the Illinois Senate. Forty-three voted "aye;" 11 voted "nay." In the House of Representatives, only eight of approximately 160 legislators voted against the bill.

The repeal bill was ready to be signed into law. Then, the state judiciary found in favor of Donald Freeze, who had brought suit previously to test the constitutionality of the helmet law, and the offending law was declared unconstitutional in Illinois.

However, courts in other states have upheld the helmet law, and some valuable lessons can be learned from the activities of the Committee on Legislation. Politicians respect organized voting-power (lots of loud voices). Reed Ehrlich, one of the eight members of the committee, has this to say about getting the repeal bill into and through the legislature: "It was so easy to do. It can be done anywhere else just as easily. All you have to do is organize carefully at the beginning. If we--the riders--are ever threatened seriously with restrictive national legislation, all we have to do is organize nationally the way the Illinois riders did regionally. We can own the United States."

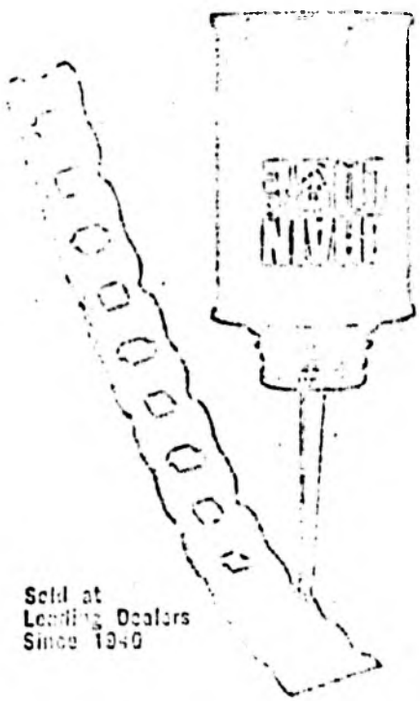
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CIRCLE NO. 45 ON READER SERVICE PAGE

CONSTITUTIONAL LAW—POLICE POWER—Michigan Statute Requiring Motorcyclists To Wear Protective Helmets Held Unconstitutional

"They that can give up essential liberty to obtain a little safety deserve neither liberty nor safety."

—Benjamin Franklin

"When asked what he would take to allow himself receive a blow on the head, he said, 'A helmet.'"

—Diogenes Laertius

The burgeoning use of motorcycles in the United States[1] has given rise to a great problem of safety. The fatality rate among motorcyclists is substantially higher than the rate for the drivers of all other motor vehicles, with head injuries the most frequent cause of death.[2] In response to this situation, the legislatures of at least thirty-four states have passed special laws regarding motorcycle safety; of these states, thirty have regulations that require the wearing of helmets.[3] These helmet regulations have given rise to a great deal of controversy, and the constitutionality of such statutes has been challenged on the ground that they unduly restrict the individual cyclist's freedom without benefiting the community.

A recent Michigan case, *American Motorcycle Association v. Davids*,[4] confronted the issue directly. In a proceeding instituted by the Association, the Michigan court of appeals held unconstitutional a statute which required a person operating or riding on a motorcycle to wear a crash helmet of a type approved by the department of state police.[5] The decision was based primarily on a finding that the statute was intended only for the protection of the individual motorcyclist—not for the safety and well-being of the general public

1. CYCLE WORLD, July 1968, at 50, stating that motorcycle registrations in 1967 increased 43,800 from the previous year.

2. *See* American Motorcycle Assn. v. Davids, 158 N.W.2d 72, 75 n.9 (1968), where the court quotes a Michigan state police report for the period 1962-1966 showing a mortality rate of 10.6 for 10,000 registrations for motorcycles, as compared with 5.2 per 10,000 for all vehicles in the same period.

3. CYCLE WORLD, July 1968, at 50. Among the states which have laws requiring helmets are: Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas. These helmet requirements appear to have been effective, for despite increased motorcycle use, motorcycle deaths in 1967 in the thirty states that had such requirements increased as much as 50% (in New York), while California, which leads the nation in motorcycle registrations but has no protective helmet law, saw a 9% increase in motorcycle fatalities.

4. 158 N.W.2d 72 (1968).

5. MICH. STAT. ANN. § 9.2358(d) (Cum. Supp. 1968), *amending* MICH. COMP. LAWS § 257.658(d) (1948).

—and that it thus went beyond the permissible scope of the state's police power.

The Michigan decision is representative of the initial reaction by various courts to such statutes. In early 1967, two New York cases held that the New York law requiring the wearing of helmets[6] was unconstitutional. In *People v. Smallwood*,[7] a local level trial court held that such a statute takes from the individual his right to exercise his judgment in the use of personal adornment, a right which, according to the court, cannot be waived. In *People v. Carmichael*,[8] another local court defined the police power of the state as the power to regulate the conduct of one person so that his actions do not unreasonably restrict the rights of or endanger others. Concluding that a helmetless driver or rider would not endanger the safety of others, the court found in the New York statute an attempt to enlarge the state's police power beyond federal constitutional bounds. In *Everhardt v. City of New Orleans*[9] the Louisiana court of appeals held unconstitutional a city ordinance requiring helmets to be worn by all motorcyclists; this court found that the requirement was a denial of due process and equal protection.

The majority trend, however, has been to hold helmet statutes constitutional. The New York courts appear to have changed their view, and three recent local court cases—*People v. Bielmeyer*,[10] *People v. Schmidt*,[11] and *People v. Newhouse*[12]—have held that the state has the right to regulate how riders and passengers of vehicles susceptible to special dangers should protect themselves on public property. In February of 1968, an intermediate appellate court in New York reversed the *Carmichael* decision, holding that the helmet requirement is valid because it furthers the state's interest in maintaining a strong and viable citizenry by keeping the cyclists safe.[13] In *State ex rel. Colvin v. Lombardi*,[14] the Supreme Court of Rhode Island denied defendant cyclist's motion to dismiss on the grounds of unconstitutionality of the helmet statute and found that the law bears a reasonable relationship to highway safety and thus does not constitute an improper exercise of police power. In the most recent reported decision, *Commonwealth v. Howie*,[15] the Supreme Judicial Court of Massachusetts followed *Lombardi* and upheld the validity of a helmet statute.

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6. N.Y. VEH. & TRAF. LAW § 381(6) (McKinney Supp. 1966).
7. 52 Misc. 2d 1027, 277 N.Y.S.2d 429 (Town Ct. of Irondequoit 1967).
8. 53 Misc. 2d 584, 279 N.Y.S.2d 272 (Town Ct. of Oakfield 1967).
9. 208 S.2d 423 (1968).
10. 54 Misc. 2d 466, 282 N.Y.S.2d 797 (City Ct. of Buffalo 1967).
11. 54 Misc. 2d 702, 283 N.Y.S.2d 290 (County Ct. of Erie County 1967).
12. 55 Misc. 2d 1064, 287 N.Y.S.2d 713 (City Ct. of Ithaca 1968).
13. 56 Misc. 2d 888, 288 N.Y.S.2d 931 (Genesee County Ct. 1968).
14. 241 A.2d 625 (1968).
15. 238 N.E.2d 378 (1968).

It is settled constitutional doctrine that a state's police power can be properly exercised only when there is a reasonable relationship to the public health, safety, morals, or welfare.[16] Accordingly, in 1905 the United States Supreme Court upheld a law requiring all people to be vaccinated because the law was related not only to the health of the individual, but also to the protection of the public against the spread of disease.[17] Conversely, if the courts can find no relationship between the statute in question and the public health, safety, morals, or welfare, the statute is unconstitutional.[18] Thus, the Supreme Court has held invalid a statute requiring every parent or guardian of a child between the ages of eight and sixteen to send that child to a public school in the district where he resided since it did not promote the health, safety, peace, morals, education, or general welfare of the people and therefore was an unreasonable interference with the liberty of parents and guardians in raising their children.[19] The basis for this and similar decisions is the due process clause of the fourteenth amendment: if there is no benefit flowing to the public from the enforcement of a statute which restricts individual freedom, there is a denial of liberty without due process of law.[20]

16. *E.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Van Oster v. Kansas, 272 U.S. 465 (1926); Pacific Gas Co. v. Police Ct., 251 U.S. 22 (1919).

It can be argued that the statute prohibiting a cyclist from riding helmetless is similar to statutes in many states which make it a crime to attempt suicide. These suicide statutes protect an individual from himself, generally without affecting the public welfare in any way except by maintaining a viable citizenry. The suicide situation, however, can be distinguished, for the shocking nature of the act and the long tradition of its criminality make it different from the new and indirect helmet regulations. To prohibit people from killing themselves directly is one thing, but to prohibit them from *risking* their lives indirectly is quite another.

17. Jacobson v. Massachusetts, 197 U.S. 11 (1905). Similarly, before the passage of the eighteenth amendment, the Court found that a state prohibition on the manufacture and sale of intoxicating liquors did not deprive the citizen of his constitutional freedom because the law protected the public against the harmful conduct of one whose behavior toward others is affected by the use of alcohol. Mugler v. Kansas, 123 U.S. 623 (1887).

18. *See* Griswold v. Connecticut, 381 U.S. 479 (1965), in which a divided Court invalidated a Connecticut law prohibiting the use of contraceptives, even by married couples.

19. Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See also* Meyer v. Nebraska, 262 U.S. 390 (1923).

20. *See* Fairmont Creamery Co. v Minnesota, 274 U.S. 1 (1927); Atkin v. Kansas, 191 U.S. 207 (1903); Minnesota v. Barber, 136 U.S. 313 (1890); Mugler v. Kansas, 123 U.S. 623 (1887).

The Michigan court of appeals offered another basis, purportedly independent of the due process argument, for holding the helmet statute unconstitutional: the maxim of John Stuart Mill that "the individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself." J. MILL, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 201 (A. Lindsay ed. 1950). The Michigan court cited four decisions which it claimed were based upon this philosophy. These citations include *Smallwood* and the first *Carmichael* decision, neither of which mentioned the maxim and both of which suggested its content as only one of a number of arguments on which the respective courts based their decisions. *See* text accompanying notes 7 & 8

Such a conclusion rests on a su[b]stantive interpretation of the fourteenth amendment's due process c[l]ause that the rights protected by that clause from interference by t[h]e states include rights not specifically enumerated in the first eigh[t] amendments. It is uncertain, however, due to the many conflicti[n]g opinions in *Griswold v. Connecticut*,[21] whether the Supreme C[our]t still follows such an interpretation so far as the fourteenth a[me]ndment is concerned.[22] Nevertheless, according to one scholar, *Gri[swold]* is

supra. The Michigan court also cited an opinion by [the] attorney general of New Mexico which did not mention the maxim, though it [did] employ Mill's philosophy. *See* N. MEX. OP. ATTY. GEN. No. 66-15, at 19 (1966). T[he] question immediately arises whether Mill's maxim is, in fact, incorporated in [the] federal Constitution. The Supreme Court has considered the due process clause [to] limit the state to restrain an individual's actions only to further the common w[el]fare and, conversely, to guarantee a citizen the right to act as he pleases so long [as] actions do not adversely affect others. *E.g.*, Grosjean v. American Press Co., 297 [U.S.] 233 (1936); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, [262] 390 (1923). *Cf. Ex parte* Drexel, 147 Cal. 763, 82 P. 429 (1905). *But see* Loc[hner] v. New York, 198 U.S. 45, 74 (1905) (dissent of Justice Holmes). In this view, the [due] process limitation on police power is simply an embodiment of Mill's premise. [Thus] this maxim is only to state the reasonable-relationship test in the converse; thus [the] maxim was not really an independent ground for the court's decision.

21. 381 U.S. 479 (1965). *See* note 18 *supra*. Ano[ther] for holding the helmet laws unconstitutional, unrelated to the due proce[ss] was advanced by the Louisiana court in *Everhardt* when it concluded that [the] ordinance in question denied equal protection of the laws to motorcyclists by i[mpos]ing undue and unnecessary restrictions upon one limited class of the motoring pub[lic]. 243 S.2d at 426. The Constitution, however, requires only that the classification [be] reasonable and be based upon substantial differences having a reasonable relation[ship] both to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved. *E.g.*, Walters v. City of St. Louis, 347 U.S. 231 [(1954)]; Old Dearborn Distrib. Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936); [Int]ernational Harvester Co. v. Missouri, 234 U.S. 199 (1914). Even assuming that the ordi[nance] has no relation to the safety of others, the classification itself would nonetheless [be] reasonable because the distinctions between cyclists and other motorists are clear [and] substantial, and because it is those very differences that suggest the need for s[pecial] legislation to protect the former which would be unreasonable if imposed on [all]. Whether the purpose of the helmet restriction relates to the public or the individ[ual] and is valid or invalid, that purpose relates directly to the unique situation of a [motor]cyclist, and thus the regulation is not an unreasonable classification violative [of] the equal protection clause.

22. It is interesting to note that the Michigan court [also] relied in part on Justice Goldberg's concurring opinion in *Griswold*—an [opinion] which invoked the ninth amendment in support of the fundamental right[s] [at] issue. The ninth amendment, said Justice Goldberg, is an acknowledgement that [liberty] is not restricted to the freedoms enumerated in the Bill of Rights, but that [there] are inherent rights which exist independently of the explicit wording of the [first] eight amendments. As applied to the states through the fourteenth amendment, [the] ninth amendment shows that it was the intent of the original authors of the Bill [of] Rights that fundamental personal rights cannot be violated by the state merely [because] they were not enumerated in the first eight amendments. 381 U.S. at 488-[89]. Since the effect of Justice Goldberg's ninth-amendment argument is additional support for the fundamental-rights theory rather than a substitute for it, the Michigan court's reliance upon it adds nothing new to the basic analysis of the problem. *See* P. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental, and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 254 (1965).

> a reaffirmation by a majority of the Court of the fundamental [or substantive] rights theory—both in the sense that only fundamental rights derived from the Bill of Rights are incorporated into the fourteenth amendment and in the sense that the due process clause is a source of rights apart from the specifics of the Bill of Rights.[23]

Thus, assuming that this interpretation is correct, the fundamental question is whether the helmet statutes bear a reasonable relationship to the public welfare.

The courts which have declared helmet statutes invalid have been unable to find a sufficient relationship between the helmet requirement and the welfare of the community at large. As indicated earlier, the Michigan court saw the statute in question only as a protection of the cyclist from severe head injuries; the court felt that any other interpretation was "a strained effort to justify what is admittedly wholesome legislation."[24] The Louisiana court declared that "[t]he only function of the helmet requirement we are able to discern is to minimize the extent of injury to the individual cyclist involved in an accident, and not to contribute to the safety of the motoring public at large."[25] On the other hand, those courts which have upheld the helmet laws advance various arguments to support the necessary relationship to the public welfare. The justification recently offered by the New York courts was the state's interest in a viable citizenry. According to this argument, the state can prevent its citizens from pursuing a course of conduct that could cause their dependents or themselves to become public charges.[26] Moreover, it is argued that "[i]t is to the interest of the state to have

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23. *Id.* at 210. Professor Kauper adds that the *Griswold* case

> is not inconsistent with cases that have reduced economic liberty to a minimum of judicial protection. Freedom of the legislature to determine economic policy in the public interest is much greater than its freedom to determine social policy by means that intrude on personal liberty and essentially private conduct. In the case of restrictions on economic liberty, a simple rationality test applies, but when the legislature impinges upon fundamental non-economic liberties of an essentially personal character, as in *Griswold*, a more exacting judicial test is applied.

The Court apparently sees a hierarchy of values protected by the Constitution and recognizes that the degree of judicial scrutiny and protection varies in direct proportion to the importance of the right. Thus, assuming that the majority does follow the substantive interpretation of the due process clause of the fourteenth amendment, the right infringed in any given case would have to be important enough to be ranked as "fundamental" in order to be protected by that clause against state regulation. The right abridged by the helmet laws is the freedom to wear whatever one chooses so long as that action affects no one but the individual himself; whether that right is fundamental enough to be a substantive due process right has of course never been discussed by the Supreme Court. *See* note 40 *infra*.

24. 158 N.W.2d at 75. The court adds: "This statute has a relationship to the protection of the individual motorcyclist from himself, but not to the public health, safety and welfare." 158 N.W.2d at 76.

25. 208 So.2d 425, 426 (1968).

26. *See* People v. Carmichael, 288 N.Y.S.2d 931, 935 (1968). *See also* State *ex rel.* Colvin v. Louisiana, 241 A.2d 625, 627 (Sup. Ct. R.I. 1968).

strong, robust, healthy citizens capable of bearing arms, of self-support, and of adding to the resources of the country,"[27] and that, as long as the means are reasonable, the legislature can protect individuals from themselves to further that interest. Thus, the helmet regulations promote the public welfare not only by tending to prevent cyclists from becoming wards of the state because of disabling head injuries, but also by tending to keep members of the community healthy and productive.[28]

The Michigan court specifically rejected the "public charges" argument, stating that it could lead to unlimited paternalism.[29] Once it can be said that protecting an individual from himself bears a reasonable relationship to public welfare, the argument runs, there is nothing to prevent the state from requiring all motorists to wear crash helmets, from forbidding smoking, or from requiring everyone to go to bed at 10:00 p.m. Such laws would be conducive to healthier citizens and thus to a "viable citizenry."[30] It is significant that the courts which *upheld* the helmet statutes on the basis of the public interest in a viable citizenry cited no authority to support their argument. Surely the Michigan court was correct in stating that the "public charges" argument proves too much, since such reasoning would give the legislature the power to regulate almost every aspect of individual conduct in a society "so complex that there are very few things that cannot be said to affect some other person or the public treasury."[31] The limitations on the police power would disappear if the states were permitted to regulate individual conduct on the basis of the attenuated "public charge" rationale.

27. 288 N.Y.S.2d at 935.

28. It was argued by the state in the Michigan case that the helmet statute could also be justified under the doctrine of *parens patriae*, the specific relationship of the state to youth. This is the power of the state that justifies laws such as those making it illegal for minors to smoke. The Michigan court correctly rejected this contention because the application of the helmet statute was not limited to youth. 158 N.W.2d at 75.

29. 158 N.W.2d at 75. It is consistent with Michigan's view of the general welfare that suicide is not a statutory crime in Michigan.

30. 158 N.W.2d at 76. People v. Carmichael, 53 Misc. 2d 584, 588-89, 279 N.Y.S.2d 272, 277 (1967). A possible answer to this objection is that even if the courts would otherwise uphold such regulation of individual conduct in the interest of viable citizenry, they will not do so because of a reasonableness test which applies in cases of this sort. This test balances the state's interest against the individual's. A helmet requirement is found to be reasonable because it is only a slight infringement on the individual's freedom as he travels on a public highway, but an extreme law—for example, a requirement that a cyclist wear a suit of armor, a prohibition of smoking, or a requirement that people to go to bed at 10:00 p.m.—would be unreasonable, and therefore unconstitutional, because it would infringe too greatly on personal liberty.

The reasonableness test, however, is unsatisfactory because the fact that a court can use it to limit grossly infringing regulations does not make up for the inability of that test to deal with infringements which are "reasonable" because relatively moderate, but nonetheless repugnant to ordinary concepts of personal liberty.

31. People v. Carmichael, 53 Misc. 2d 584, 589, 279 N.Y.S.2d 272, 277.

A second justification offered to demonstrate a reasonable relationship between helmet laws and the public welfare is that the crash helmet may prevent certain types of accidents—specifically situations in which the cyclist could be propelled off the road or into the opposing lane, causing damage to other vehicles or property, or injuries to other motorists or pedestrians. For example, loose stones kicked up by passing vehicles, or other flying objects—against which the driver of an automobile has some protection—could strike the helmetless motorcyclist in the head, causing him to lose control of his vehicle.[32] One answer to this argument was given by the Michigan court:

> If the purpose [of the helmet regulations] truly were to deflect flying objects, rather than to reduce cranial injuries, a windshield requirement imposed on the manufacturer would bear a [more] reasonable relationship to the objective and not vary from the norm of safety legislation customarily imposed on the manufacturer for the protection of the public rather than upon the individual.[33]

But the court's answer is specious because it is not the function of the judiciary to decide whether the means adopted by the legislature are the best means possible to attain the end sought.[34] Except when the regulations chosen are in themselves unconstitutional, courts should defer to the legislative selection of methods. Thus, even if a windshield regulation would provide more effective protection for public safety, the helmet requirement is still constitutional as long as it tends in some degree to protect public safety. But while the legislature need not choose the best means to an end, it is clear that it cannot choose a method that violates the fundamental liberties of an individual if the end can be achieved without infringement of those liberties.[35] The Supreme Court stated this directly in

32. People v. Bielmeyer, 54 Misc. 2d 466, 469, 282 N.Y.S.2d 797, 800 (1967):
> Cyclists generally keep to the right of the road where stones and gravel are found which could be propelled by the delicately balanced wheels into the head of the cyclist or passenger, causing distraction and loss of control.
>
> Far more than with an automobile or a truck the very nature of a motorcycle requires that a rider be able to control his vehicle at every second . . . . [This] means that the rider must always wear the recommended clothing and equipment for his protection as well as the protection of others.

33. 158 N.W.2d at 75.

34. McLean v. Arkansas, 211 U.S. 539, 547 (1909):
> The legislature being familiar with local conditions is primarily the judge of the necessity of such enactments. The mere fact that the court may differ with the legislature in its views of public policy or that judges may hold views inconsistent with the propriety of legislation in question affords no ground for judicial interference . . . .

See also Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Standard Oil Co. v. City of Marysville, 279 U.S. 582 (1929); St. Louis Southwestern Ry. v. Board of Directors of Miller Levee Dist. No. 2, 207 F. 338 (8th Cir. 1913).

35. This principle is supported by the general rule, stated in People v. Armstrong, 73 Mich. 288, 41 N.W. 275 (1889), that the state can impose restraints on the individual only to that extent which is required or necessary for the protection of public health, safety, or welfare. This seems to imply that if a statutory restriction is not

Schneider v. State,[36] in which it invalidated an ordinance which banned all distribution of handbills on public streets. Although the ordinance's purpose—to keep the streets clean and neat—was legitimate, it was insufficient to justify an abridgement of the individual's right of free speech. There were other reasonable methods available to prevent littering which did not interfere with personal freedom—for example, punishment of those who actually throw papers on the streets. Similarly, in both *Shelton v. Tucker*[37] and *Dean Milk Co. v. City of Madison*,[38] the Supreme Court held laws which limited personal freedom unconstitutional because there were adequate non-infringing means to achieve the same end.[39] Thus, it might be argued that if the end which justifies the helmet requirement is the protection of the public from cyclists careening out of control because of a blow on the head by a flying object, that requirement should be invalid because a regulation on the manufacturer to install a windshield would accomplish the same goal without any infringement of personal liberty.

This argument, however, raises several problems. Unlike the rights that were restricted in *Schneider* and similar cases, the right to wear what one wishes on a public street, allegedly infringed by the helmet laws, is not a strong or well-established one.[40] Furthermore, the effectiveness of the noninfringing alternative here is uncertain—it is not clear that a windshield will do the same job as

necessary or essential—that is, if there is another method to the same end that does not infringe on individual liberty—the restriction is invalid.

36. 308 U.S. 147 (1939).
37. 364 U.S. 479 (1960).
38. 340 U.S. 349 (1950).
39. The Court in *Shelton* held unconstitutional an Arkansas statute requiring every teacher, as a condition of employment, to file an annual affidavit listing every organization to which he had belonged or regularly contributed within the preceding five years.

> There can be no doubt of the right of a state to investigate the competency of those whom it hires to teach in its schools . . . . [but] even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

364 U.S. at 485, 488. In *Dean Milk Company*, an ordinance forbidding the sale of milk in a city under a "pasteurized" label unless the milk had been pasteurized and bottled at an approved plant within five miles of the city was declared unconstitutional. The Court made it clear that "even in the exercise of its unquestioned power to protect the health and safety of its people, [a municipality may not erect an economic barrier against competition] if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interest, are available." 390 U.S. at 354.

40. The rights abridged in *Schneider*, *Shelton*, and *Dean Milk Co.* were the right of free speech, the right of free association, and the guarantee of equal protection of the laws, respectively. All of these are liberties deeply rooted in the traditions of the United States, guaranteed from the beginnings of its history, and upheld time and time again by its courts. Although there are isolated cases in which courts have held that an individual has the right to choose his own attire [People v. O'Gorman, 274 N.Y. 284, 8 N.E.2d 862 (1937)], that right has certainly been recognized much less frequently.

a helmet in protecting the cyclist's head. Thus, it is difficult to see how the existence of an alternative and less restrictive method would by itself in these circumstances render the helmet requirement unconstitutional. The ultimate question then is not whether there is an alternative noninfringing method to the end. Rather, since the opposing courts agree that some form of reasonable-relationship test is proper,[41] the determinative question should be simply whether flying objects do, in fact, constitute such a danger to helmetless motorcyclists that those cyclists could adversely affect the safety of the general public.

The evidence which has arisen in response to this question is Delphic. The New York, Rhode Island, and Massachusetts courts, asserting that the danger is real, support their conclusion with such general statements as "one hears or reads about instances where cyclists have been hit with hard-shelled beetles or bees and have lost control of their bikes, causing damage and injuries to others."[42] Accepting these statements, it might seem that the helmet regulations can be justified by the protection they afford to the general public even though their original purpose was the protection of individual cyclists.[43] But the courts which have claimed that the danger of flying objects is genuine cite no cases or studies and offer no *specific* evidence to support their conclusion.[44] Moreover, the legislatures which have enacted helmet statutes make no mention of any studies or reports which show that flying objects present such a danger to cyclists as to cause accidents. A New York legislative memorandum did cite an extensive study showing that most motorcycle fatalities could have been avoided by wearing the proper helmet,[45] but neither the memorandum nor the study said anything

41. The courts do not differ in their determination of the proper test to apply here, but differ rather in their view of the intent and effect of the helmet statute. Whereas the Michigan and Louisiana courts saw the law as affecting only individual safety, the New York, Rhode Island, and Massachusetts courts saw a reasonable relationship between it and the safety of others. Thus, all the courts agree that an individual is master of his fate so long as his actions concern only himself, but disagree as to whether the action of a cyclist in not wearing a helmet could directly affect the welfare of others.

42. People v. Bielmeyer, 54 Misc. 2d 466, 469, 282 N.Y.S.2d 797, 800 (1967). *See also* note 32 *supra*; State *ex rel.* Colvin v. Lombardi, 241 A.2d, 625, 627 (R.I. 1968).

It is also interesting that in a telephone interview, the Ann Arbor, Michigan, police stated that it is very likely that flying objects could cause a motorcyclist to lose control of his machine. However, they were unable to cite specific statistics or to recall any concrete instances in which a flying object had actually been the cause of a motorcycle accident.

43. *See* note 45 *infra*.

44. This is, of course, not conclusive proof that such dangers do not exist. It may indicate only that there have been no studies or reports on this subject: and, indeed, exhaustive research has revealed no such studies.

45. *See* N.Y. Session Laws 2961 (McKinney 1966) (citing the results of that study): The number of accidents involving motorcycles is increasing rapidly. In fact, motorcycle accidents increased by 105% in 1965 as compared to 1964. . . . Fatalities

about protecting people other than the cyclist himself. Indeed, although there is substantial evidence that helmets have prevented individual cyclists from being injured in accidents,[46] none could be found to show that the use of helmets had ever prevented the *occurrence* of an accident, or even to show that accidents had been caused by flying objects hitting a helmetless rider in the head. It is an unsatisfactory resolution of the fundamental issue merely to take judicial notice of what "one hears or reads about"[47] when there is as yet no evidence to support that contention and when several courts have disputed evidence of the "fact" which is being judicially noticed.

It is unclear whether the state must come forward with any evidence of a reasonable relationship between a police power regulation and the public welfare in order to resist a challenge to the law's constitutionality. It may be that the challenger is required to prove that there is in fact no reasonable relationship to public welfare. Support for this approach to the burden-of-proof problem raised in these cases might be found in the presumption of constitutionality that attaches to all legislative enactments.[48] In *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, the Supreme Court stated:

> As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute . . . . The action of the legislature . . . indicates that such evils did exist [for which this statutory provision was an appropriate remedy].[49]

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increased by 63.6% and personal injury accidents by 100%. A summary of the Department statistics indicates that 89.2% of the motorcycle accidents result in injury or death and that almost all fatalities occurring as a result of such accidents involved head injuries. Most of these fatalities could have been avoided, or the severity lessened, by the use of a proper helmet.
The helmet requirement, continues the memorandum, "should go far in protecting the *drivers and passengers* on motorcycles." *Id.* (emphasis added).

46. *See* notes 3 and 45 *supra*.

47. *See, e.g.*, text accompanying note 42 *supra*.

48. Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944); Toombs v. Citizens Bank, 281 U.S. 643 (1930); Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908).

49. 282 U.S. 251, 257-58 (1931). In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964), the Court held that Title II of the Civil Rights Act of 1964 prevention racial discrimination in public accomodations was a valid exercise of congressional power under the commerce clause as long as Congress had a rational basis for finding that racial discrimination by those establishments affected interstate commerce. By analogy, it can be argued in the helmet cases that, since the legislature has passed the law, it has determined that there is a reasonable relationship between it and the public welfare and that that determination cannot be overturned in the absence of a showing by complainant that no such reasonable relationship exists.

However, the *Heart of Atlanta* and *McClung* cases are inapposite here because they dealt with the congressional power over commerce—a broad, enumerated power of Congress—rather than with the police power. Moreover, in those cases there were congressional hearings about the effect of the prohibited activity upon interstate commerce: "[T]he record of [the Act's] passage through each house," says the Court in

If the law is that the state has no burden to offer any evidence to support its contention the Michigan court's decision in *Davids* would appear to be correct since the defendant did not disprove that a reasonable relationship existed between the regulation and the public welfare.[50] However, such an interpretation of the law relating to the burden of proof requires the challenger, in effect, to offer evidence that there is no evidence of a reasonable relationship.[51] How is one to prove lack of evidence other than by merely stating that fact and challenging the opposition to offer some evidence to controvert? To require the challenger to prove a negative fact seems unreasonable. It appears more sensible—at least in cases where the challenger asserts in his pleadings that there is no evidence to demonstrate a reasonable relationship between the statute and the public welfare—to place the initial burden of going forward with the evidence upon the state. Once the state has offered *any substantial* evidence to support the statute,[52] the burden would immediately shift to the challenger and it would be up to him to disprove that evidence. The meaning here of "substantial evidence" is the one advanced by the Supreme Court as the standard for judicial review of administrative action:

> Evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred . . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.[53]

Heart of Atlanta, "is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce." 379 U.S. at 252. *See also* Katzenbach v. McClung, *supra*, at 301: "for the evidence presented at the hearings fully indicated the nature and effect of the burden on commerce which Congress meant to alleviate." But in the helmet situation there is no evidence that the legislatures ever gave any thought to the effect of their statutes on the safety of others. Indeed, there is evidence to the contrary; *see* note 51 *supra*.

50. The Michigan court's opinion is devoid of any reference to evidence which tended to demonstrate conclusively and conclusively that helmets did not prevent accidents or that flying objects did not cause them.

51. Statistics are seldom compiled on events that do not happen or accidents that do not occur. It would be far easier for the state to offer evidence that such accidents caused by flying objects do, in fact, occur.

52. To allow the state to meet its burden of going forward with the evidence by offering merely a "scintilla" of evidence to support a reasonable relationship does not solve the problem. For example, the state could present one isolated incident in which a flying object striking a helmetless cyclist had caused an accident, and the challenger would still have the burden of proving that that incident was the only one of its kind. Thus, requiring the state to offer some substantial evidence would appear to be a better proposal.

53. NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292, 300 (1939). According to the Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), this definition continues as the authoritative guide to the meaning of "substantial evidence."

Under the substantial evidence test, a statute cannot be struck down unless the

This proposal is generally consistent with the presumption of constitutionality since the ultimate burden of proof will usually remain upon the challenger. Under the proposal suggested in this Note, which would put the initial burden of going forward with the evidence upon the state, the Michigan court would appear to have decided correctly since the state failed to offer any evidence to support a reasonable relationship between the helmet statute and the public welfare.[54]

court has a firm conviction that it is unreasonable. Thus, such a test would result in upholding more state regulations than if the state judged the statutes on a "clearly erroneous" basis. The Supreme Court has stated that "a finding [or a statute] is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and *firm conviction that a mistake has been committed.*" United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (emphasis added). A firm-conviction-of-mistake test is closer to a substitution of judicial for legislative judgment than is a firm-conviction-of-unreasonableness test, which is necessary to upset a finding or a statute under the substantial-evidence test; consequently it is more difficult to invalidate a statute under the substantial-evidence test than under the clearly-erroneous test. When applied to helmet laws which are challenged as unreasonable, the proposal suggested in the text would require the state to come forward with enough evidence to meet the substantial-evidence test and thus to overcome the contention of unreasonableness. But as long as the statute is not unreasonable, that is, as long as there is enough evidence in its favor to justify a refusal to "direct a verdict" against it, then the challenger still has the burden of going forward even if the claim of a reasonable relationship is seen by the court as "clearly erroneous."

54. None of the courts which have dealt with the issue has gone to the basic factual and evidentiary question regarding the actual existence of a reasonable relationship or to the even more fundamental question concerning who has the initial burden of offering evidence. Instead, the courts have become involved in a balancing process between the interests of the individual and those of the state. To the courts striking down the helmet laws, the state's interest is too remote to be given weight. To the courts upholding the laws, however, the individual cyclist's interest is small, for wearing a helmet would hardly seem to be an oppressive burden, while the interest of the state in public highways and highway safety is great enough to justify regulation of even the most attenuated threat. People v. Bielmeyer, 54 Misc. 2d 466, 468-69, 282 N.Y.S.2d 797, 800 (1967) ("It has long been recognized that the power to regulate and control the use of public roads and highways is primarily the exclusive prerogative of the states."). Furthermore the right to wear what one wishes on a public street may not be considered fundamental enough to be protected by the fourteenth amendment even under the substantive-rights interpretation of the due process clause. *See* notes 23 and 40 *supra*. Thus, because helmet laws are merely a minor abridgement of individual liberty and because the right on which they impinge has not been definitely recognized as a fundamental one, these courts have been willing to grope to find a relationship between the regulations in question and the public welfare. Despite Benjamin Franklin's admonitions against those who would put safety over freedom, these courts seem willing to resolve all doubts in favor of the state without demanding any concrete evidence that unhelmeted cyclists are likely to harm others or even considering the burden of proof question at the crux of this entire controversy.

Yet the argument for constitutionality, if convincing at all, would appear to be persuasive only in regard to the operator of the cycle. The relationship between the requirement that a passenger on a cycle wear a helmet and the safety of others appears to be more attenuated. That requirement is supported in the case authority only by a statement in *Bielmeyer* that "passengers are just as susceptible to injuries as operators and a head injury to a passenger could sufficiently distract a driver to create a danger to other users of the highway." 54 Misc. 2d at 469-70, 282 N.Y.S.2d at 801. While such an event is conceivable, to view it as likely requires great imagination,

The ramifications of the [illegible]met cases are for the mo[illegible] part yet unknown. In Michigan, one i[illegible]ediate effect of the *Davids* decision was the passage of a new statu[illegible]y the Michigan legislature.[55] This statute requires that all moto[illegible]les carry, when in operation, a number of crash helmets equal [illegible]he number of persons riding on the bike. Such a regulation is e[illegible]ore unlikely to promote public safety than the previous requi[illegible] since merely having a helmet on the motorcycle in no way pr[illegible]e cyclist from being distracted or hurt. It is difficult to see wi[illegible]urpose this requirement serves other than encouraging the cyclis[illegible] wear a helmet; it is very awkward for him to carry it.[56] The [illegible] law appears to be merely an attempt to circumvent the court's [illegible]ling. Since the Supreme Court has indicated that indirect mea[illegible] to achieve unconstitutional ends are just as objectionable as the [illegible]direct form of regulation,[57] the new Michigan statute should al[illegible] declared unconstitutional.

The Michigan decision in t[illegible]stant case may have an effect on the somewhat analogous probl[illegible]connected with seat belt regulations. The Michigan courts, if [illegible]follow *Davids*, could not uphold a legislative requirement that [illegible]otorists wear safety belts.[58] Such a regulation would bear even [illegible]elation to the safety and welfare of others than the helmet laws [illegible] for it is inconceivable that the failure to wear a seat belt coul[illegible]e an accident,[60] or even pose the threat of one.

since the passenger is shielded by the o[illegible] from most flying objects and since he is not in control of the cycle. If there[illegible] evidence to show that flying objects striking the operator actually cause a[illegible] it is unlikely that there is any to support an even more remote possibili[illegible] for a court searching for reasons to justify the law, such a highly unlikely [illegible]t as that used in *Bielmeyer* should probably be outweighed by the passenger[illegible] to individual freedom.

55. MICH. STAT. ANN. § 9.2358(d) (196[illegible]

56. The statute was evidently passed [illegible] feeling that the new regulation was similar to the ones requiring seat belts t[illegible]alled in cars and, as such, should be allowed. However, the seat belt requiremen[illegible] imposed upon the manufacturer and do not regulate individual conduct; in [illegible], the individual cyclist must buy and carry a helmet.

57. *See* Louisiana v. United States, 3[illegible]15 (1965).

58. It is significant that at the prese[illegible]no state has such a law on the books.

59. Even the New York courts, wh[illegible]e allowed a reasonable regulation of individual safety in the interest of a pr[illegible]e community, would probably find such a law unreasonable on the grounds that [illegible] great an infringement upon personal freedom. *See* note 30 *supra*. According [illegible]urt in Miller v. Miller, 160 S.E.2d 65, 69 (N.C. 1968), the scant use which the [illegible] reasonably prudent motorist makes of seat belts indicates that such a regula[illegible]d be too great an infringement. On the other hand, even where there is no [illegible]nent, most motorcyclists wear helmets in the interests of personal safety. Thus, [illegible] laws might be reasonable where seat belt laws would not.

60. Yet some states require seat belts [illegible]ration of a car manufactured after a certain year. *See* CAL. VEHICLE CODE § [illegible]pp. 1967); GA. CODE ANN. § 68-1801 (Supp. 1966); MASS. ANN. LAWS ch. 90, § [illegible]; MICH. REV. STAT. § 9.2410(2) (Supp. 1965); NEB. REV. STAT. §§ 39-7, 123.05 (Su[illegible]7); N.J. REV. STAT. § 39:3-76.2 (Supp. 1967); N.Y. VEH. & TRAF. LAW § 383(a) ([illegible]inney Supp. 1966); N.C. GEN. STAT. § 20-135.2 (1965); OKLA. STAT. ANN. tit. [illegible]. [illegible]2-418 (Supp. 1967); ORE. REV. STAT.

The effect of the helmet decisions on the law in general may be substantial. On the one hand, if a helmet statute is held constitutional, inroads could be made upon personal liberty; the legislature might rely on similar strained and unproved relationships to the general welfare in order to justify regulations impinging upon other areas of individual conduct.[61] On the other hand, to hold such a statute unconstitutional may require the judiciary to interfere unreasonably with the legislature's conception of public welfare. In light of these considerations, courts dealing with challenges to such regulations in the future should pay closer attention to the difficult factual questions underlying the reasonable relationship test; they must also attempt to answer the basic questions surrounding the burden of proof and the burden of going forward with the evidence in these cases.

§ 483.482 (1966); R.I. GEN. LAWS ANN. § 31-23-39 (Supp. 1966). In the case of such a regulation, but as in the helmet situation, the burden of installation is on the individual owner and he himself is regulated for his own protection. Thus, Michigan courts would probably not uphold such a law, for the requirement that the individual have belts in his car bears less relation to public welfare than a requirement of wearing them, and much less relation than a helmet requirement. This is analogous to the present Michigan law that helmets be carried on cycles—a law which cannot be reconciled with the *Davids* decision, unless by the argument that the owner is thereby making seat belts available to anyone who should drive or ride in his car and is thus protecting people other than himself.

The federal standards issued by the Secretary of Commerce are different, for under them the burden is on the manufacturer, not the owner, to install safty belts. National Traffic and Motor Vehicle Act of 1966, 15 U.S.C. §§ 1391-425 (Supp. II, 1967), and Initial Fed. Motor Vehicle Safety Standards, 23 Fed. Reg. 2408, tit. 23, ch. II, part 255 (1967).

Congress has declared the scope of the federal standards. *See* National Traffic and Motor Vehicle Act of 1966, 15 U.S.C. § 1391(1) (Supp. II 1967):

> Motor vehicle safety means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents or injuries occurring as a result of the design, construction or performance of motor vehicles.

The standards, therefore, regulate the manufacturer in order to protect the public from unnecessary risks, and they do not directly restrict the individual owner's freedom. Thus, the federal seat belt standard would seem to meet no constitutional difficulties.

Some argue that a duty of due care to wear the belts can be derived from the federal seat belt regulations. The argument runs that statutes requiring mere installation of seat belts impliedly require their use, and that any ruling to the contrary undermines any possible value inhering in legislation. There is a notable absence of legislative history supporting this contention. *See* Note, *Seat Belt Legislation and Judicial Reaction*, 42 ST. JOHN'S L. REV. 371 (1968). As to the argument that the regulations are meaningless unless construed to *require* use, an equally likely construction is that they are designed to *encourage* use. In this connection, *see* Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288 (1967).

61. *See* text accompanying note 31 *supra*.

SB 3



BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE
GEORGE F. BONEY, ASSOCIATE JUSTICE
ROGER G. CONNOR, ASSOCIATE JUSTICE

Supreme Court
State of Alaska
POUCH U. CAPITOL BUILDING
JUNEAU, ALASKA
99801

April 25, 1969

Hon. Barry W. Jackson, Chairman
House Judiciary Committee
Capitol Building
Juneau, Alaska

Dear Chairman Jackson:

Senate Bill No. 3 providing for the peremptory disqualification of district judges probably needs to be amended in at least two respects.

District judges also conduct sessions of municipal court in the main cities of Alaska. AS 22.20.022 should be amended to make it plain that there could be no challenge of a district judge while conducting a session of municipal court. Otherwise the procedure would be entirely unworkable.

(c) of the statute should be amended to require that the challenge of a district judge be made almost immediately after the matter has become a case. The five day period would completely stall the machinery in the district courts with respect to the minor criminal actions where a complaint is filed one day and often times tried the next day. All such cases, of course, should not be automatically stalled for five days in order to allow for a challenge. In that type case the challenge should be filed immediately after the defendant has notice that an action is pending in areas such as Ketchikan, Sitka and Nome where

there is only one judge to try the case and it would have to be known which judge the case would come before. In other areas such as Juneau, Fairbanks and Anchorage the challenge would have to be filed immediately after the case had been assigned to a judge without the five day provision.

Sincerely yours,

Buell A. Nesbett
Chief Justice

SB 3



BUELL A. NESBETT, CHIEF JUSTICE
JOHN H. DIMOND, ASSOCIATE JUSTICE
JAY A. RABINOWITZ, ASSOCIATE JUSTICE
GEORGE F. BONEY, ASSOCIATE JUSTICE
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Supreme Court
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JUNEAU, ALASKA
99801

April 25, 1969

Hon. Barry W. Jackson, Chairman
House Judiciary Committee
Capitol Building
Juneau, Alaska

Dear Chairman Jackson:

Senate Bill No. 3 providing for the peremptory disqualification of district judges is now in your committee.

Pursuant to our discussion of this morning, please be advised that it is my opinion that if this bill is enacted into law any additional expense to the Alaska Court System can be absorbed within the framework of the court system's budget as approved by the House Finance Committee. This is based on the assumption that there will not be a wholesale abuse of the peremptory challenge provision, and the occasional challenge in areas such as Nome and Ketchikan can be taken care of by the resident superior court judge.

Sincerely yours,

Buell A. Nesbett
Chief Justice

SB-45

File in SB45

STANLEY H. REITMAN
ATTORNEY AT LAW
708 FOURTH AVENUE
ANCHORAGE, ALASKA 99501
PHONE 272-2409

February 3, 1969

The Honorable Barry Jackson
Chairman, House Judiciary Committee
House Chambers
Juneau, Alaska

Dear Barry:

Re: Alaska Professional Corporation Act
A.S. 10.45

On January 6, 1969 I drafted a letter to the Legislative Council with copies to various interested persons. From the newspapers I see that one or more bills pertinent to the Alaska Professional Corporation Act have been introduced in this session. However, none of such bills have reached my desk as yet.

The enclosed xerox copy outlines some of the problems practitioners are having or will have regarding this Act, and I respectfully request you review the suggested statutory changes attached to my letter. I hope the Legislative Council has seen fit to incorporate some or all of my suggestions in the bill or bills sponsored by the Council.

Thank you for any courtesy extended to me and to all of those Alaskan professionals who are vitally interested in the effectiveness of the Alaskan Professional Corporation Act.

Very truly yours,

Stanley H. Reitman

SHR/mm

Enclosure

COMMENTARY AND SUGGESTED STATUTORY CHANGES

(1) Centralization of Management

Statute might emphasize the centralization of management concept by adding this language to AS 10.45.070:

> "Management of a professional corporation shall be vested in the Board of Directors which shall have the continuing exclusive authority to make the management decisions necessary to the conduct of the profession for which the professional corporation is formed. The officers of the corporation, who shall be elected by the Board of Directors, shall have such power and authority to represent the Board as the Board may from time to time expressly or impliedly grant to such officers. A shareholder shall not have any power to bind the corporation within the scope of the corporation's activities merely by virtue of his being a shareholder.

(2) Transferability of Shares

Existing AS 10.45.080 requires the prospective sale or transfer of shares be approved by a majority of the other shareholders. Why make the rule mandatory - let the shareholders concensually impose such restrictions if they desire. By doing so we eliminate an unnecessary statutory impediment to "free transferability". In all cases the professional shareholders should prudently provide for this possibility in their buy-sell agreement. I therefore would amend this section to read:

> "Transfer of Shares.
>
> "A shareholder of a professional corporation may sell or transfer his shares in such professional corporation only to another individual duly licensed to render the same professional service as that for which the professional corporation was formed. The articles of incorporation may provide specifically for restraints on the alienation of shares and may require the purchase, redemption or retirement of shares by the professional corporation at a price and in a manner set out in the articles. The articles may, alternatively or in addition, authorize the corporation's Board of Directors or its shareholders to adopt by-laws restraining the alienation of shares and providing for their purchase, redemption or retirement by the corporation."

(3) Corporate Name

Almost all professional corporation or association statutes enacted by other jurisdictions require the professional organization to employ an identifying word or words in its name to indicate it is operating under a corporate or association format. Moreover, it is my personal belief, unsupported by anything other than instinct, that it will be far easier to confront the IRS if the corporate name indicates business is being conducted in the corporate name. Accordingly, it is vital to strike the last sentence of AS 10.45.120:

> "It is permissible for the corporation to render professional services and to exercise its authorized powers under

the corporate name without the word 'Corporation' or 'Incorporated' or their abbreviations, or the words, 'a professional corporation' included in the name."

(4) Liability.

The existing liability sections 140, 150, 160 and 170 evidence an undue sensitivity to any suggestion or attempt to evade personal liability to clients and other third parties. Particularly bad, and not found in any other state statute, is section 170, which makes shareholders responsible for all corporate debts (including non-professional). This must be eliminated. The specific provision imposing joint and several liability for professional services I presume is intended to build in the partnership concept that a partner is jointly and severally liable for the torts of his partner. At the minimum, AS 10.45.170 must be eliminated. Suggested substitutional language for sections 140, 150, 160 and 170, adapted from the Georgia Professional Association Act, might prudently read:

"This Act does not modify any law applicable to the relationship between a person furnishing professional service and a person receiving such service, including liability arising out of such professional service, and including the confidential relationship between the person rendering the professional service and the person receiving such professional service, if any, and all confidential relationships previously enjoyed under the laws of this State or hereinafter enacted shall remain inviolate. Subject to the foregoing provisions of this Section, the shareholders of any professional corporation organized pursuant to the provisions of this Act shall not be individually liable for the debts of, or claims against, the professional corporation unless such shareholder has personally participated in the transaction for which the debt or claim is made or out of which it arises."

(5) Continuity of Life.

Akin to my comments on centralization of management under (1) above, a positive legislative expression regarding continuity of life will be useful. Accordingly, this new added language is suggested:

"Unless the Articles of Incorporation expressly provide otherwise, a professional corporation shall continue as a separate entity independent of its shareholders, for all purposes for such period of time as provided in the Articles, or until dissolved by a vote of two-thirds of the members, and shall continue notwithstanding the death, insanity, incompetency, conviction for felony, resignation, withdrawal, transfer of ownership of shares, retirement, or expulsion of any one or more of the shareholders, the transfer of shares to any new shareholder or shareholders, or the happening of any other event, which under the law of this State and under like circumstances, would work a dissolution of a partnership, it being the aim and intention of this Section that such professional corporation shall have continuity of life independent of the life or status of its shareholders. No shareholder of a professional corporation shall have the power to dissolve the corporation by his independent act of any kind."

(6) Disposal of Shares of Deceased Shareholder.

A problem may arise upon the death of sole owner of a professional corporation. The legatees or distributees more than likely will not be licensed to engage in the profession for which the corporation was formed. Additionally, disposition or transfer to a licensed person or persons may neither be feasible nor attainable. To prevent any undue loss because of a forced liquidation (keep in mind, the corporation may have significant holdings of real estate, equipment and other passive investments), an alternative should be given the family to switch over to a business corporation and in the process keep the corporate entity going. Accordingly, the following language might be added at the end of AS 10.45.220:

> "If there is only one shareholder and the shares held by such deceased shareholder are not disposed of within six months after death, the legal representative, legatees or distributees of such deceased shareholder shall either (a) liquidate the professional corporation, or (b) amend its articles of incorporation so that the professional corporation may continue in existence as a business corporation under the Alaska Business Corporation Act."

SB76

Memorandum

Alaska Court System

TO: Chief Justice Buell A. Nesbett

SB 76 am

DATE : May 28, 1968

FROM: Harold J. Butcher, Judge

SUBJECT: Proposed Rule Changes

Dr. Rehbock and I discussed rule changes affecting children's cases in the Superior Court yesterday afternoon and I think considerable progress was made in the several rules we discussed in detail with the hope that other rule changes may also be made after I furnish him with a memorandum on other rules which I feel should be changed for more orderly procedure and easier handling of children's matters. Nevertheless, I would like to propose a fundamental change in Rule 12 and the change contemplated will require major consideration on your part as to whether the change contemplated can, in fact, be accomplished by rule. This memorandum is intended to open the door to the subject and I will hope for a conference with you at an early date to discuss the matter further.

Section 47.10.080 reads as follows:

> (a) The court, at the conclusion of the hearing, shall find and enter a judgment that the minor is or is not a delinquent or dependent minor.
>
> (b) If the Court finds the child a delinquent he must (1) order the child committed to the Department of Health and Welfare for an indeterminate period of time * * * or (2) order the child placed on probation * * *.
>
> (c) If the court finds that the minor is dependent, it shall (1) order the minor committed to the department for an indeterminate period of time not to exceed the date the minor becomes 21 years of age; (2) order the minor released to his parents, guardian, or some other suitable person; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor; the department's supervision may not extend past the date the minor becomes 21 years of age; or * * *". (Emphasis added)

I call your attention to the 1967 report of the President's Commission on Law Enforcement and the Administration of Justice as quoted in an article entitled "Children's Court-Gateway or Last Resort", published in Case and Comment for November-December, 1967, Vol. 72, Issue No. 6.

"The formal Juvenile Court system and its pronouncement of delinquency should be used only as a last resort."

The article from which the above quotation was made goes on to say:

"Delinquency invented as a soft substitute for the word 'crime' is now a cruel term itself."

As I read Section 47.10.080 the court must, at the conclusion of the adjudicative hearing declare the child either a delinquent or a dependent and has no other choice unless the decision itself is postponed. In many other states, among which is Colorado, the Legislature has provided an additional category covering children in trouble representing a status in which custody can be taken of a child and treatment administered and I quote from the Colorado Children's Code as follows:

"(17) (a) (i) 'Delinquent child' means any child ten years of age or older who, regardless of where the violation occurred, has violated:

(ii) Any federal or state law, * * *

(iii) Any municipal ordinance, * * *

(18) (a) "'Child in need of supervision' means any child:
(b) Who is an habitual truant from school;
(c) Who has run away from home or is otherwise beyond the control of his parent, guardian, or other legal custodian; or
(d) Whose behavior or condition is such as to endanger his own or others' welfare." (Emphasis added)

The Colorado Code goes on to define dependent children but we are not concerned with that definition at this time.

Thus, it will be seen that Colorado, by statute, has devised a means of avoiding the application of the harsher term of "delinquency" in all those cases except where there has been a specific violation of law. In the category of a "child in need of supervision" the custody of the child is procured without declaring him a delinquent. The common identification of this second category in Colorado and other places where the same category is in use is CHINS (Children in need of supervision). In Hawaii, Illinois and other states where a similar category exists persons (persons in need of supervision) are referred to as PINS.

In the most recent issue of the Family Law Quarterly in an article on the Gault decision by Norman Doresen and Daniel A. Rezneck, the attorneys for Gault before the Supreme Court, the following comment appears.

> "This aspect of juvenile court law (avoidance of the declaration of delinquent) is in flux, however. There is discernible a legislative trend to treat 'truants' 'incorrigibles' differently from those juveniles who commit law violations: to adjudicate the former as 'persons in need of supervision' (known as 'PINS') and to reserve the label 'delinquency' for the latter. An effort is made thereby to eliminate the stigma of a delinquency adjudication from these juveniles.
>
> Removal of both the stigma of delinquency and the threat of commitment might well justify a difference in procedural treatment between 'PINS' and juveniles accused of law violations. It cannot be assumed that the application of particular procedural rights in juvenile courts by the Supreme Court in cases involving alleged law violations which are adult crimes will necessarily carry over in all respects to all categories of juveniles over whom the juvenile court exercises jurisidion. As we shall discuss below, Gault need not be interpreted as imposing procedural inflexibility on differing categories of juvenile court adjudication, any more than it does on the pre-judicial and dispositional phases of the process."

It should be remembered at this stage the Gault decision is applicable according to its sweep in cases where a child has committed an act which, if committed by an adult, would be a crime and Gault may not necessarily be applicable in delinquency cases where the act of the child would not be a crime if committed by an adult.

It is my opinion that regardless of the strictness of the Alaska Statute in its requirements for an adjudication of either delinquency or dependency and particularly in view of the fact that the Supreme Court has the power to make rules which have the force and effect of law, that we could, by rule, establish the separate catagory of "Children in Need of Supervision" (CHINS) or Persons in Need of Supervision (PINS) and it is my further opinion that in this catagory about 75% of the misconduct of children in this area, at least, would probably fall. Subse-

quently, and at the next session of the Legislature, we can urge the Legislature to adopt this middle ground in declarations involving children. Meanwhile, with a tool such as a change in Rule 12 might provide, much good could be accomplished in the handling of children before the court.

My object, therefore, is to induce the Supreme Court to make the rule change at once anticipating that the Legislature could be induced to change the statute at the next session providing, of course, you agree with me on this subject.

I should very much like to discuss the matter with you personally at your first opportunity and to further urge upon you then that we incorporate in Rule 12 which at the present time requires either a declaration of delinquency or dependency in the event the allegations of the petition are proved, the additional provisions referred to above.

HJB

FORM SA-18

SB 79

MEMORANDUM State of Alaska

TO: Honorable Irwin L. Metcalf
House of Representatives
Alaska State Legislature

DATE : April 13, 1970

FROM: Thomas J. Moore
Commissioner
Department of Labor

SUBJECT: CS for SB 79

With respect to Committee Substitute for Senate Bill No. 79, relating to oil and gas lease provisions requiring reports of labor conditions, the Department regards this as a desirable piece of legislation.

Part of the regulations which the Department contemplates issuing under this bill is residency of an employee, based on one year's residence in the State. It would give us the opportunity to review the hiring practices of individual companies and, where they were not responsive to resident hiring, call the matter to their attention.

FORM SA-1B

SB 85

MEMORANDUM State of Alaska

TO: The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska

DATE : April 14, 1969

FROM: R. D. Stevenson
Chief, Excise Tax Section
Department of Revenue
Alaska Office Building
Juneau, Alaska

SUBJECT: CS for Senate Bill No. 85, amended, An Act relating to the compilation of jury lists.

Attached is a copy of a memorandum addressed to Mr. George A. Morrison, Commissioner of Revenue from Charles Pyles, Supervisor of Audit of the Department of Revenue concerning Administrative problems encountered by the Department of Revenue in complying with the provisions of CS for Senate Bill No. 85, amended, concerning certain lists to be prepared by the "Department of Revenue".

If you have any questions on the material contained in the attached memorandum, please feel free to call Mr. Charles Pyles, Department of Revenue at 6-5354.

RDS/se
Attachment 1
cc: Charles Pyles
Supervisor of Audit
Department of Revenue
Alaska Office Building

FORM SA-18

MEMORANDUM State of Alaska

TO: C. A. Morrison
Commissioner of Revenue

DATE : April 11, 1969

FROM: Charles Pyles
Supervisor of Audit

SUBJECT: CS for SB #85
"An Act relating to the compilation of Jury Lists"

Administrative Problems:

The list of persons, to be prepared by the Department of Revenue, who either purchased a resident hunting or fishing license should be corrected to read "prepared by the Department of Fish and Game". The Department of Revenue is responsible solely for the accounting for monies received from the sale of licenses; the copies of licenses are processed and filed by the Department of Fish and Game. Mr. Fred Walstad of the Fish and Game Protection Division advises that his department hopefully has 98% of the previous year's hunting and fishing license copies filed and available for this use by February 15 of the current year.

The list of individuals who have filed income tax returns for the previous year which result in a refund can be provided by the Department of Revenue, from information compiled by Data Processing division. We must point out, however, that the income tax returns for the previous year are not due until April 15 of the current year. The incomplete list, consisting of 80% of the individuals who have previous year income tax returns could be provided by the Department of Revenue on approximately August 15 of the current year.

The remaining 20% of the prior year income tax filings would not be available for a listing until near December 31. This is due to fiscal year filings, extensions of time in which to file, etc.

We wish also to point out that there is a group of Alaska residents who may legally qualify for jury duty but whose income is insufficient to require an income tax filing.

Charles L. Pyles

SB 93

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

April 30, 1970

M E M O R A N D U M

TO : Representative Barry W. Jackson

FROM : Arthur H. Peterson, Revisor of Statutes

SUBJECT: HCS CSSB 93

Your HCS for CSSB 93 (ombudsman) is attached. The main changes are on pages 1 and 2. The way the last part of the "Term of Office" section now reads, a subsequent appointee will serve a minimum of two years and a maximum of five years before he will be up for approval or rejection. (If his minimum were set at three years his maximum would be six years before being up for his first approval or rejection.) That five years may seem a bit long, but the provision incorporates the two elements the committee wanted -- a two-year minimum and a non-gubernatorial election. In addition, on page 6, line 24 of CSSB 93 I changed "shall not" to read "may not", and on page 7, line 14 I deleted "of 1970".

AHP:HG
Enclosure

DH-434
(Rev. 1/64)

Jackson SB98

MEMORANDUM State of Alaska

TO: Representative Earl D. Hillstrand
Chairman, House State Affairs
Alaska State Legislature

DATE: March 24, 1970

FILE NO: 00-3077

SUBJECT: S. B. 98 am

FROM: Robert L. Beardsley
Commissioner
Department of Highways
Juneau

Pursuant to your request we suggest the following amendments to the referenced bill.

Page 2, Line 21
Add or activities conducted thereon;

OK

Page 2, Line 22 and Line 23
Strike out completely and substitute the following:

(3) Signs, displays, and devises in all zoned and unzoned, commercial and industrial areas. The Department will regulate the size, spacing, and lighting of signs within these areas that are not covered by (1) and (2) of this Section.

No billboards allowed!

Add
*Sec. 6. A.S. 19.25.100 is repealed.

OK

The above amendments and additions will define the limitations on advertising signs and bring us into conformity with Public Law 89-285, the Highway Beautification Act of 1965. Section 19.25.100 should be repealed because the Federal Highway Administration will not allow this type of sign along the Federal-aid Highway system. We have installed signs along the system indicating the availability of services of the various roadhouses, lodges, etc. These signs were approved by the Federal Highway Administration.

Department control and regulations within the zoned and unzoned commercial and industrial areas only applies to those signs, displays or devises that do not advertise the sale or lease of the property on which they are located or activities conducted thereon. The regulations are aimed at the large commercial billboard type structures which fortunately have not been introduced into Alaska for the most part.

Junkyard Control
Page 3, Line 1
Change "shall to "may".

Our reason for requesting this change is two-fold. Number one, the Federal government has not appropriated a significant amount of funds for either control of outdoor advertising or junkyards. As an example the existing appropriation is $1000 for advertising control and $831 for junkyard control. If the removal is mandatory, we would be forced into spending unauthorized State funds.

OK

Second, we are of the opinion that it would be in the best interest of the State to expand the junkyard control legislation to also include the secondary highway system and suggest that Chapter 27, Title 19, be amended to accomplish this. Sections requiring amendment would be as follows: Section 19.27.020, Section 19.27.030 and Section 19.27.110.

The addition of the secondary highway system in the legislation would require an inventory of existing signs and junkyards along the secondary system and the future expenditures of State funds for their control. However, we believe the program would be well worthwhile.

MEMORANDUM State of Alaska

TO: Earl Hillstrand, Chairman
House State Affairs Committee
Capitol Building, Juneau

DATE: March 25, 1970

FILE NO: 00-3077 & 00-1041

SUBJECT: Highway Beautification Act of 1965

SB 98

FROM: Robert L. Beardsley
Commissioner
Department of Highways

As further backup to Senate Bill #98 the State of Alaska has requested, in the Engineering and Construction Budget, State funds to match the Highway Beautification Program Act of 1965 as follows:

Year	Program	Total	Funds Federal	State
1967	Apportionment-Control Outdoor Advertising (Est.)	$ 102,480	$ 72,360	$ 30,120
1967	" Control Junkyards (Est.)	42,000	30,000	12,000
1967	" Landscape & Scenic Design (Est.)	1,299,743	1,207,743	92,000
1968	" Beautification Prog.(Est.)	1,487,500	1,350,000	137,500
1969	" " " "	1,487,500	1,350,000	137,500
1970	" " " "	1,985,252	1,800,000	185,252
1971	" " " "	1,985,252	1,800,000	185,252
	Total Funds Appropriated by State of Alaska for Beautification	$8,385,727	$7,610,103	$ 775,624

Federal funds apportioned to the State of Alaska are as follows:

	Total	Federal	Expended
1966 Apportionment			
Outdoor Advertising	$ 36,180	$ 56,180	$ 7,500
Junkyard	15,000	15,000	--
1967 Apportionment			
Outdoor Advertising	$180,899	$180,899	$ --
Junkyard	75,000	75,000	--
1970 Apportionment			
Outdoor Advertising	$ 1,000	$ 1,000	$ --
Junkyard	1,662	1,662	Reduced 50%

The 1966 and 1967 apportionments were not expedned because State enabling legislation was not passed until 1968 (Chapter 233 SLA 1968). For all practical purposes the Beautification Program is non-existent at the present time. State matching funds are available. The writer will approach the administration requesting approval to spend 100% State funds to institute the outdoor advertising and junkyard program until Federal funds are avilable.

RLB/TAJ/mth

SB-98

Public Law 89-285
89th Congress, S. 2084
October 22, 1965

An Act

79 STAT. 1028

To provide for scenic development and road beautification of the Federal-aid highway systems.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Highway Beautification Act of 1965.

TITLE I

SEC. 101. Section 131 of title 23, United States Code, is revised to read as follows: 72 Stat. 904.

"§ 131. Control of outdoor advertising

"(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

"(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State. 72 Stat. 889.

"(c) Effective control means that after January 1, 1968, such signs, displays, and devices shall, pursuant to this section, be limited to (1) directional and other official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning the lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, and (3) signs, displays, and devices advertising activities conducted on the property on which they are located.

"(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the

purposes of this Act. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

"(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

"(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

"(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices—

"(1) those lawfully in existence on the date of enactment of this subsection,

"(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and

"(3) those lawfully erected on or after January 1, 1968.

The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

"(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

"(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

"(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

Information centers.

"(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit informational directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable.

Bonus payments.

"(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in such agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required by such agreement or the control required by this section, whichever control is stricter. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

"(k) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway system than those established under this section.

"(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

Notice of final determination.

62 Stat. 928.

"(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, and not to exceed $20,000,000 for the fiscal year ending June 30, 1967. No part of the Highway Trust Fund shall be available to carry out this section."

Appropriation.

SEC. 102. The table of sections of chapter 1 of title 23 of the United States Code is amended by striking out

"181. Areas adjacent to the Interstate System."

and inserting in lieu thereof

"181. Control of outdoor advertising."

TITLE II

SEC. 201. Chapter 1 of title 23, United States Code, is amended to add at the end thereof the following new section:

23 USC 101 et seq.

"§ 136. Control of junkyards

"(a) The Congress hereby finds and declares that the establishment and use and maintenance of junkyards in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

"(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made pro-

Apportioned funds, withholding.

vision for effective control of the establishment and maintenance along the Interstate System and the primary system of outdoor junkyards, which are within one thousand feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

Reapportionment of withheld funds.

"(c) Effective control means that by January 1, 1968, such junkyards shall be screened by natural objects, plantings, fences, or other appropriate means so as not to be visible from the main traveled way of the system, or shall be removed from sight.

Definitions.

"(d) The term 'junk' shall mean old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber debris, waste, or junked, dismantled, or wrecked automobiles, or parts thereof, iron, steel, and other old or scrap ferrous or nonferrous material.

"(e) The term 'automobile graveyard' shall mean any establishment or place of business which is maintained, used, or operated for storing, keeping, buying, or selling wrecked, scrapped, ruined, or dismantled motor vehicles or motor vehicle parts.

"(f) The term 'junkyard' shall mean an establishment or place of business which is maintained, operated, or used for storing, keeping, buying, or selling junk, or for the maintenance or operation of an automobile graveyard, and the term shall include garbage dumps and sanitary fills.

"(g) Notwithstanding any provision of this section, junkyards, auto graveyards, and scrap metal processing facilities may be operated within areas adjacent to the Interstate System and the primary system which are within one thousand feet of the nearest edge of the right-of-way and which are zoned industrial under authority of State law, or which are not zoned under authority of State law, but are used for industrial activities, as determined by the several States subject to approval by the Secretary.

"(h) Notwithstanding any provision of this section, any junkyard in existence on the date of enactment of this section which does not conform to the requirements of this section and which the Secretary finds as a practical matter cannot be screened, shall not be required to be removed until July 1, 1970.

Landscaping and screening costs.

"(i) The Federal share of landscaping and screening costs under this section shall be 75 per centum.

Junkyards. Costs of relocation, etc.

"(j) Just compensation shall be paid the owner for the relocation, removal, or disposal of the following junkyards—

"(1) those lawfully in existence on the date of enactment of this subsection,

"(2) those lawfully along any highway made a part of the interstate or primary system on or after the enactment of this subsection and before January 1, 1968, and

"(3) those lawfully established on or after January 1, 1968.

The Federal share of such compensation shall be 75 per centum.

"(k) All public lands or reservations of the United States which are adjacent to any portion of the interstate and primary systems shall be effectively controlled in accordance with the provisions of this section.

"(l) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to outdoor junk-

yards on the Federal-aid highway systems than those established under this section.

"(m) There is authorized to be appropriated to carry out this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, and not to exceed $20,000,000 for the fiscal year ending June 30, 1967. No part of the Highway Trust Fund shall be available to carry out this section." Appropriation.

SEC. 202. The table of sections of chapter 1, title 23, United States Code, is amended by adding at the end thereof the following: 72 Stat. 917.

"130. Control of junkyards."

TITLE III

SEC. 301. (a) Section 319 of title 23, United States Code, is revised to read as follows:

"§ 319. Landscaping and scenic enhancement

"(a) The Secretary may approve as a part of the construction of Federal-aid highways the costs of landscape and roadside development, including acquisition and development of publicly owned and controlled rest and recreation areas and sanitary and other facilities reasonably necessary to accommodate the traveling public.

"(b) An amount equivalent to 3 per centum of the funds apportioned to a State for Federal-aid highways for any fiscal year shall be allocated to that State out of funds appropriated under authority of this subsection, which shall be used for landscape and roadside development within the highway right-of-way and for acquisition of interests in and improvement of strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such highways, including acquisition and development of publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public, without being matched by the State. The Secretary may authorize exceptions from this requirement, upon application of a State and upon a showing that such amount is in excess of the needs of the State for these purposes. Any funds not used as required by this subsection shall lapse. There is authorized to be appropriated to carry out this subsection, out of any money in the Treasury not otherwise appropriated, not to exceed $120,000,000 for the fiscal year ending June 30, 1966, and not to exceed $120,000,000 for the fiscal year ending June 30, 1967. No part of the Highway Trust Fund shall be available to carry out this subsection." Appropriation.

(b) The table of sections of chapter 3 of title 23 of the United States Code is amended by striking out

"319. Landscaping."

and inserting in lieu thereof

"319. Landscaping and scenic enhancement."

SEC. 302. In order to provide the basis for evaluating the continuing programs authorized by this Act, and to furnish the Congress with the information necessary for authorization of appropriations for fiscal years beginning after June 30, 1967, the Secretary, in cooperation with the State highway departments, shall make a detailed estimate of the cost of carrying out the provisions of this Act, and a comprehensive study of the economic impact of such programs on affected individuals and commercial and industrial enterprises, the effectiveness of such programs and the public and private benefits realized thereby, and alternate or improved methods of accomplishing the objectives of this Estimate and study.

79 STAT. 1033

Report to Congress.

Act. The Secretary shall submit such detailed estimate and a report concerning such comprehensive study to the Congress not later than January 10, 1967.

Rules and regulations. Ante, pp. 1028, 1030.

SEC. 303. (a) Before the promulgation of standards, criteria, and rules and regulations, necessary to carry out sections 131 and 136 of title 23 of the United States Code, the Secretary of Commerce shall hold public hearings in each State for the purpose of gathering all relevant information on which to base such standards, criteria, and rules and regulations.

Report to Congress.

(b) The Secretary of Commerce shall report to Congress, not later than January 10, 1967, all standards, criteria, and rules and regulations to be applied in carrying out sections 131 and 136 of title 23 of the United States Code.

Appropriation.

SEC. 304. There is authorized to be appropriated the sum of $500,000 to enable the Secretary of Commerce to carry out his functions under section 135 of title 23 of the United States Code relating to highway safety programs.

SEC. 305. Nothing in this Act or the amendments made by this Act shall be construed to authorize the use of eminent domain to acquire any dwelling (including related buildings).

TITLE IV

SEC. 401. Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act.

Appropriation.

SEC. 402. In addition to any other amounts authorized by this Act and the amendments made by this Act, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to the Secretary of Commerce not to exceed $5,000,000 for administrative expenses in carrying out this Act (including amendments made by this Act).

Short title.

SEC. 403. This Act may be cited as the "Highway Beautification Act of 1965".

Approved October 22, 1965, 2:30 p.m.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 1084 (Comm. on Public Works).
SENATE REPORT No. 709 (Comm. on Public Works).
CONGRESSIONAL RECORD, Vol. 111 (1965):
Sept. 15: Considered in Senate.
Sept. 16: Considered and passed Senate.
Oct. 7: Considered and passed House, amended.
Oct. 13: Senate concurred in House amendment.

GPO 80-139

SB 131

JUDICIARY COMMITTEE REPORT

ON

SENATE BILL NO. 131

The purpose of Senate Bill No. 131 is adequately explained by the Governor's letter of transmittal.

All states can now appear in the courts of Alaska to enforce judgements and liabilities for unemployment insurance contributions.

This bill will allow the Attorney General to appear for the other state if the other state similarly provides assistance to Alaska in its courts.

Barry Jackson, Chairman

SB 133

ALASKA COMMISSION ON THE STATUS OF WOMEN

8 Craig Avenue West
Fairbanks, Alaska
April 8, 1969

Dear Barry,

The February workshop in Juneau of the Alaska Commission on the Status of Women was m st informative. Ours is a research and recommendation co mmission. Independently, we research policies and practices in our own areas that fall within the responsibilities provided by Senate Bill 249, which established our Commission.

For your interest, enclosed are the Agenda and the Minutes for the Juneau workshop. Unfortunately, the minutes do not include our Friday afternoon and evening business sessions or the Sunday morning concluding business session.

During these sessions, the Commission unanimously voted support for Senate Bill 133, to add "Sex" to the "Unlawful Employment Practices", a part of the Civil Rights Bill. We request your support for Senate Bill 133. There is a similar bill, House Bill No. 33, introduced by Rep. Chance since our meeting.

Also, the Commission is in full support of the bill presented by the Department of Labor dealing with discrimination against women under the Employment Security Act. We respectfully request your support for this bill presented by Commissioner Moore who failed to provide us the number.

Enclosed also, is our long awaited report to the Governor and the Legislature for 1968. Recommendations were forwarded to the governor in February and an interim report will be presented in May.

Any suggestions you might have to make the work of our commission more effective would be welcome.

Sincerely,

Pat

Mrs. A. H. Fleetwood

ALASKA COMMISSION ON THE STATUS OF WOMEN

The Alaska Commission on the Status of Women met in the Conference Room of the Governor's Office on Saturday, February 8, 1969, at 9:30 a.m. The following members were present:

Mrs. Gertrude Reeser, Chairman
Mrs. John Cushing, Vice-Chairman
Mrs. Marjorie Fitzpatrick
Mrs. A. H. Fleetwood
Mrs. Isabel McLean
Mrs. LaDemma Zuback

Mrs. Reeser, President, opened the meeting, stating that similar meetings were being held in 53 other communities, including the other 49 states, Washington, D.C., the Virgin Islands, and Puerto Rico. The purpose of the program is to bring women into full partnership with men, put women in policy-making positions, and bring about full utilization of women in family, home, community, state and nation in order to extend opportunities to all people to develop to their full potential. These opportunities can help to make our State a better place.

Mrs. Reeser introduced Representative Mildred Banfield, who complimented the Commission on their previous report which had been well received in the Legislature. She offered any help that the Legislature might be able to give the Commission in their efforts. It was her feeling that the Commission could help in placing women in a position where they could best render service to the community, the family, and to themselves.

Mrs. Wanda Cooksey, Consultant, Guidance and Counseling, Alaska Department of Education, was then introduced. She reviewed what was presently being done in the State in public schools in guidance services. About 10-12 districts this year have approved guidance programs. The State Department of Education files with the federal government a state plan for receiving NDEA money which helps to support these guidance and counseling programs. Among the responsibilities of these programs is educational opportunities--helping students to decide for themselves what they want, what their programs should be, and what opportunities are suitable for them. Usually this counseling is on a one-to-one relationship; however, in recent years there has been more work done in the area of group counseling. Trained personnel are essential, and some training is being undertaken now. Counseling takes a great deal of time, but other demands on counselors for other guidance services limits the amount of time available for individual counseling. Mrs. Cooksey also works in the area of adult education. This field has grown rapidly in the past few years. It provides that persons who have not graduated from high school may take tests which will allow them to obtain a high school diploma. These tests are usually handled through community colleges or through the Department of Education. Communities are establishing their own testing offices. The program also offers brush-up courses. She stated that this material would soon be available in a brochure for the purpose of public information.

Another area is adult basic education, offered in ten communities now. This is a federally financed group of programs offering educational programs for adults who have not achieved the 8th grade level. The demand is considerable and both of these programs are helping people to obtain employment. No minimum amount of formal educaton is required for these programs, and after completing these satisfactorily, persons are eligible for college entrance. Wrangell is the only community which has a program directed at the lower grades, and they are in the second year of a pilot project. Fairbanks has a person working with the parents of disadvantaged children. In the villages, the teacher is the only person who can help in this area, and her time is very limited.

Mrs. Reeser introduced Dr. Donald Freedman, Alaska Division of Health. Mr. Freedman was concerned about expanded services for women as wives, mothers, and young women, particularly in the areas of population and of providing services where they are needed. The greatest problem has been with staffing and budget to provide services.

The population growth, in which the population of the world now doubles in 37 years, causes higher death rates, disease, and other related problems. Contrary to past years, the present birth rate exceeds the death rate and more people are living to the reproductive age, bringing a variety of problems. In the State of Alaska people who should be getting health and other services are not receiving them. Mothers in remote areas spend a great deal of time caring for these health problems, and education would be a great assistance to them.

The State has recorded a figure of 586 known abortions during the past year. Pregnant individuals handle this problem in many ways--by leaving the country, illegal abortions, suicide--and many result in permant damage, both physical and psychological, to the mother. These girls often feel they have to have an abortion because they can't get the help they need in this country.

In Alaska the birth rates in some sections are higher than in other sections of the population. Also, the death rate among infants is higher in these areas. In a family of from 6 to 12 children a very real problem exists in bringing these children up in a healthy manner, and often leads to other problems such as alcohol, sex, drugs, etc. Often the cause goes back 20-30 years in the family attitudes. In families of over 3 children, there are increases in complications of many problems for both the mother and the child--mental retardation, premature births, infant deaths, etc. We know the groups that have the greatest needs, but we are unable to do much about it because it takes personnel, budget, and program. Studies have been carried on in some low income areas to see if these people would accept family planning advice. Almost 100% continued to come back for this assistance; and in one year there was a drop of 32% in the births and a drop of 40% in illegitimate births. Presently there is only one family planning clinic in Alaska. There are also programs now to see what can be done to help support the doctor with other paramedical personnel and other aids in pediatrics and other areas.

Dr. Freedman stated three warnings: 1) Women carrying unwanted children to term have a high incidence of disabling psychiatric problems than those having abortions, regardless of the circumstances of conception. The created

psychiatric problems are passed on to the children; 2) The unwanted children have a greater number of emotional and social handicaps which affect their attitudes, behavior, and learning as they grow up; 3) Almost all women having abortions under decent conditions have very few emotional sequelae after their abortions. Many have no problems whatsoever.

Dr. Freedman then stated points on services which would be particularly helpful in thinking of expanded needs: 1) Expanded assistance in fertility control, family planning clinics and services of all kinds wherever needed; 2) Development of family planning specialists; 3) Better prenatal care for all mothers; 4) Better mental and health care for children and their whole families; 5) Abortion legislation.

Mrs. Reeser then introduced Mr. Richard Folta, Juneau attorney, who spoke on Alaska's laws relating to the family situation. He stated that generally Alaska was above other states in providing justice to women through its laws. Property rights are provided women whereby they may own property, sue, be sued, and made liable for their own torts and crimes. One area where fair treatment is not afforded women is in the area of domicile, or intent to reside. The domicile of the wife is that of the husband. Alaska has modified this so that a woman may set up a domicile for voting purposes, divorce purposes, and other purposes, if she lives here a year. In Alaska a wife may sue her husband for negligence in case of injury. A child may also sue its parents for a negligent injury. Alaska law does not recognize common law marriages.

Alaska does not legally recognize maternity leave, which concerns Mr. Folta as it discriminates against the working wife. He felt the Commission might look into this. A high percentage of women work in Alaska, very often from necessity.

Alaska is very liberal in its divorce laws, and provides nine grounds for divorce. Most divorces are granted on the grounds of incompatability. However, it is the children who are injured the most often, and no one represents their interests. The applied theory of "fault" in divorce is wrong, and perhaps the Commission could look into this and eventually advocate some change.

In the area of adoption the Alaska statutes are very fair. The consent of the father is not required, making adoption somewhat easier than in other states which do require this consent.

There is some bias against high school girls who are pregnant. Often they are not allowed to continue in school, and this could be another area the Commission could consider. The abortion laws in Alaska need to be reviewed and a more realistic law adopted. During questioning it was felt that a change in the abortion laws will be a difficult thing to bring about. Several states do have fairly ideal abortion laws, and some exploration would be advisable. It was also mentioned that Alaska is a common law property state, which gives no consideration to the housewife who stays at home and works in the home.

Dr. Freedman indicated that studies show the best way to handle abortion is as a medical problem, the decision resting with the physician and patient, and not regulated by a set of laws. He felt that very few additional persons would be needed to staff an adequate family planning program. Needed most were

funds and someone to administer them. These funds would go to the local communities which would set up their own clinics using their own practicing nurses and physicians during regular hours with the aid of adult educational material sent out through the schools. Some thought has been given to providing materials, supplies, and drugs in the rural villages through some lay resident.

Mrs. Cooksey stated that in the case of pregnant girls attending school, some have kept on, though some have not been able to do so for physical reasons. There is really no out-of-school programs for these girls except in several larger cities in the State.

The next speaker introduced by Mrs. Reeser was Charlotte Thompkins, past extension service agent of the University of Alaska Home Extension Service. She stated that the Extension Service was well equipped to help in the villages, but so short-handed because of a lack of funds for extension agents that help was not being provided to its fullest potential. It was felt that at least six agents should be provided for just Southeastern Alaska. At present there are only five for the entire State of Alaska. Anchorage is engaged in a project with approximately 20 aids--lay people--being trained to go out and work with people considered to be poverty stricken. They are using some federal and some state funding, emphasizing nutrition as their main objective. In most cases these agents have been able to make only one visit a year to outlying areas, but at least two visits are recommended. It often takes time to become accepted in these villages, and in order to be of real help one must be able to go back. Some of the specific areas of need and interest are: homemaking, cleaning, repairing, reupholstering, knitting instructions. It was felt that if more of these people were aware of what was available, there would be more requests for them and more effort to fill the requests. The possibility of cooperation with VISTA was discussed.

The meeting was adjourned at 12:00 for lunch to be held in the Iris Room of the Baranof Hotel. Guest speaker for the luncheon was Shari Gross, President of the State League of Women Voters of Alaska. Mrs. Gross spoke on the history of the League in the United States and the process by which the League accomplishes its aim of a more informed voting public.

The meeting was reconvened in the Conference Room of the Capitol Building at 2:15 p.m.

First speaker of the afternoon session was Mr. Thomas Moore, Commissioner of Labor, State Department of Labor. Mr. Moore quoted some Alaska employment figures, including the total work force of 94,000, up 35,000 from 1960. Female employment is presently 35,250. One of the major problems in Alaska, which has the highest unemployment rate in the United States, is the training of people to meaningfully participate in the development industries. The first such training program, financed by the federal government, was the Manpower Training Program started in 1962, financed under the Area Redevelopment Act. This program is directed toward heads of households, unemployed, or underemployed, and low educational levels. Since 1962 approximately 2,500 trainees have completed or are completing scheduled training under 226 courses in 50 different occupations. These courses include basic education courses as well as a great variety of skills training. Among trainees, 51% are educationally deficient, 9% are physically, emotionally or mentally handicapped, 38% were women, and 42% were members of minority groups.

The Department of Education, Vocational Division, is responsible for curriculum through the training. The Department of Labor is responsible for the selection of training occupations, based on cooperation with industry and business, so that the trainees will have jobs available. The Department pays an allowance, transportation, and often room and board for the training period.

He also discussed the Work Incentive Program for persons receiving aid to dependent children. This provides referrals and day care centers for these persons. At present there are 232 people enrolled in these programs, and 14 have been placed in jobs. About 97% of the enrollees in the program are women. With the discovery of oil in Alaska, an attempt is being made to train persons to hold jobs in this industry wherever possible.

Under the Employment Security Act there are certain types of disqualifications which apply only to women. Such provisions provide that if a woman leaves her job to be with her husband, to be married, or because of pregnancy, her disqualification is permanent until she earns $120.00. Under the general provisions of the Act, anyone seeking work and available for work is qualified for benefits. This discriminates against working women.

Mr. Moore was questioned concerning efforts of the Department to actively recruit female trainees for various positions, such as electricians. He indicated no intentional direction of recruitment was made, but that they had to be practical. Women were being recruited mainly for the clerical jobs. In training for advancement, there is a program called New Careers for persons who do not have specific educational or training requirements for a job. He stated that generally women's pay scales were slightly below men's, probably on the theory that the man is the basic family wage earner.

Other requirements relating to women such as the 25-pound maximum lifting requirement are primarily safety regulations. Mr. Moore felt that the disqualifications concerning moving, marriage, and pregnancy should be the same for all employees, and that they were presently discriminatory. An amendment has recently been offered to delete these so that women would be eligible for benefits as soon as they were available for employment.

Mrs. Reeser introduced Mr. Khris Lethin, Director of Planning and Research, Office of the Governor. Mr. Lethin discussed the operations of the Planning and Research program and the various titles under the Act. The first was planning, then the Vista program, and the State Technical Assistance Office funded by OEO programs. He then described the OEO Act. Title I provides for the Job Corps operation, of which Alaska has none. Title II - Work and Training for Youth and Adults - covers a number of programs such as Neighborhood Youth Corps, in-school and out-of-school programs, New Careers, and Operation Mainstream. Federal funds for these come from OEO to the Department of Labor. Community Action may be operated by the State, locally, or through non-profit corporations (Green Amendment). These programs are provided by OEO under Community Action Programs on these different levels.

The Work Incentive Program is under the Department of Labor. Under Title VIII, VISTA is operated by the State Division of Planning and Research. Many of these programs are directed toward the rural areas, and ground work is done in the villages prior to placing the program. Due to a problem in hiring

by the National Office of OEO, they have had to ask that recruits are more adult and have some specialty so that they can do some specific projects in the villages.

One Commission member discussed briefly the Hope Center, a vocational rehabilitation center which has been trying to operate but needs more referrals from the State in order to keep going. There is indication that many people need this help, but are not being referred.

Mention was made of the Foster Grandparents Program, and a possible application of it in Alaska.

Mrs. Marie Darlin spoke briefly, stating that the Governor's Committee on Helping Services will be preparing a list of all community service agencies which should be available sometime during the summer. She also spoke of a commission on children and youth for the State of Alaska. The main concern, as felt by the State PTA, is that of establishing such a commission. Most states already have such commissions, and the Division of Welfare has been attempting to establish one which would be concerned with the education and welfare of children. Such a commission would provide a wider area from which to gather all the needs of the children and provide for these needs. Support was asked if legislation is introduced to set up such a commission. She also repeate the need for libraries in the outlying areas of the nothern areas of the State.

Representative Ernie Haugen was introduced. He discussed the Governor's State of the State and Budget Messages, which indicated two main objectives of the administration--economic development, and human resource requiremens of the State. Items in the budget and in department budgets total about $110 million out of $144 million for the human resource requirements of the State. Some legislators are spending a considerable amount of time working on legislation for the low income groups--aid to dependent children, etc. On many federally aided programs the federal participation is gradually diminished until the State is required to take over, thereby causing budget problems within the States. Many of these are in areas of real human need and are difficult to cut back.

Several bills have been introduced on consumer protection. He suggested that persons interested be sure to study the bills carefully for their end results. Several other bills raise the welfare benefits in several categories--aid to dependent mothers, etc. Some of these are covered in the Governor's budget. Another bill raises employment benefits to $5.00 on each end of the benefit schedule. The real need for unemployment insurance is in the low income levels--seasonal workers and others--whose earnings are low. In the seafood processing industry many women are the head of the family, and their earnings are seasonal; and although they qualify, they don't come within the scope of the program at the present time.

A bill to introduce the word "sex" in the Human Rights Bill has been introduced.

Mrs. Elladean Bittner discussed the need for day care centers and whether federal funds were being used to their fullest extent.

The meeting was adjourned at 4:50 p.m.

from 1968 report of
Alaska Commission on the Status of Women

The Alaska Commission members in Washington, D. C. have been invited to attend the Annual Meeting of the National Consumers League on June 19, 1968. The theme of this meeting is "Urban and Rural Poverty--Unfinished Business". Due to mutual concern of this problem the members are planning to attend.

The next Alaska Commission meeting is scheduled for August 9, and 10th, 1968 in Anchorage.

RECOMMENDATIONS

The Alaska Commission on the Status of Women Commission recommends:

1. Formation of sub-committees in cities, towns and villages to co-ordinate with the Commission.

   a. Volunteer workers program
   b. Library or mobile book units for rural areas
   c. Leadership training
   d. Adoption program for native students
   e. Catalog of service organizations
   f. Catalog of qualified women for policy making positions

2. Day Care Program

   a. Grandmother program
   b. Neighborhood sitter's cooperative

3. Counseling and Guidance

   a. Work experience training
   b. Awareness of Existing programs

4. Discrimination on basis of sex

(1) Formation of sub-committee to assist the Commission on the Status of Women.

Because the commission consists of only eleven members and the area to be covered and the charges of duties is large it was believed that various service organizations could help materially with much of the necessary research and contacts. Each commission member in the larger cities has been asked to make up a sub-committee which could

reach out for information in the nearby rural areas and determine the best way to assist them in their local problems.

As of May 31, 1968, Anchorage has had the best response to this plan and has had several meetings of a remarkably well represented group of service organizations with much volunteer assistance. Sitka has the nucleous of such a group and shortly should have their first meeting, stressing not only what can be done or needs doing in the city itself, but in the outlying villages.

Nome had had for many years a coordinating committee and it is hoped that they will work with the commission.

(a) Volunteer workers are needed in every segment of the State to act as sitters, medical aids, kitchen aides, to organize various youth and adult programs and work collecting books and needed teaching supplies. A rooster of available volunteer workers would be a help.

(b) From a survey made of a number of villages and expecially replies from a questionnaire sent to Vista workers, there is a crying need for books. Libraries and schools with surplus or duplicate books should be contacted and alerted to this need. In some areas mobile libraries should be considered. Book drives in the larger communities could be conducted and the books sent to those villages expressing such a need.

(c) Leadership training is woefully lacking in the smaller communities and the sub-committees will be charged with finding potential leaders and obtain help from them to establish worthwhile education, health and organization activities in the villages. This can be done by cooperating with existing agencies.

(d) A suggestion was made that an "adoption" program be implemented for native students. It was found especially true in the Fairbanks and Anchorage areas that often native students try to attend college but become discouraged due to a feeling of segregation. It is believed that if these native students could have sponsors who would make them feel welcome and wanted in a community they would have a better attitude. There is a need for them to have someone they can go to for advice on dress, manners, etc. as well as for emotional outlet.

(e) An attempt is being made to compile a working catalog of all the service organizations in the State to use as a working basis and contact for the sub-committees of the Commission. Several quite complete lists have been made and help has been received from several organizations.

(f) A catalog of policy making positions in the State which women should be able to fill is being considered. Required is a list of Alaskan women capable of filling such posts. Service organizations have been contacted about this project but as yet no concrete results have been forth coming.

2. Day Care Programs are evidently of major concern in all areas. From questionnaires sent out to outlying areas, practically everyone expressed a need for some sort of child day care program.

(a) One suggestion was implementing the old time concept of the "Grandmother" program. This would organize the older women in a community on an availability basis and free the younger women to work in canneries or other jobs.

(b) The Neighborhood Sitter's Cooperative has worked well in a number of areas and could be organized in many cities.

Counseling and Guidance are needed greatly in all areas, not only for youths but adults. Here again we feel the sub-committees could act competently in creating awareness of these community programs.

(a) Work experience training has had success in some localities and it is recommended that this program be enlarged and made available to many more.

(b) There needs to be more awareness of existing training programs. Especially from the Alaska Department of Labor we learned of a number of existing programs. It is suggested that comprehensive lists of the programs be compiled and more widely brought to the attention of the populous.

(c) Home extension courses and community colleges are offering a variety of subjects which are not being actively sought by the public. These should be more widely publicized and the public encouraged to take advantage of them through such mediums as "Campus Days" where the facilities are opened to the public and adequate explanations given of the subjects offered.

Discrimination on Basis of Sex:

The Civil Rights Bill passed by the Alaska Legislature reads; "Section 18.80.220 - Unlawful Employment Practices, It is unlawful for

(1) an employer to refuse employment to a person, or to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of race, religion, color or national origin, or because of his age when the reasonable demands of the position do not require age distinction;"

This Commission strongly recommends the word "sex" be added following the words "race, religion, color" and preceeding "or national origin"

in (1), (2), and (3) of Section 18.80.220.

We have been advised that the Equal Employment Opportunity Commission in a staff opinion, that Alaska's law limits its ban on sex discrimination to the requirement of equal pay for equal work for male and female employees. Because this law limits itself to discrimination, the E.E.O.C. will not defer complaints of discrimination because of sex, received by it, to the Alaska State Commission for Human Rights. Such an amendment would give the State Commission the legislative ability to handle its own complaints, as it does in the other areas under its jurisdication.

SB 145

JUDICIARY COMMITTEE REPORT

ON

CS FOR SENATE BILL NO. 145

The original SB 145 mainly provided for the biennial (rather than annual) renewal of the license of an electrical contractor firm, consistent with the provisions for other occupations and professions covered by the centralized licensing chapter, AS 08.01. It also provided for reinstatement of a lapsed license and made clear that the grounds for suspending and revoking a license would also serve for refusing to grant a license.

The committee substitute adds a requirement that all electrical contractor licenses, not just those issued to firms, be renewed, and applies the same biennial and reinstatement language to them.

Barry Jackson, Chairman

SB-160

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF REVENUE

OFFICE OF THE COMMISSIONER / POUCH S—JUNEAU 99801

March 27, 1970

The Honorable Barry Jackson
Chairman, House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Re: Senate Bill 160 - Multistate Tax Compact Act

Dear Mr. Jackson:

On March 26, 1970 Senate Bill 160, which has passed the Senate, was referred to the House Judiciary Committee. I am writing to you to urge its immediate consideration and passage. Following is a general description of the Multistate Tax Compact, its purpose, what it hopes to do and reasons why it is to the definite advantage of Alaska to adopt the Compact.

1. The Multistate Tax Compact was first contemplated at a National Association of Tax Administrators (N.A.T.A.) meeting in Chicago in January, 1966 where the idea was unanimously approved.

The purpose of the Compact was to provide an alternative to Federal regulation of taxation of businesses conducting business in two or more states. Big multistate business firms (principally those affiliated with the National Association of Manufacturers and the National Association of Wholesalers) have and currently are bringing much pressure on the United States Congress to regulate the entire multistate tax field.

Congress has had and currently has before it several bills which would regulate the entire multistate tax area. Most notable of these are the Willis Bill (90th Congress) and the Rodino Bill (H.R. 7906 - 91st Congress) which is identical to the Willis Bill. These bills strongly favor the large multistate companies at the expense of the states.

The Rodino Bill has passed the U. S. House of Representatives in Congress and is pending before the U. S. Senate Finance Committee. The U. S. Senate Finance Committee also has before it Senate Bill 2804 which has the backing of many Senators and would provide the Multistate Tax Compact approach to work out taxation problems in lieu of the Federal government doing this.

2. The Multistate Tax Compact is made up of 19 full member states and 12 states who are associate members. The full member states are:

Kansas	Nevada	Hawaii
Washington	Oregon	Colorado
Texas	Missouri	Wyoming
New Mexico	Nebraska	Utah
Illinois	Arkansas	Montana
Florida	Idaho	North Dakota
		Michigan

Associate members, including Alaska do not vote but are allowed to participate to a limited degree. It is expected that the associate members who do not adopt the Multistate Tax Compact within a reasonable time will be dropped.

3. The Multistate Tax Commission's headquarters was in Kansas City, Missouri but is now in Denver, Colorado. It operates with an Executive Director and a small staff. The Commission is composed of one representative member from each full member state and meets three times a year. Subcommittees may meet oftener.

4. The Multistate Tax Compact was set up to deal with all types of multistate taxation. At this time it is most active in the fields of income tax, sales and use tax, and property taxes. Regulations standardizing procedures are being drafted and some have already been distributed to member states. In particular I refer to such items as consolidated income tax returns, standard accounting procedures in the construction industry, and sales and use taxes.

5. The Multistate Tax Commission is the only organization which has testified in Congress against passage of S. 2044 which would greatly restrict the withholding of income taxes from the wages of transportation workers. This is an area which vitally concerns Alaska since we have been accused of causing problems to transportation workers by our action in bringing the case of Alaska v. Petronia, 418 P 2d 755 (Wash. 1966), cert. den. 389 U.S. 7 (1967) in which the state's position was upheld.

6. The Multistate Tax Commission has also arranged with several member states to conduct joint audits of multistate firms to avoid duplication of audits by those states. The Commission has also met with railroad companies to work out standard rules for the assessment of real estate.

7. If the states do not act and Congress passes the Rodino Bill, Alaska will suffer in the following ways:

a) Using the two factor apportionment formula (payroll and property) of the Rodino bill rather than the three factor formula (sales, payroll and property followed by Alaska and the Multistate Compact, the State of Alaska would have received $6,200 less in corporation taxes than it did in 1968, the latest year for which figures are available. If the Rodino bill were changed to cover all businesse rather than only those businesses having a net income of less than $1,000,000 as that bill presently reads, Alaska would have lost $167,056 in corporation income taxes in 1968.

b) The Rodino bill would exclude from Alaska state income tax the income of multistate businesses which do not have an office in Alaska but who have salesmen which come into the state or otherwise conduct businesses in Alaska. In 1968 Alaska would have lost $18,581 in corporation income tax because of such a restriction.

c) The Rodino bill would prohibit Alaska from imposing its gross receipts tax (AS 43.70) on multistate businesses which do not have a business location in Alaska. This would reduce Alaska's business license tax collections. The Multistate Compact contains no such restrictions.

d) The Rodino bill would limit the jurisdictional standards on our state and local governments and jeopardize collection of any Alaska or local government sales and use tax. We could not require an out-of-state retailer to collect the use tax if it has a representative, agent, salesman, canvasser or solicitor in this state. This would give the nonresident business an advantage over local business and make more difficult the collection of a use tax by local governments.

I suppose that what everything boils down to, really, is simply this: there is clearly so much pressure on the United States Congress from big multistate business firms that Federal legislation giving them some relief from state taxation will be passed unless the states offer a proper alternative. In other words the "Federal solution" to the alleged version of complying with the tax laws of many states is to exempt multistate operators from state taxing jurisdiction. Because of the revenue losses which must inevitably follow from this sort of "solution" the states committed to the Compact idea believe that the problems of non-uniformity and multiple returns should be worked on (i.e., simplified or made more uniform) through their voluntary, collective efforts. Only in this way will the legitimate complaints be solved while at the same time preserving the fiscal integrity and political independence of the states in our Federal system.

The Multistate Tax Commission budget is apportioned to members on a basis of 10% in equal shares and 90% on the basis of tax revenue. It was originally estimated that Alaska's share would be about $1,900 for the current year. However, subsequent information received indicates that it would be approximately $1,650. Compared to the tax loss that the state can incur, this cost is very low.

It is recommended that Senate Bill 160 be passed. Permission is requested to appear before your committee to answer any questions that it may have.

Very truly yours,

Vernon L. Snow

Vernon L. Snow
Deputy Commissioner

VLS/ge
Enclosures: Memorandum ~~to~~ from Eugene F. Corrigan, Executive Director, Multistate Tax Commission, dated February 27, 1970
First Annual Report - Multistate Tax Commission

cc: Members of the House Judiciary Committee w/enclosures
Representative Bill Ray w/enclosures
John Beard
R. D. Stevenson

SB-160

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State of Missouri

EUGENE F. CORRIGAN, Executive Director

RECEIVED
MAR 2 1970
DEPARTMENT OF REVENUE
STATE OF ALASKA
JUNEAU

February 27, 1970

WHY ALASKA SHOULD BE A MEMBER OF THE MULTISTATE TAX COMMISSION

One of the major reasons why each state should join the Multistate Tax Commission is that the Multistate Tax Commission provides the only viable alternative to federal invasion of the field of state and local taxation of multistate business. The thrust of such a federal invasion of the field is now a very real one in the form of H.R. 7906, which has passed the House and is soon to be considered in the Senate Finance Committee. Our hope lies in convincing the Senate that the business complaints which gave rise to the Bills in question are no longer justified, that some of the problems have been solved, and that solutions are being developed for the others through cooperative efforts among the states.

The Multistate Tax Commission stands as the only vehicle available for such efforts. We have already received many compliments for having codified a sales and use tax jurisdiction standard...the first time that it has been done.

The Multistate Tax Commission has been pursuing experiments in joint auditing for income tax purposes. Joint audits should eventually prove to be of immense value not only to the states but to business as well. To the states they will offer the benefits of periodic audits of all businesses. To business they will offer the assurance of decreasing interference with business operations by state auditors since one audit will suffice for many, and eventually all, states.

The Multistate Tax Commission is also seeking to foster increasing uniformity in the manner in which all states approach taxation of multistate business. This does not mean uniformity in tax rates. It means optional uniformity in the means by which is determined the tax base to which each state applies its tax rate. We use the word "optional" because the Multistate Tax

Compact provides only that the three-factor formula is available for use with respect to a taxpayer if the taxpayer chooses to use it. This does not preclude the state from using a formula more favorable to taxpayers if the state so chooses.

A major complaint of the business world to Congress has been that the same income of a multistate business is often taxed in two or more states. The Multistate Tax Commission approach offers a guarantee against such results; and it does so without restricting the states' option to choose alternatives so long as those alternatives do not produce such double taxation.

By comparison, H.R. 7906 (to which we have referred in the first paragraph of this memorandum) would answer business' complaints about non-uniformity in a way which would provide no uniformity whatsoever. Rather, it would simply exempt from taxation a large share of the income of certain preferred multistate businesses. It is apparent that this exemption approach is unfair to the states whose markets are being exploited by these multistate businesses free of tax consequences; and that it is equally unfair to in-state businesses with which said multistate businesses compete.

On the other hand, many multistate business complaints have been valid. The Multistate Tax Commission seeks solutions to problems in this field for the benefit of both business and the states. We know that we can be successful if states such as yours will support us.

How much would it cost Alaska to support the Multistate Tax Commission as a regular member? Your state's share of our budget would decrease as membership increased. The following example illustrates how the computation of your state's share would be made under the provisions of Paragraph 4(b) of Article VI of the Multistate Tax Compact:

> The Commission's approximate budget for 1970-71 is $160,000.00. One tenth of the budget is divided equally among all member states. We currently have 19 members. The next member will be the twentieth. One-twentieth of $16,000.00 (one-tenth of $160,000.00) would be $800 for 1970-71. The balance of each state's share is determined by the ratio of that state's revenues from certain types of taxes compared to the revenues of all members of those types of taxes. The taxes in question are the sales, use, income, capital stock and gross receipts taxes. The total of such taxes collected by our current members for the period July 1, 1967 through June 30, 1968, was approximately $5,567,324,150. According to your Revenue Department's figures Alaska collected $33,688,684 from the above mentioned taxes for that period, which amount is approximately .6% of $5,601,012,834 ($5,567,324,150 plus $33,688,684). Accordingly, your state's share of the remaining nine-tenths of the budget would be approximately $864 for 1970-71. .6% of $144,000 ($160,000 less 10%) would be $864.

To summarize:

	1970-71
	$ 800.00
	864.00
	$ 1,664.00

The above figures are based upon the assumption that Alaska would be the twentieth state. We emphasize that increased membership decreases the per-state percentage share of expenses. Also, appropriate adjustments will be made with respect to time lapsed in the current budget period for those states becoming members between payment due dates.

The increased budget for 1970-71 ($144,000 in 1969-70) reflects our expectation of rendering substantially increasing services to the member states. There is no desire on our part to spend money unnecessarily. We are well within our budget for the current year.

Ultimately, of course, the viability of the Multistate Tax Commission will depend upon the willingness of all states to become Regular Members. This will determine the long-range value of the Multistate Tax Commission as an instrument of state government in the field of state and local taxation of multistate businesses.

We are occasionally asked whether the Multistate Tax Commission will not be just another supergovernmental agency with all of the objectionable features which a federal agency would have in this field. The answer is negative. The various tax administrators of the member states operate the Multistate Tax Commission through the Executive Committee elected from among themselves. The Executive Director, who has many years of experience in state revenue administration, is responsible to these state tax administrators. A federal agency would not be responsible to any state tax administrator or group thereof.

The following may help to emphasize the advantages which the Multistate Tax Commission offers to all states as an alternative to the type of federal legislation with which H.R. 7906 threatens them:

1) The Multistate Tax Commission cannot and never will tell a state what tax or what rate of tax it may apply to a business. A federal agency ultimately would do so.

2) The Multistate Tax Commission is a means of protecting each state's current tax base. The threatened federal legislation would immediately diminish that tax base.

3) The Multistate Tax Commission will make it possible for each state to benefit from a larger number of audits at decreased cost. The threatened federal legislation offers no help whatsoever in this field. A federal agency would eliminate the need for any

state tax collection activities at all, which would ultimately result in the elimination of the states as sovereign entities.

4) The Multistate Tax Commission will ultimately ensure that each business carries its fair share of the governmental burdens of the states in which it does business. The threatened federal legislation would ensure that many businesses would in fact be exempt from any obligation whatsoever to many states whose markets they exploit.

5) The Multistate Tax Commission will protect each multistate business against the multitude of audits to which it is subjected today. This will be true because many states (ultimately, we hope, all states) will participate in one complete audit performed under the auspices of the Multistate Tax Commission.

6) The Multistate Tax Commission has available to it the expertise of the tax experts who participate in its activities, including several prominent consultants and the Revenue Administrators of all member states. The threatened federal legislation is the product of mainly non-state-oriented people who have been overly impressed by certain non-state-oriented aspects of multistate tax problems but have paid far too little attention to the state-oriented aspects of those problems and who have ignored the great strides which the states have been making in curing the causes of the original 1961-62 complaints to Congress.

7) The Multistate Tax Commission offers business a vehicle by which to communicate its problems to tax administrators as a group and also a vehicle via which those problems can in many cases be solved.

8) The Multistate Tax Commission is run by the state tax administrators of its member states operating co-operatively. The threatened federal legislation would jeopardize each state tax administrator's operation of his own revenue department.

9) A. The Multistate Tax Commission offers:

a) unity of purpose for both the states and business;
b) uniformity of approach;
c) the distribution of its benefits to its members and to the business world.

B. The threatened federal legislation offers:

a) unity of purpose on behalf of certain favored businesses only, thereby affording those businesses a discriminatory approach which limits the benefits to those particular businesses. This defeats the interests of all other businesses as well as the interests of the states.

b) no uniformity whatsoever; it really offers less uniformity than exists now.

c) virtually no benefits to either the states or the business world as a whole, the exception being the benefits which it confers on the certain favored multistate businesses.

The Multistate Tax Commission needs the support of Alaska as a member. We hope that this memorandum has served to convince you of the importance of your state becoming a regular member.

EUGENE F. CORRIGAN
EXECUTIVE DIRECTOR

SB 191

JUDICIARY COMMITTEE REPORT

ON

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 191

The proposed amendments to A. S. 9.35.080 would repeal sub-paragraph (1) of that section and replace it with a new sub-paragraphl. The changes proposed would not make major substantive changes but would clarify ambiguities in the present section.

Section 9.35.080(1) is intended to provide an exemption from execution upon a man's income of $350.00 per month if he is the head of a family and $200.00 per month if he is a single man.

A number of problems arise under the seciton. First, all of the earnings of a married woman are exempt. To change this, the judiciary committee amendment would change the exemption to $350.00 per month for the head of a family and $200.00 otherwise. Second, the present language specifies that the total amount of the exemption shall apply to income "which is due him or received by him from any source at any time within thirty days immediately preceeding the levy." While it is clear that the statute is intended to insure receipt by the judgment debtor of the appropriate exemption amount each month, this language does not specify whether the excess over the exemption which may be attached is to be computed with respect to amounts actually paid during the past thirty days, and appears to authorize both accrued income and paid income to be added together to determine the excess liable to attachment. The proposed amendment would gear the thirty day period contained in the exemption statute to an accrual basis, and would subject only those funds actually earned or otherwise accrued during the previous thirty day period to execution, regardless of when those funds are payable.

The third change would specify that the $350.00 and $200.00 monthly exemption amounts relate to net rather than gross income and direct that the amount be computed after deductions and payments required by law or court order, such as social security and child support payments. Frequent problems arise because the present section fails to specify net or gross income, but the practice of many courts has been to treat the exemption as relating to net income.

The fourth change exempts the judgment debtor from the requirement of filing a formal affidavit to avail himself of the exemption. The formal affidavit requirement which requires notarization frequently constitutes an unnecessary burden.

Barry Jackson
Chairman
House Judiciary Committee

SB191

JUDICIARY COMMITTEE REPORT

ON

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 191

The proposed amendments to A. S. 9.35.080 would repeal sub-paragraph (1) of that section and replace it with a new sub-paragraph 1. The changes proposed would not make major substantive changes but would clarify ambiguities in the present section.

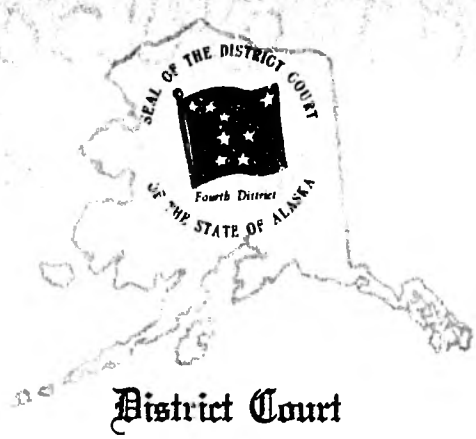
Section 9.35.080(1) is intended to provide an exemption from execution upon a man's income of $350.00 per month if he is the head of a family and $200.00 per month if he is a single man. The judiciary committee amendment would change this to $350.00 per month if he is the head of a family and $200.00 per month if he is not the head of a family. A number of problems arise under the section. First, the present language specifies that the total amount of the exemption shall apply to income "which is due him or received by him from any source at any time within thirty days immediately preceeding the levy." While it is clear that the statute is intended to insure receipt by the judgment debtor of the appropriate exemption amount each month, this language does not specify whether the excess over the exemption which may be attached is to be computed with respect to amounts actually paid during the past thirty days, and appears to authorize both accrued income and paid income to be added together to determine the excess liable to attachment. The proposed amendment would gear the thirty days period contained in the exemption statute to an accrual basis, and would subject only those funds actually earned or otherwise accrued during the previous thirty day period to execution, regardless of when those funds are payable.

The second change would specify that the $350.00 and $200.00 monthly exemption amounts relate to net rather than gross income and direct that the amount be computed after deductions for federal and state tax withholding, social security, school tax, disaster tax, and unemployment insurance. Frequent problems arise because the present section fails to specify net or gross income, but the practice of many courts has been to treat the exemption as relating to net income.

The third change exempts the judgment debtor from the requirement of filing a formal affidavit to avail himself of the exemption. Amendments to other statutes proposed specify procedures to be followed in claiming exemptions. The formal affidavit requirement which requires notarization frequently constitutes an unnecessary burden, particularly in rural areas where notaries are not readily available.

Barry Jackson
Chairman
House Judiciary Committee

SB 218



District Court

State of Alaska

604 BARNETTE STREET
FAIRBANKS, ALASKA 99701

March 13, 1969

Circulated to Senate

The Honorable Barry Jackson
The House of Representatives
Juneau, Alaska

Re: Senate Bill No. 218

Dear Barry:

Apparently sooner or later this bill will pass through your committee. It is the one which sets forth the language for re-election of a judge, as for example, "shall Charlie Brown be retained as judge of the Superior Court for six years?" Now that I am somehow intimately involved in this sort of election the humor with which I viewed this approach has diminished. I would like to suggest that we eliminate the confusion which occurred with respect to Justice Rabinowitz and Judge Taylor last time around in the same manner as other states have solved this. Namely, the wording should be "shall Charlie Brown be retained as judge of the Superior Court for the term prescribed by law?" This eliminates the public thinking that they are voting on the length of term.

I hope this suggestion is not misguided, but it does seem somewhat essential to avoid the confusion. Thanks for all you are doing for me, Fairbanks, and Alaska.

Sincerely,

Arthur Lyle Robson
District Judge

ALR/mjf

SB 218

JUDICIARY COMMITTEE REPORT

ON

SENATE BILL NO. 218

By providing for a single judicial ballot in each judicial district, this bill changes the present requirement that the name of each judge and supreme court justice seeking to succeed himself be placed on a separate ballot. The committee substitute clarifies the question which is to appear on the ballot by referring to the fact that the vote is required by law.

Barry Jackson, Chairman

SB 245

ROBERTSON, MONAGLE, EASTAUGH, ANNIS & BRADLEY
ATTORNEYS AT LAW
P. O. BOX 1211
JUNEAU, ALASKA 99801

R. E. ROBERTSON (1885-1961)
M. E. MONAGLE
F. O. EASTAUGH
R. J. ANNIS
J. B. BRADLEY
W. G. RUDDY
T. P. BLANTON

200 NATIONAL BANK OF ALASKA BLDG.
PHONE 586-3340
CABLE ADDRESS: ROMEA

February 12, 1970

Representative Stanley P. Cornelius,
Sixth Alaska Legislature,
Juneau, Alaska.

Re: SSSB 245

Dear Representative Cornelius:

AS 09.35.200 provides for contribution among judgment debtors.

S 245 by a one line amendment proposed that the above section be extended to cover joint tortfeasors, probably because of the Spaeth case, 16 Alaska 199, which held that this section did not apply to joint tortfeasors where no apportionment is made or may be made. This case also restated the common law rule that contribution may not be enforced by the tortfeasor who pays the judgment against one or more joint tortfeasors.

I felt that S 245 was an imperfect solution and would leave many important questions unsettled.

As a result the uniform act was introduced as the present sponsor's substitute. It was revised by the National Conference in 1955 and has been enacted in fourt states, Massachusetts, North Carolina, North Dakota and Tennessee.

I see nothing in the act as proposed that would adversely affect plaintiffs, who indeed would be aided through the use of the contribution doctrine through the settlement process as well as after judgment.

Under our present law it is my opinion that the settlement by one tortfeasor with the claimant would not result in the release from liability of other joint tortfeasors, and it is my further opinion that subsection (d) would not change our present law in that respect.

In short I believe that the bill before the House Judiciary Committee comprehensively treats the subject of contribution amount joint tortfeasors on an equitable basis and I urge its enactment.

Very truly yours,

F. G. Eastaugh

2-26-70

JUDICIARY COMMITTEE REPORT

ON

SPONSOR SUBSTITUTE FOR SENATE BILL NO. 245

This bill proposes the adoption of the Uniform Contribution Among Tortfeasors Act, prepared by the National Conference of Commissioners on Uniform State Laws in 1955. The national conference's prefatory note to this Act states in part:

> "This uniform act establishes the right of a person liable for damages for an unintentional wrong to compel others, who are liable with him for the same damages, to share in discharging the common liability.
>
> "Under the existing law an injured person may select whom he wishes to sue from among those jointly liable to him for an injury. He need not sue all. He may settle out of court or he may sue all and collect the full amount of the judgment from one. Under the prevailing law rule there is no recourse by one who voluntarily pays or who is forced to pay the common liability, against the others who are equally liable to the injured party but who have escaped payment.
>
> "This act would distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under the common law."

The judiciary committee amendment would require each tortfeasor's share of the liability to be based on his relative degree of fault. After a review of the official comments accompanying the uniform act and of the relevant pages of the transcript of the meeting of the national conference's committee which wrote this Act, the Judiciary Committee is unconvinced of the need to prohibit the degrees of fault from being considered (as is done in the original version).

Barry W. Jackson, Chairman

A M E N D M E N T

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: Sponsor Substitute for Senate Bill No. 245

Page 2, Line 16: Delete "not".

SB 245

Edward A. Merdes
Grace Berg Schaible
Howard Staley
Stephen S. DeLisio

2nd Floor - Bloom Building
527 Third Avenue
Telephones: 452-4483
452-4484

LAW OFFICES OF
MERDES, SCHAIBLE, STALEY & DeLISIO
POST OFFICE BOX 810
FAIRBANKS, ALASKA 99701

File -
Misc. Judiciary
correspondence

March 6, 1969

The Honorable Barry Jackson
House of Representatives
Pouch V
Juneau, Alaska 99801

Dear Barry:

Sometime back I wrote you regarding the possibility of introducing a Bill permitting contribution among joint tortfeasors. It is my understanding that Senator Haggland is considering introducing the Uniform Contribution Among Tortfeasors Act. I hope you will support the Bill when it is introduced. The basic idea of the legislation is that if two persons are found to be liable for injuries or damage to a third person, and one of the two has to pay more than his share of damages, he has a right to recover proportionately from his joint tortfeasor.

It also tends to prevent collusion between one Defendant and the Plaintiff in a tort action in return for a promise by the Plaintiff to only collect from the uncooperative Defendant. This can be very deceptive to a jury which does not realize that the Plaintiff and one of the Defendants are working together.

The Uniform Bill also contains many provisions which insure that the rights of the Plaintiff, the injured person, are not prejudiced in any way by the Bill.

Yours very truly,

Howard Staley

HS/be

NO.2

SB

1-27-79

JUDICIARY COMMITTEE REPORT

ON

CS FOR SENATE BILL NO. 269

This bill seeks to clarify the law regarding the simplified distribution of small estates. By inserting the words "in Alaska", it becomes clear that in determining what statutory procedure to follow as to a decedent's estate, only the value of the estate within Alaska is to be considered. Thus, it is unnecessary to have an ancillary probate proceeding in Alaska when a person with an estate under $2,000 in Alaska dies with a larger estate elsewhere. The original bill applied this language only to real property; the committee substitute adds personal property.

Barry W. Jackson, Chairman

SB-271

ALASKA CARRIERS ASSOCIATION, INC.
327 Barrow Street
Anchorage, Alaska 99501

April 14, 1970

TO: HONORABLE BARRY JACKSON, CHAIRMAN, HOUSE JUDICIARY COMMITTEE
MEMBERS, HOUSE JUDICIARY COMMITTEE

FROM: EDWARD R. SANDERS, MANAGING DIRECTOR, ALASKA CARRIERS ASSOCIATION

CSSB 271 has probably been given closer and more searching attention than most other bills before the legislature. The work being done on it by your committee at this time is an example. This attention has caused very material improvements and changes to be made in the bill as originally submitted by the Governor.

Recent consultation with additional people, including some attorneys practicing transportation law and other groups heavily affected by surface transportation activity, has convinced my Association's governing body that this bill is now in excellent condition for passage - except for the following changes, which should definitely be incorporated. Making these changes in a Judiciary Committee substitute would probably be the most expeditious way of handling them. The suggested changes are as follows:

Line 11, Page 1, change "AS08.18" to "Section 420(12)

Line 16, Page 1, strike the underlined matter and remove the brackets from "The"

Line 20, Page 1, after "and" strike the remainder of that line and insert "every exempt carrier except as provided in Section 20(4) to wit"

Line 22, Page 4, strike all language and insert "carrier, private carrier and exempt carrier as described in Section 20(4) including those operating motor vehicles"

Line 27, Page 4, add after "carriers" the words "and exempt carriers as described in Section 20(4)"

Insert before Line 17, Page 12 the following:

(12) "Construction contractor" means a contractor licensed by the State of Alaska to and actively engaged in the work of constructing, repairing or removing any kind of private or public facility or structure and does not include "contract carriers" authorized to transport commodities in bulk in dump type equipment unless such "contract carrier" is also actively engaged in the work of constructing, repairing or removing private or public facilities or structures as a licensed contractor.

I would like to express our strongest opposition to any change being made in Section 3 of the bill. This identical method of handling is in use throughout the other states and is used by the Interstate Commerce Commission.

It has proven to be an efficient and equitable method of properly evaluating whether or not a specific additional operating authority should be granted. Ill advised changes in this provision could well weaken the trucking industry in this state to the point of destruction. You are urged to make no change in Section 3.

The Committee has our deep and sincere appreciation for the searching and objective work it has done and is doing on this most important legislation.

Thank you.

Edward R. Sanders
Managing Director

scj

Original sponsor: Rules Committee by request of the Governor

Offered: 3/12/70
Referred: Rules

IN THE SENATE

BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 271

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the regulation of motor freight carriers."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 42.10.020 is amended by adding a new paragraph to read:

(4) vehicles operated by a construction contractor while performing such a business as defined in Section 420(12) ~~AS 08.18~~ except that weight fees in an amount as provided by sec. 240 of this chapter shall be paid for each vehicle designed to be operated on a public highway.

* Sec. 2. AS 42.10.090 is amended to read:

Sec. 42.10.090. REGULATION OF PRIVATE AND EXEMPT CARRIERS. ~~Except as provided in sec. 20(4) of this chapter, the~~ [THE] commission shall

(1) supervise and regulate every private carrier and exempt carrier as to its safety of operation;

(2) require every private carrier and every exempt carrier ~~exempt carrier to file~~ except as provided in Section 20(4) to file information required by the commission to carry out this chapter, and supervise and regulate each private carrier in all other matters affecting its relationship with shipping and the general public.

* Sec. 3. AS 42.10.130(c) is repealed and re-enacted to read:

(c) Except as provided in (a) and (b) of this section a permit shall be issued to any qualified applicant, authorizing the whole or a part of the operations covered by the application, if the proposed service is or will be required by the present or future public convenience or necessity; otherwise the application shall be denied.

public convenience and necessity require the service to be resumed, it may order the carrier to reinstate the operation.

* Sec. 7. AS 42.10.230 is repealed and re-enacted to read:

Sec. 42.10.230. MODIFICATION, SUSPENSION OR REVOCATION OF PERMITS Upon complaint or upon its own initiative the commission, after notice and opportunity for hearing and for good cause shown, may amend, modify, suspend, or revoke a permit, in whole or in part. Good cause for amendment, modification, suspension or revocation of a permit includes but is not limited to any of the following:

(1) as the public convenience and necessity may require;

(2) misrepresentation of a material fact in obtaining the permit;

(3) unauthorized discontinuance or abandonment of all or part of the carrier's operation;

(4) failure to comply with the provisions of this chapter, the rules, regulations or orders of the commission, the motor vehicle laws of the state or the laws or regulations of the United States;

(5) failure to comply with a term, condition, or limitation of the permit.

* Sec. 8. AS 42.10.240 is repealed and re-enacted to read:

Sec. 42.10.240. WEIGHT FEES. (a) Every common carrier, contract carrier, private carrier and exempt carrier as described in Section 20(4) ~~carrier and private carrier including those operating motor vehicles~~ including those operating motor vehicles not otherwise registered or licensed in the state, and every person that rents or leases motor vehicles to common, contract or private carriers, shall pay the following weight fees each year for each motor vehicle owned or operated by it on the public highways of the state:

(1) motor vehicles of private carriers, and exempt carriers as described in Section 20(4) except those of persons who rent, lease or otherwise provide a motor vehicle for use of motor carriers, weighing over 4,000 pounds..... $25

carrier or contract carrier or by a construction contractor as defined in AS 08.18 to another construction contractor as so defined, under rules and regulations to be prescribed by the commission;

* Sec. 18. AS 42.10.420(6) is amended to read:

(6) "motor vehicle" means a truck, trailer, semi-trailer, tractor, wrecker, tow car, hearse, ambulance or other self-propelled or motor-driven vehicle used upon any public highway of this state for the purpose of transporting property;

* Sec. 19. AS 42.10.420 is amended by adding new subsections to read:

(10) "rate" includes every rate, toll, fare, rental charge, or other form of compensation demanded, observed, charged or collected by a carrier for its services;

(11) "property" means all commodities, articles and cargo, of whatever nature or value, including but not limited to refuse, garbage, trash and other waste or nonwaste material.

* Sec. 20. AS 42.10.300, 42.10.360, 42.10.390 and 42.10.410 are repealed.

(12) "construction contractor" means a contractor licensed by the State of Alaska to and actively engaged in the ~~work~~ business of constructing, repairing or removing any kind of private or public facility or structure and does not include "contract carriers" authorized to transport commodities in bulk in dump type equipment unless such "contract carrier" is also actively engaged in the ~~work~~ business of constructing, repairing or removing private or public facilities or structures as a licensed contractor.

SB 271

ALASKA CARRIERS ASSOCIATION
327 Barrow Street
Anchorage, Alaska 99501

RE: Changes made under CSSB 271

CSSB 271 updates the Motor Freight Carrier Act to reflect changes made necessary by changes in conditions that have occurred since its passage and last amendment AND corrects deficiencies in the original act that have been discovered through application of its provisions throughout recent years.

The bill also contains changes in the original bill made necessary by mutual need of the Associated General Contractors and the Alaska Carriers Association members. All of which are either beneficial to the general public and/or do not affect them but are conducive to a more efficient and responsive surface transportation industry in Alaska.

Specifically, the individual sections accomplish the following:

Section 1 - Liberalizes the conditions under which construction contractors may perform needed services for themselves with equipment operated by themselves.

Section 2 - Simply makes the section AS 42.10.090 tie in with Section 1.

Section 3 - Establishes for the first time a "public convenience and necessity" provision that guarantees that the Commission will authorize such additional service to the public as it needs from time to time, but prevents them from issuing unneeded operating authorities that would undermine the operational stability of existing carriers.

Section 4 - Makes all filing fees the same since the work effort on such matters is of comparable nature and cost. Some fees are now $25 and would be raised to $50.

Section 5 - Establishes simplified and explicit rules governing the transfer of permits. Provides clearly that permits may be transferred if certain required conditions exist, whereas presently there is no certainty that they may be transferred and this injects instability and lack of incentive to carriers to build better facilities and do other things that would increase their ability to better serve the public. Also, it provides that incorporated carriers must transfer operating authorities in the same manner and under the same conditions as sole proprietorships and partnerships. It further gives to the Commission increased authority to eliminate dormant operating authorities so that the level of service to sparsely

populated areas will meet the needs of those areas. It provides that all claims for loss or damage and all COD money collected will be remitted to the proper parties before transfer will be permitted.

Section 6 - Establishes for the first time a requirement that no common carrier may discontinue or abandon service in areas where operations do not produce a profit unless a showing of fact convinces the Commission that the public interest will be served by such action. It establishes working rules to accomplish proper results in such instances.

Section 7 - Goes further into the matter of adjusting the scope of a carrier's operations so as to cause such scope to coincide with the need of the public for common carrier service. This section implements and assists Section 6.

Section 8 - Establishes increased weight fees to be paid by for-hire carriers and establishes a lower weight fee on private carriers so that such monies will be sufficient to defray the cost of augmenting the staff of the Commission to the point where it will be efficiently operational. It is not now so efficient and the public benefit and stability of the industry urgently requires it. It is anticipated that these increased weight fee taxes will result in considerably more than $100,000.00 more revenue per year being collected to support the operation of the Commission. Recent acquisitions of additional equipment will produce still additional new revenue.

During the First Legislature the air and surface transportation industry agreed to pay these taxes in order to fund the budgets of the Commission even though most states take those monies from their general fund. It is felt that some portion of the budget needs should be borne by the general fund even in view of this special tax because the general public desperately needs an effective ongoing regulatory commission of this nature.

For example, the Commission needs and the regulated industries urge that the following minimal increased staffing be provided the Commission:

(a) At least two (2) hearing officers;

(b) An Executive Director;

(c) A branch office in Fairbanks and in Juneau to more effectively carry out the purposes of this Act.

(d) A second attorney experienced in trying cases;

(e) Support staff.

Section 9 - Establishes the legal ability of the Commission to determine just and reasonable classifications of property (they now only have this authority as to classification of carriers).

Section 10 - Establishes needed clarification as to contract carrier (dump truck) rates being minimum rates.

Section 11 - Establishes procedures under which the Commission may suspend rates, charges, or other provisions it feels may not be justified or in the public interest while it conducts the necessary investigation to determine the facts in the matter. It states the maximum period of suspensions and places the burden of proof of lawfulness and reasonableness on the carrier making the suspended changes.

Section 12 - Provides more clearly that new changes in carriers' tariffs must be placed on public file for at least 30 days unless a proper showing can be made to the Commission justifying a shorter filing period.

Section 13 - Provides that a carrier must abide by the effective provisions of its tariffs and that it is unlawful to charge or collect more or less than the stated tariff charges. This ensures equal treatment to every member of the public.

Section 14 - Provides that all contract carriers shall observe similar rules and conditions placed on common carriers and dump truck carriers by Section 13 hereof.

Section 15 - Gives to the Commission the authority to fix rates at a level it finds to be reasonably compensatory. This section further provides procedures to be followed in arriving at a needed action of this type.

Section 16 - Establishes the right of the Commission to promulgate rules and regulations necessary to carry out the intent of the Act and provides that all acts of the Commission are subject to judicial review. It provides, for the first time, that a violation is a misdemeanor which, upon conviction, is subject to a fine of up to $500.00 plus the costs of prosecution.

This section further provides, for the first time, a civil penalties provision that is to be administered by the Commission itself, with determination of guilt, amount of penalty and the levying thereof by the Commission. It provides that the attorney general will bring action in the courts to collect such penalties as are not promptly paid by the guilty party.

Necessary provisions as to cumulative effect and joinder of action are provided.

Section 17 - Provides liberalized vehicle leasing provisions for the use of construction contractors in leasing vehicles between themselves and further carries out the intent of Section 1 hereof.

Section 18 - Makes a necessary revision to the definition of a "motor vehicle," "rate," and "property" in order to bring needed clarification to the Act so as to enable the Commission to act in clearly defined areas as compared to the vague areas now existing and which cause unnecessarily lengthy and expensive litigation without in fact resulting in clear-cut legal decisions.

In general, I wish to certify that the trucking industry and the Associated General Contractors take the following position regarding this bill:

1. It urges its passage without further change because:

2. The increased taxes are needed to offset needed Commission staff increases;

3. The hearing officer and executive director are needed for effective functioning of the Commission;

4. It is imperative - urgently imperative - that branch offices of the Commission be established in Fairbanks and Juneau due to geographic, population, and existing transportation needs;

5. The technical and legal clarifications and changes are positively needed to permit the Commission to finally commence doing effective regulatory work required under this statute (AS 42.10).

Very sincerely,

Edward R. Sanders
Managing Director

SB-271

Alaska Carriers Association, Inc.

REPLY VIA AIR MAIL

327 BARROW STREET
ANCHORAGE, ALASKA 99501

REFER TO FILE: 4.25

TO: HONORABLE TOM FINK, ET. AL.

FROM: RALPH SANDERS, MANAGING DIRECTOR

RE: CSSB 271

This bill, in the form reported out by the House Judiciary Committee, represents almost two years of intensive effort to overhaul the Motor Freight Carrier Act, AS 42.10, in order that it can more efficiently serve the needs of the people of Alaska. The Act was a good act initially, but not perfect; and many conditions have changed during the recent years of rapid growth of population and economic development. These factors have made some existing provisions outmoded and inadequate and have necessitated the inclusion of additional provisions designed to cover the new methods of shipping, changed traffic flows and different needs of the shipping public and the trucking industry -- both private and for-hire.

Many legislative committees, carrier groups and the Associated General Contractors have worked on this proposed legislation; and all parties are now satisfied that it will answer known problems and will materially increase the ability of the Transportation Commission to do more effectively the work they were intended to do when the legislature first enacted AS 42.10.

Among other things, this bill adds a public convenience and necessity provision for the first time which specifically provides that additional operating authorities will be granted whenever it can be shown that the public convenience and necessity requires it.

The bill clarifies and simplifies the relationship of trucks operated by construction contractors and removes some restrictive provisions that have been objectionable to them.

Under this bill private carriers will pay a $25.00 per year weight fee tax, and the for-hire carriers will pay increased weight fees, increased in amount from 37½ per cent to 50 per cent according to the weight of the vehicle. These increases are agreed to by industry in order to pay for additional staffing of the Commission and branch offices in Fairbanks and Juneau.

The bill establishes clear and greatly improved conditions controlling the transfer of permits from one party to another.

Many other vitally important changes are proposed. For explanation, see attached.

Very sincerely,

Edward R. Sanders
Managing Director

scj

Attachment

ALASKA CARRIERS ASSOCIATION
327 Barrow Street
Anchorage, Alaska 99501

RE: Changes made under CSSB 271

CSSB 271 updates the Motor Freight Carrier Act to reflect changes made necessary by changes in conditions that have occurred since its passage and last amendment AND corrects deficiencies in the original act that have been discovered through application of its provisions throughout recent years.

The bill also contains changes in the original bill made necessary by mutual need of the Associated General Contractors and the Alaska Carriers Association members. All of which are either beneficial to the general public and/or do not affect them but are conducive to a more efficient and responsive surface transportation industry in Alaska.

Specifically, the individual sections accomplish the following:

Section 1 - Liberalizes the conditions under which construction contractors may perform needed services for themselves with equipment operated by themselves.

Section 2 - Simply makes the section AS 42.10.090 tie in with Section 1.

Section 3 - Establishes for the first time a "public convenience and necessity" provision that guarantees that the Commission will authorize such additional service to the public as it needs from time to time, but prevents them from issuing unneeded operating authorities that would undermine the operational stability of existing carriers.

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During the First Legislature the air and surface transportation industry agreed to pay these taxes in order to fund the budgets of the Commission even though most states take those monies from their general fund. It is felt that some portion of the budget needs should be borne by the general fund even in view of this special tax because the general public desperately needs an effective ongoing regulatory commission of this nature.

For example, the Commission needs and the regulated industries urge that the following minimal increased staffing be provided the Commission:

(a) At least two (2) hearing officers;

(b) An Executive Director;

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(d) A second attorney experienced in trying cases;

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Section 15 - Gives to the Commission the authority to fix rates at a level it finds to be reasonably compensatory. This section further provides procedures to be followed in arriving at a needed action of this type.

Section 16 - Establishes the right of the Commission to promulgate rules and regulations necessary to carry out the intent of the Act and provides that all acts of the Commission are subject to judicial review. It provides, for the first time, that a violation is a misdemeanor which, upon conviction, is subject to a fine of up to $500.00 plus the costs of prosecution.

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Necessary provisions as to cumulative effect and joinder of action are provided.

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1. It urges its passage without further change because:

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4. It is imperative - urgently imperative - that branch offices of the Commission be established in Fairbanks and Juneau due to geographic, population, and existing transportation needs;

5. The technical and legal clarifications and changes are positively needed to permit the Commission to finally commence doing effective regulatory work required under this statute (AS 42.10).

Very sincerely,

Edward R. Sanders
Managing Director

sb-271

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF COMMERCE

ALASKA TRANSPORTATION COMMISSION

750 MACKAY BUILDING
338 DENALI STREET—ANCHORAGE 99501

April 13, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
State Capitol Building
Juneau, Alaska 99801

Dear Chairman Jackson:

I regret that I am unable to appear before the House Judiciary Committee to give further testimony on CSSB 271. We still have a number of things to be accomplished in completing the preparation of our Direct Exhibits for the CAB ALASKA SERVICE INVESTIGATION. I want you to know, however, that I certainly appreciate the invitation to discuss this Bill with your Committee.

Perhaps it will suffice this time if I offer my comments in writing on Section 3 of the Bill which Section, I understand, is the subject of a proposed amendment.

In essence, Section 3 would require that an applicant for new operating authority must show to the satisfaction of the Commission that the public convenience and necessity require such new authority. This provision is roughly the same as that presently in the Air Commerce Act of 1960 (AS 02.05.080(a)(2)), and in the Bus ACT (Sec. 42.15.061(b)). This is also the standard type of provision found in nearly every other State and Federal Statute providing for certification in transportation and utilities.

I know of no regulatory act in the United States which places the burden of proof in certification on the regulatory agency. To do so in this instance would place an unworkable burden on the Alaska Transportation Commission.

It is my understanding that there is a proposal to make such an amendment to Section 3 of the Bill. If my understanding of the amendment is correct it would, in effect, automatically grant an operating permit to every applicant unless the Commission were able to prove that the public convenience and necessity would not support another operating authority. This approach would completely subvert the primary objectives of transportation regulation. Apparently there is a misconception as to what those objectives are.

It is my guess that the proposed amendment is offered with the idea that transportation regulation is analogous to the regulation of a profession such as licensing Doctors, Optometrists, et cetera. The two types of licensing however are not analogous. The basic purpose for licensing Doctors, Optometrists, et cetera, is for the protection of the health and welfare of the public who must use those services. However, with the regulation of transportation, the basic objective is to establish an adequate, strong, and economically healthy transportation industry which is available to serve the public needs at all times (winter as well as summer) and at a reasonable price.

It was proven over half a century ago that unrestricted entry into the field of transportation is the best possible way to create a complete monoply with resultant high prices and poor service to the public.

If the public convenience and necessity does require a new operator for adequate service, this factor is not too difficult for the applicant to prove. However, if the Statute in effect gives the applicant the right to have a permit, unless the Commission can prove that the public convenience and necessity does not require it, it would mean that the Commission would have to show that every single demand by every single shipper and every single consignee for motor freight service was being reasonably and expeditiously handled by existing carriers. The Commission could not do this even if it had 10 times the staff and 10 times the budget that it now has. The end result would be unrestricted entry by every applicant for whatever authority he may choose to apply.

I apologize for the haste in which these comments were prepared. I hope that they answer some of the questions concerning Sec. 3 of the Bill.

Again I wish to express the appreciation of the Commission for the opportunity to communicate with your Committee on this Bill.

Sincerely yours,

George Benesch

George Benesch
Commissioner

4/16/70

HOUSE JOURNAL

Judiciary Committee Report

on

HCS for CS for SENATE BILL NO. 271

This bill, originally introduced at the request of the governor, proposes several changes in the Alaska Motor Freight Carrier Act which Ralph Sanders, lobbyist for the Alaska Carriers Association, states are all "either beneficial to the general public and/or do not affect them but are conducive to a more efficient and responsive surface transportation industry in Alaska." The Judiciary Committee amendments are intended to make clear that motor vehicles operated by a construction contractor are exempt from regulation by the Alaska Transportation Commission and that the contractor may rent out his motor vehicles when he is not actually "working" on a construction job, but is still actively engaged in the construction business. It is also the understanding of the committee that dump trucks which are used to haul their owner's material either for his own purposes or under a sales contract are exempt from ATC regulation.

Barry W. Jackson
Chairman
House Judiciary Committee

SB 297

Comments Of
Alaska Legal Services Corporation
In Support of S.B. 297

This proposal was originally drafted by Alaska Legal Services attorneys and jointly introduced by Senators Josephson, Begich, Miller, Brad Phillips, and Rader. (S.B. 297) It passed the Senate April 7, 1969, with one dissenting vote, and has been referred to the State Affairs and Judiciary Committees of the House.

The State Commission for Human Rights exercises jurisdiction over all violations of existing State anti-discrimination laws. Specifically, its jurisdiction relates to discrimination in employment, whether by an employer, labor organization or employment agency; places of public accomodation; housing; financial practices; and state operations. (A.S. 18.80.210-255). Primary enforcement responsibility is vested in the State Commission for Human Rights. (A.S. 18.80.010 et seq.) The Commission, upon the receipt of a complaint from an aggrieved individual or upon its own motion (A.S. 18.80.100) may initiate informal proceedings to achieve conciliation (A.S. 18.80.110) and, if appropriate, issue a cease and desist order against the action and individual or firm as to whose action the hearing was conducted. (A.S. 18.80.120-130). In such proceedings

the Commission, and not the complainant, would exercise control of the presentation. The complainant or the respondent may seek judicial review of the Commission's action (A.S. 18.80.135(a)). Enforcement of the cease and desist order may be judicially obtained, but only at the instance of the Commission (A.S. 18.80.135(b)). In addition to the above, enforcement may be had through criminal prosecution of a person who engages in action prohibited by the substantive provisions of the anti-discrimination laws. (A.S. 18.80.270).

As provisions are now written, it is unclear whether an individual is required to resort to the Commission for Human Rights for relief from discriminatory conduct, or if he is free to seek redress directly through the courts. A second problem is that the terms of the present act do not indicate that relief may be sought as a member of a class, or that the Commission may act against a pattern of discrimination within an industry, labor union, etc., rather than merely dealing with individual instances of discrimination.

The proposed addition specifically states that the Superior Courts of Alaska shall have jurisdiction over causes of action arising under the Alaska discrimination laws, including any collateral issues which are a part of the discriminatory conduct complained of. This would include a pattern of discrimination which might otherwise not be cured if the issues were limited to specific discriminatory acts. For example, an individual who instituted an action against a company to redress racial discrimination would be able to maintain a class action and obtain relief as to all members

of his class, including those who work in a different department.

It further provides for notification to the Commission whenever such a suit is filed, and that the Commission may either intervene in the suit as a party, or inform the Court that it is already acting on the discriminatory act giving rise to the lawsuit. In case of the latter, the court will defer action on the suit until the Commission has determined the issues before it. A limitation of forty-five days in this case is included to ensure the prompt settlement of these issues. The act empowers the Court to enter a preliminary injunction pending Commission action.

If the plaintiff's lawsuit is deferred to Commission action, the plaintiff is given the status of an "aggrieved" party in the event of an adverse decision so as to authorize his participation in or prosecution of an appeal from the Commission's order.

These amendments will serve three basic functions:

(1) an individual will be free to pursue his own remedies rather than rely upon Commission action in cases where the Commission is unable to give his problem prompt attention;

(2) class actions directed at patterns or practices will be permitted, rather than requiring enforcement to focus on individual or isolated acts; and

(3) the Commission's enforcement powers will be strengthened by the power to intervene in broad scale attacks upon discrimination.

We believe these amendments to be doubly important because of the limited staff and budget with which the Commission is currently required to operate.

This proposal was unanimously endorsed by the Board of Directors of Alaska Legal Services Corporation with the stipulation that a provision be added setting a nominal damage figure at $250. This could be accomplished by adding a sentence at the end of Section 18.80.340 as follows:

> Upon a judgment for the plaintiff in a case brought under this chapter, the court shall award nominal damages of $250.00 unless actual damages exceeding that amount have been established.

Dlvr. to Jackson

A M E N D M E N T

IN THE HOUSE BY

TO: CSSB 303 am

Page 3, Line 18:

Change "the" to "and".

Page 4, Line 13:

Add: ~~[illegible]~~

"(e) No person or public agency may undertake a project as described in (a)(5) of this section without the approval of the commission.

"Sec. 44.29.180. INJUNCTION. If it appears that a person or public agency is violating or threatening to violate a provision of sec~~s~~. ~~180~~ 170 of this chapter or a regulation or order of the commission, the commission shall bring an action against that person or agency in the superior court in the judicial district where the violation occurs or is threatened, to restrain the person or agency from continuing the violation or from carrying out the threat of violation. In the action, the court has jurisdiction to grant to the commission, without bond or other undertaking, such prohibitory ~~and~~ and mandatory injunctions as the facts warrant.

"Sec. 44.29.190. PENALTIES. (a) A person who violates a provision of sec. 170 of this chapter or a regulation or order of the commission is, upon conviction, punishable by a fine of not more than $10,000 or by imprisonment for not more than one year or by both.

(b) In an action brought under sec. 180 of this chapter, if the court finds that a person/or agency has violated a provision of sec. 170 of this chapter or a regulation or order of the commission, the commission, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than $10,000 per violation. Each day of a continuing violation is considered a separate violation.

(c) A person/who or agency which violates the terms of an injunction or restraining order issued under sec. 180 of this chapter

shall forfeit and pay to the general fund of the state a civil penalty of not more than $25,000 per violation. Each day of a continuing violation is considered a separate violation. ~~Except as provided in subsection (c) of this section, the~~ The commission may petition for the recovery of the penalties.

(d) The penalties in this section are cumulative, not exclusive. The payment of a penalty does not relieve a person on whom the penalty is imposed from liability to any other person for damages arising out of the violation."

Page 2, Line 13; Page 3, Lines 17, 19, & 20: Change "170" to read "190".

SB 311

Judiciary Committee Report

on

House Committee Substitute for Senate Bill 311

The bill limits the basis upon which an insurance company may cancel an automobile insurance contract. The limitation applies between the sixty-first day and the end of the twelve-month policy period. An insurance company would be allowed to cancel within the first sixty days for any reason at all.

Between the sixtieth day and the end of the twelve months, the insurance company could cancel only for non-payment of premium or for suspension of a driver's license.

The limitation of cancellation of an insurance policy under this bill does not apply to renewal of an auto insurance policy unless the renewal comes within the twelve-month period of original issuance. If the insurance company does not wish to renew beyond the twelfth month, it has the obligation of giving notice of its intention not to renew.

The bill further provides that background and character information given on an insured has limited protection from libel; i.e., that a libel action could not be successful unless the source intentionally gave false information or was grossly negligent in determining the veracity of the information.

Barry Jackson
Chairman
House Judiciary Committee

TF:deh

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

SB-336

File
Judges salary
bill

Supreme Court
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR
941 4TH AVENUE, ROOM 309
ANCHORAGE, ALASKA

February 13, 1970

The Honorable Barry W. Jackson
Alaska House of Representatives
Pouch V, State Capitol
Juneau, Alaska 99801

Dear Representative Jackson:

On January 29, 1970, I accompanied the Alaska Judicial Council on its appearance before the joint meeting of the Senate and House Judiciary and Finance Committees. The meeting was not too well attended, and while most of the programs were well received, the meeting was marked by criticisms and obvious misunderstandings by some of the membership. Since that time, I have come to the conclusion that the most important points of that program may well be in jeopardy.

We would all agree that the Alaska Court System is not perfect, and should never be immune from criticism. However, I do feel that most of the criticism of the Judges made during the presentation for increased salaries was not only unjustified, but irrelevant. I say this, not in defense of our Judges. If we do have Judges who do not measure up, they will no doubt come before the Judicial Qualifications Commission. This Commission has not been in existence long enough to make its impact felt. However, every indication is that it stands ready, willing and <u>able</u> to do its job.

The point I wish to stress in this letter is as follows:

Currently there are four vacancies among the tenure judge positions of the District Court which badly need filling.

In November the Judicial Council failed to receive enough applications to nominate a single one to the Governor.

In the Superior Court there must be added four additional Judges if we are to avoid a chaotic condition resulting from the tremendous increase in the caseload. In this respect, it now takes over two years to get a personal injury case to trial in Anchorage, despite all of the streamlining of the process which we have been able to do.

In addition, the Chief Justice has heretofore indicated his intent to retire sometime this year.

It therefore appears that during this calendar year there may be nine new Judges added to the Courts. It is in this vein that I feel the question of salary increases is critical.

During the joint meeting on January 29, certain members of the Committees pointed out some of the low salaries of Judges in states such as Texas. Regardless of the accuracy of the figures presented, they wholly missed the point. The relevant point is: "What are good Alaska lawyers, who would make good Judges in Alaska, making?" I do not have to ask this question of you, as you know the answer. I do feel that we need your assistance in convincing the non-lawyer members of the Legislature of the urgent necessity of a general and substantial salary increase for all levels of the Court in this session.

If there was ever a time, since Statehood, that a single legislative session had a greater opportunity to improve the caliber of Judges in Alaska Courts, it is this session, at this time. I cannot conceive of a time in the future when more new Judges will or should be going on the bench.

Not to act will no doubt result in lesser qualified applicants for these positions, which, if not provided, could well create a "log jam" from which it would take years to clear.

Both the Judicial Council and the Alaska Court System unanimously support the idea of a salary commission. It will, no doubt, eliminate what has been an annual fight for money. However, the idea of a salary commission is to keep salaries at a fair and just level, in keeping with the times and the change in the economy. It is ill suited as an instrumentality to bring

about adequate salaries from the present low level. In my opinion, it is the responsibility of the Legislature to start this commission out with adequate salaries, leaving only future adjustments to the commission.

I have written this letter to you and other lawyer members of the Legislature in an attempt to convey to you what I feel to be a critical issue -- one which always seems to "lose its way" in committee meetings.

Your help in this matter would be sincerely appreciated, and I sincerely believe that the State of Alaska will profit from any progress in this area.

Sincerely,

Robert H. Reynolds

Robert H. Reynolds
Administrative Director

RHR/grg



District Court

State of Alaska

FOURTH JUDICIAL DISTRICT
604 BARNETTE STREET, ROOM 313
FAIRBANKS, ALASKA
99701

January 16, 1970

The Honorable Barry W. Jackson, Chairman,
and Members of the House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Mr. Jackson:

Enclosed for your information is a copy of a story which appeared in the Fairbanks Daily News-Miner on January 13, 1970, concerning district court judges' salaries. Your committee is to be commended for having called for the bill so early in the session, but the proposed $24,000 salary for district court judges is not adequate, and someone's suggested "compromise" at $22,000 will not produce any more qualified applicants for the vacant district judgeships than the present $19,000 did.

This will be a rather long letter. I suspect that few legislators have enough contact with the district court to know why there is great disenchantment among the district judges, and inability of the court system to obtain applicants for vacancies. Salaries are only one of many reasons.

The district court at this moment is neither fish, flesh, nor fowl. There are sixteen positions on the court. Four are vacant, four are held by persons unable to pass the state bar examination (but having "grandfather rights"), and eight are held by lawyers of varying ability and experience.

There are two schools of thought on inferior courts: one, that justice of the peace courts, staffed by persons having no legal training or experience but hopefully possessed of good common sense, are adequate; the other, that the inferior court must really be a court, staffed by professionally competent and experienced people.

I thought that Alaska had chosen to establish a real court, not a justice of the peace system. Professional qualifications were established, the state's careful selection process was made applicable, the judges were given tenure, and for a time salaries seemed to be moving toward respectability. Promises were made that other steps would be taken to lend prestige to the office.

But in the two years I have held office, the purchasing power of my salary has declined despite a dollar increase of $1,500 (from $17,500 to $19,000). A superior court law clerk, wet behind the ears but admitted to the Alaska bar, earns $22 more in his first six months than a district court judge who has held office since the court was established. The gap increases as the law clerk goes through the steps and ranges of the state employees' pay schedule. A young man, not even admitted to the Alaska bar has started work as a district attorney at $21,000 a year in Fairbanks. He too will receive regular step and range increases. The salaries of the young attorneys who are public defenders are somewhat higher than those of the assistant district attorneys. All of this public employment for attorneys is compensated on the statutory schedule which makes allowance for the higher cost of living in the northern part of the State, and provides for regular increases. Even at these salaries there is a constant turnover in the district attorney's office. The man having the greatest seniority in the Fairbanks office has been here six or seven months and is not yet admitted to the Bar, although he soon will be. District court judges receive lower pay, have no periodic increases in their salaries, and cost of living differentials are ignored.

Twenty-one states pay their inferior court judges more dollars than Alaska does; ten additional states pay more in purchasing power, computed at the Anchorage, nct Fairbanks, cost of living index. Their retirement programs are comparable to Alaska's.

Assorted non-judicial functions are dumped on us, largely because they were dumped on the old U. S. Commissioner, ex-officio justice of the peace, and what-have-you. We are coroners, recorders, and warehousemen of the effects of the dead (you should see our collection of lynx pelts, old rusty guns, and useless clothing). I thought Alaska long since recognized that its Territorial judiciary was grossly unsatisfactory, but many of the evils of the U. S. Commissioner persist.

District court judges do not receive transportation or per diem to attend state bar meetings, but all other Alaska judges do. We have no libraries, our clerical staffs are limited for the tremendous volume of paper work that must be done (compare the number of cases disposed of by the district court with those disposed of in the superior court, and remember that a judgment must be typed and signed in each case). Our equipment is limited- -I mean typewriters, dictating equipment, and other basic office tools. We have no secretaries. The judges have no telephone lines, and those in the clerks' office are overloaded. Our clerks' quarters are arranged as inefficiently as is conceivalbe- -the architect had no notion of what a district court does. Our jury room is loaded with old closed files in disintegrating file cabinets, and we have no other place to put them. Our state clerks transfer to other state offices, where they are given pay ranges one, two, or three grades higher than we are permitted to give them.

We are nominally part of an integrated court system, but some of our clerks are directly employed by the City of Fairbanks, and owe their loyalty not to the court system, or the State, but the City. There is inter-office jealousy and resentment about differences in salaries, leave policies, insurance and the like between "city" and "state" clerks. These girls, with spearate employers, work in the same room, doing identical work.

We are forbidden, as no other Alaska judge is, to engage in any profit making venture of any sort. (Compare 22.10.180, AS to 22.15.219, AS.) At the same time, we are commanded by Supreme Court Rule, and authorized by statute to act as U. S. Commissioners. One judge here receives fees for this work, and the State subsidizes the federal government through free use of State court facilities, clerks, and the time of the judges who, although not Commissioners themselves, cover for those who are. (See 22.10.180 AS, and Rule 42, Rules of Administration. This was a sensible transition measure, but transition days are over.)

Probate and juvenile jurisdiction have been taken away from us. Forcible entry and detainer jurisdiction has been reduced to cases in which the value of the property is $3,000 or less (there is no such rental property in Alaska). We have no greater dollar jurisdiction than the non-professional U. S. Commissioner had.

District court is in session every day of the year. In Fairbanks, this means that for each judge every third weekend is lost. We must stay close to the telephone all weekend for search warrants and this is true 24 hours of every third week, when each judge is "on duty". There should be some compensating attractions in the position, but there are none.

The result of all this is that the professionally qualified district court judges are bitterly dissatisfied. The lack of applicants for the four empty seats shows that the Bar shares our feeling. There must be changes- -either a very substantial improvement in the status of the court, or a retreat to the old, nationally discredited justice of the peace system. While there have always been some good J. P.s, there has always been a heavy preponderance of terrible ones.

If we are to resort to J.P. "justice", it is my belief that the J.P. criminal jurisdiction should be limited to cases where only a fine can be imposed, and the civil jurisdiction should be held to the present $500 small claims limit. More serious criminal and civil cases should be filed in the superior court, which already has jurisdiction, and the superior court would have, of course, to be substantially enlarged. The people of this state are entitled to a

competent judiciary on all levels, and there is no question now of the State's ability to provide it. The Legislature must decide which route to take. Until now, it has not quite made up its mind.

The question immediately before you is that of salaries. Remember that the American Bar Association recommends that the salaries of the district and superior courts be identical, recognizing that the nature of the work of the two is quite different but the legal skills and general ability of the judges of both court levels must be equal if a state is to have a good judiciary.

The Alaska Judicial Council has recommended district court salaries of $29,000 or $30,000. The Alaska Bar Association has approved the recommendation.

Two professionally qualified district court judges quit last year. One professionally qualified acting judge quit. More resignations will occur unless salaries are very substantially increased and other frustrating and insulting aspects of the position changed. No superior court judge has resigned. No supreme court justice has resigned for reasons such as those outlined in this letter. There has never been a scarcity of applicants for either superior court or supreme court positions. District court positions are now going begging, and the same was true in the fall of 1968, when the judges went through selection process of the Judicial Council and gubernatorial appointment. It is time for the Legislature to be seriously concerned about the district courts.

This letter seems unreasonably long, but I believe a recital of some of the specifics will help you understand, as nothing else can, why it is imperative that salaries be very substantially increased.

Yours very truly,

Mary Alice Miller

Mary Alice Miller
District Court Judge

MAM/ms
encl.
cc: Tom Fink, Vice Chairman
Eugene V. Miller
Earl D. Hillstrand
Wendell P. Kay
Irwin L. Metcalf
Stanley P. Cornelius
Mildred H. Banfield
Jess Harris

JUDICIARY COMMITTEE REPORT

ON

CS SENATE BILL NO. 336

This bill would increase the maximum salary payable to a judge of the district court from $19,000 to $24,000.

The committee feels that immediate action is necessary to bring the district court more in line with the salaries now paid to judges of the supreme and superior courts. The district court, in view of the qualifications required and the extensive duties, is drastically underpaid. Great difficulty ensues in obtaining qualified applicants for the court; there are now four vacancies which have existed for a long time. As it is now, the court is unattractive, as a young lawyer can do better financially in the district attorney's office, office of public defender, in private practice, or in municipal legal work.

Twenty-one states now pay their inferior court judges more than Alaska; ten additional states pay more in terms of dollar purchasing power. The American Bar Association recommends that the salaries of district and superior courts be identical, recognizing that considerable legal skill and general ability is required at the inferior court level where the public most often meets the law. Both the Alaska Judicial Council and the Alaska Bar Association have recommended district court salaries of $29,000.

Barry W. Jackson, Chairman

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

3/31/70

Prepared by Bill Spear in A.N.'s office

HOUSE JOURNAL

Judiciary Committee Report

on

HCSCS for SENATE BILL NO. 352 am

This bill, based on legislation developed in large part by the Federal Trade Commission, is designed to meet the increasing need in Alaska for the protection of consumers as well as honest businessmen from the depredations of those persons employing unfair or deceptive trade practices. Similar legislation has been recently enacted in many states and is being considered in many more because of the recognition that mass advertising, distribution, merchandising, and other modern business techniques have rendered the present law, where it exists at all, ineffective to afford any real protection to the consumers. In addition to these modern developments, which make fraud so much easier to perpetrate, the consuming public itself has changed radically since the common law principles were developed that are at the base of the substantive law of the marketplace today. This bill recognizes that, in addition to providing a remedy for individual damage, that consumers, to some extent, must be protected as a group against injury by fraud, since it is often extremely impractical from a financial standpoint for most injured consumers to protect themselves as individuals.

Thirteen specific types of deceptive trade practices are enumerated. In addition, the attorney general is granted the power to promulgate regulations to further define and specify their scope. Together these features provide an extensive range of protection to the consumer while clearly defining for the businessman, who must operate under them, what conduct is or is not prohibited. Thus, the bill avoids much of the vagueness that has plagued earlier attempts at trade regulation. In addition to the enumerated prohibitions, the bill would make certain consumer paper nonnegotiable within the meaning of the Uniform Commercial Code. The purpose of this provision is to correct the present injustice of permitting the transferee of consumer paper to cut off the defenses of the consumer when the paper is taken from the original seller. This section corrects the abuses of the holder-in-due-course doctrine by requiring the financial institutions who are in the practice of purchasing such paper to examine more closely the persons who are seeking to negotiate the paper.

One of the outstanding features of the bill is the inclusion of a range of remedies, both public and private, civil and criminal, which lend the essential flexibility of enforcement to the bill which is required where violations may range from very minor transgressions to large scale, calculated swindles. The attorney general is established as the primary enforcement officer and is granted investigatory and subpoena powers, limited by certain procedural protections, to deal quickly and effectively with fraudulent practitioners. These powers were included by the committee in this version of the bill because of the feeling of some members that the additional investigatory power would be essential in

cases where fly-by-night operations were involved and that in other cases a thorough preliminary investigation would lead to fewer actual litigations. Provision is made for the enforcement officer to seek an injunction against unlawful practices, the violation of which could incur a civil penalty, and to accept an assurance of voluntary compliance with respect to any unlawful practice; he is empowered in a proper case to bring a criminal action with fines up to $10,000 or imprisonment for not more than one year. The bill also provides for a civil action on behalf of the state with a civil penalty of $5,000.

In addition to the public remedies, the bill provides for private remedies as well. Private remedies have the advantage not only of providing additional discovery of unfair trade practices since they are often more visible to the consumer than to an enforcement agent, but they also seek to reimburse the parties actually damaged rather than merely putting an end to the practice. The most controversial issue in the area of private remedies was the inclusion of the class action. It was felt by witnesses and some committee members that provision for the class action would tend to subject legitimate businessmen to undue harassment from unscrupulous plaintiffs and their attorneys who could use the threat of a class action as a club for a favorable settlement of an unjust claim. Others considered that the inclusion of the class action was necessary to the effective operation of any consumer protection law and noted its near unanimous acceptance by other state statutes and proposed drafts of similar legislation. A compromise was reached in which the class action was included in the bill, but in order for the action to be filed it must first be investigated and approved by the attorney general. It was felt that by placing a public official between the filing of an action and the alleged act, many or all of the actions lacking in merit would be weeded out.

Two features which have been found very successful in other state laws of this nature have been included here: a provision for treble damages and a $200 minimum recovery in individual actions. These features recognize that the average transaction involving a consumer fraud are generally so small as to prevent all but the most outraged consumer who can afford the expense of a law suit, from bringing an action. These provisions, though originally applicable to all private actions, were amended to be unavailable in the class action. The provision for treble damages is one of long standing in consumer matters and operates to deter fraudulent practices, encourage injured parties to come forward and bring suit, and to reasonably compensate those individuals for their trouble in bringing the suit. The $200 minimum recovery has the same effect. The bill was amended, however, to limit a treble damage recovery only to cases where the plaintiff could prove willful violation of the prohibitions, thus putting the plaintiff on a standard of proof similar to a criminal action. Provision is also made for the award of reasonable attorney fees to a successful plaintiff.

It is felt that adoption of this bill will provide Alaska with a consumer protection law which can adequately deal with the many and complex problems involved in a rapidly expanding economy and insure the preservation of business decency in the state and equity for our consumer citizens of whatever economic status.

Barry W. Jackson

Barry W. Jackson
Chairman
House Judiciary Committee

6/4/70

FREE CONFERENCE COMMITTEE REPORT
ON
FCCS 2d HCS CSSB 352

The need for and the application of this bill are discussed in the House Judiciary Committee report in House Journal Supplement No. 10 (March 31, 1970). The major differences between 2d HCS CSSB 352 am H and the Free Conference Committee substitute are that the following sections, as designated in 2d HCS CSSB 352 am H, are deleted:

AS 45.50.471(b) -- evidence of unlawful act as prima facie evidence of intent to injure competitors;

AS 45.50.501. POWER OF ATTORNEY GENERAL. -- investigatory power;

AS 45.50.511. SUBPOENAS; HEARING. -- attorney general;

AS 45.50.521. REMEDIES. -- failure to cooperate with attorney general investigation;

AS 45.50.531(b) -- temporary restraining orders without bond;

AS 45.50.571. POWERS OF RECEIVER;

AS 45.50.591. LIABILITY FOR ACTIONS OF EMPLOYEE;

AS 45.50.621. FORFEITURE OF CORPORATE FRANCHISE.

In addition, the second sentence of AS 45.50.561, ADDITIONAL PUBLIC RELIEF, (as designated in 2d HCS CSSB 352 am H) was deleted, and its first sentence was made (b) of AS 45.50.501 (as designated in the FCCS). The following sections (as designated in the FCCS) were changed as indicated:

AS 45.50.491. REGULATIONS. -- instead of the attorney general, the commissioner of commerce is given regulation-adopting authority;

AS 45.50.501. RESTRAINING PROHIBITED ACTS. -- In (a) the venue is broadened for bringing actions to enjoin prohibited acts;

AS 45.50.511. ASSURANCES OF VOLUNTARY COMPLIANCE. -- the number of proper judicial districts where such an assurance is to be filed is increased;

AS 45.50.531. PRIVATE AND CLASS ACTIONS. -- in (a) a provision is added allowing the jury to decide the award of treble damages; in (b) a provision is added requiring the plaintiff in a class action to post bond; in (f) the time limitation in which an action is to be commenced

is amended by adding a "reasonably should have discovered" clause;

AS 45.50.551(c) -- the criminal penalty of imprisonment is deleted, leaving only a fine.

It is the understanding of the committee that the phrase "installment sale" in AS 45.50.471(13) in the bill refers to installment sales contracts and transactions as defined in AS 45.10.220(9) + (10), respectively.

4/27/70

A M E N D M E N T

TO: 2d HCS CSSB 352 am H

Page 8, Line 26:

After the period, add: "Also, in an action brought under this subsection, the court may in its discretion require the plaintiff to post bond sufficient to cover costs and attorney fees which may be awarded under (g) of this section."

SB352

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

March 19, 1970

M E M O R A N D U M

TO: Barry W. Jackson, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson AHP
Revisor of Statutes

SUBJECT: HCSCSSB 352 (consumer protection)

In preparing this committee substitute, H.B. 446 (the governor's consumer protection bill) was used as the basic bill. In addition to correcting citations throughout, and making minor style changes (e.g., page 1, line 9), the following changes were made:

(1) Sections 501 - 521 (investigatory powers of the attorney general) and 551 (confidentiality of information) were taken from HB 444 (the Legislative Council's consumer protection bill);

(2) Section 581(f) adds a time limitation provision applicable only to the private and class actions; such a limitation doesn't seem appropriate to the injunction section (531), or to the civil penalties relating to injunctions (section 611(a) and (b)), and the criminal action (under section 611(c)) would seem to be adequately covered by AS 12.10.010 and 12.10.020(a); a careful reading of this time limitation is suggested;

(3) Section 481(a)(13), 481(b) and 481(c) are relatively minor but possibly helpful provisions taken from HB 444;

(4) Section 591 (liability for actions of employee) was taken from CSSB 352 am; perhaps it should be limited to civil liability.

The committee may also wish to consider the following matters:

(A) In section 471(a)(5), "seconds" as defined in section 631(4) doesn't seem to fit; "seconds" can be "original" or "new";

(B) In section 631(5) "trade" and "commerce" are defined; however, I believe that the only place that "trade" is used is on page 1, line 11 and page 3, line 7, and it's used in a way that probably doesn't require a definition; I don't find "commerce" used anywhere in the bill;

in addition, the meaning of the last clause of that definition is unclear;

(C) Existing AS 45.75.220 and AS 45.80 deal, respectively, with misleading packaging and the deceptive advertising and sale of civil defense aids; amendment or repeal of these provisions may be appropriate;

(D) It may or may not be appropriate to include the following provisions which appear in HB 444: proposed AS 45.-90.020(a)(3) (exemption of actions or appeals pending on the effective date of this Act); proposed AS 45.90.-020(b) (exemption of certain trademarks, etc.);

(E) It may be appropriate to include proposed AS 45.50.530(b) and (c) (regarding the effect of violating an injunction or voluntary assurance) which appear in SB 352;

(F) In the phrase "methods, acts or practices" which appears many places in the bill, "methods" probably should be deleted because it doesn't add anything to the phrase and in many other places in the bill, including the basic AS 45.50.471, the phrase does not include it;

(G) On page 5, line 22 1/2, after the "of" the following should be inserted: "secs. 471 - 631 of".

AP:ic

File
Xerox copies
for all members
for 12 Mar

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

March 10, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Juneau, Alaska 99801

Dear Representative Jackson:

This is in response to the request of the Vice-Chairman of your committee, Mr. Fink, for clarification of certain issues raised with regard to the sections of HB 446 and CSSB 352 which would have the effect of suspending the holder-in-due-course doctrine, now provided for in the Uniform Commercial Code, where consumer paper is sought to be negotiated.

Section 45.50.550 of proposed House Bill 446 makes any instrument entered into between a retail buyer and seller a non-negotiable instrument within the meaning of the UCC (AS 45.05). Paragraph (b) provides that an assignee of the seller is subject to all claims and defenses of the buyer and the buyer may not agree to limit his rights.

This section is intended to modify AS 45.05.726 which provides:

> Subject to a statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee a claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith, and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under §§ 246 - 402 of this chapter. A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

Under the current practice, when a negotiable instrument and a security agreement are executed by a retail buyer, under the provisions of AS 45.05.726, the buyer by executing the negotiable instrument agrees not to assert any defenses against an assignee of the paper except defenses which could be asserted against a holder in due course. In effect, the assignee becomes a holder in due course and the buyer may not assert against the assignee defenses which he would have available in an action by the seller. Proposed AS 45.50.550 removes the holder in due course protection of the assignee thus allowing the buyer to assert any defenses against an assignee which he could assert against the seller of the merchandise.

Under trade practices an assignee among others could consist of finance companies, small loan companies and state and national banks. There is no statutory conflict under state law which proposed AS 45.50.550 would affect as to any of the various types of assignees. Nor is there any statutory conflict under Federal Law, which would adversely affect national banks in the event proposed House Bill 446 was adopted.

National banks are authorized to purchase installment consumer paper. 12 U.S.C.A. § 84 sets forth the limits of liability of any person to a national bank. Paragraph 13 provides that as to full recourse negotiable or non-negotiable installment consumer paper the bank is subject to a limitation of 25% of its capital and surplus. However, this section goes on to provide if the bank certifies it has evaluated the responsibility of the purchaser of merchandise and is relying primarily on him for payment the 25% limitation is transferred from the seller of the paper to the maker.

For example, if a bank were purchasing negotiable or non-negotiable recourse consumer paper from an automobile dealer it would be limited in the amount that it could purchase to 25% of its capital and surplus. However, if the bank evaluates the responsibility of the buyer of the automobile and certifies that it is relying primarily upon him for payment that paper is not considered in the 25% limitation applicable to the dealer.

The section refers to both negotiable and non-negotiable consumer paper. The provision for certification is not limited to negotiable paper but also includes non-negotiable paper. Therefore, a statute which made all such paper non-negotiable would not change the authorization or the practice which national banks have been following.

It does, of course, because it removes a bank from the protection of a holder in due course, requires it to be a little more circumspect in purchasing paper because of the requirement of evaluating the responsibility of the buyer and certifying that the bank is relying primarily on him for payment. Or in the words of the comptroller of national banks: "What is required essentially is the responsible exercise of prudent banking judgment supported by a reasonably adequate record." (Comptroller's Manual for National Banks, May 1968, Sec. 1620(e).

Several states including California and Massachusetts have adopted legislation such as HB 446 without any noticeable effect on banks. Congress in 1959 when considering 12 U.S.C.A. § 84(13) acknowledged the necessity of including non-negotiable paper in paragraph (13) because various state laws had been enacted limiting the negotiability of consumer paper. Thus it was stated in Senate Report (No. 731) on the amendment:

> Furthermore, there has been a trend in recent years for the various States to protect consumers by adopting retail installment sales acts which specify the form which obligations covering consumer installment purchases shall take. The form prescribed is almost always nonnegotiable, and in at least some of these States the law prevents the seller of goods from taking a negotiable note in addition to the form of obligation prescribed by statute. In these States banks engaged in this type of financing must take nonnegotiable paper. (U.S. Code Congressional and Administrative News, Vol. 2, 86 Congress, First Session, page 2305.)

For the foregoing reasons, it is the opinion of this office that enactment of the sections on non-negotiability of consumer paper will not have any noticeable effect upon legitimate and good faith commercial transactions. On the other hand, passage of the measure will accomplish a substantial benefit to Alaska's consumers as was explained in our previous memorandum, (See letter to Hon. Tom Fink, Feb. 9, 1970 pp. 3-6) by requiring the purchasers of consumer paper to be more selective in choosing businesses from whom they purchase paper and in policing the activities of the businesses with whom they do choose to deal.

It may be appropriate here to discuss one further point concerning the various approaches to the provision in question. The language of the provisions in HB 446 and CSSB 352 are quite similar to the draft developed by the Committee on State Legislation. (See Suggested State Legislation 1970, The Council of State Governments.) In drafting the provisions both alternatives of the UCCC (SB 211) on the subject were considered but found to be less acceptable than the language of the present bills. SB 211 chose alternative "A" of the UCCC which provides that the rights of the consumer can only be asserted as a matter of defense to or set-off against a claim by the holder of the paper. Under that provision then the consumer has no rights unless the holder sues the consumer. In the commentary on the language here it was stated:

> This would allow continuation of threats to, and impairment of, a consumer's credit rating which result from harassing collection tactics sometimes used without any actual litigation being undertaken against the consumer. (p. 5 of Reprint)

Thus it is felt that though the effect of either approach is aimed at the same problem the legislation under consideration here is superior to that of the UCCC.

I hope these remarks have been of help to you in your study of this provision.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By
Donald J. Beighle
Assistant Attorney General

GKE:DJB:agm

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

March 9, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Juneau, Alaska 99801

Dear Mr. Jackson:

On March 7, 1970 I was honored to attend a session of your committee in which the various consumer fraud bills were being considered.

At the time of that meeting I indicated that this office had been accumulating a large volume of material dealing with consumer matters and laws on both the state and federal level. You asked if I would forward some of that material to you for your perusal.

In response to that request I am enclosing a small sampling of the material in our files. Much of the material would not be particularly useful to your committee in its study of these bills, but I would be delighted to forward all such files if you wish.

I hope this information will be helpful to you.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By William Edward Spear
William Edward Spear
Assistant Attorney General

GKE:WES:agm
Enclosures

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

February 17, 1970

The Honorable Tom Fink
Alaska House of Representatives
Juneau, Alaska 99801

Dear Mr. Fink:

On February 9, 1970 you were sent a letter in which the three consumer fraud bills now pending before the legislature were compared in some detail. Since that time one of the bills, SB 352, has been altered in several important points and this letter is to insure that you understand that the previous letter from this office was concerned with the original bill and not the substitute CSSB 352.

Though the substitute bill incorporates some of the features of the governor's bill (HB 446) it now appears to bear more relation to the Legislative Council proposal (HB 444) than to the former bill. Like HB 446, the substantial investigatory powers of the Attorney General are deleted. However, CSSB 352 goes even further in that it also has removed the power of the Attorney General to make regulations. The importance of this feature was expressed in our previous letter and its absence in a final law would be detrimental to the enforcement branch and the legitimate businessman as well.

The signal change in the substitute bill is the removal of any criminal sanctions from the bill which places it in the same category with HB 444 and leaves the governor's proposal the only bill providing for criminal actions. It is felt that the effectiveness of a consumer fraud law not containing provisions for criminal proceedings would be drastically reduced and would be far out of line with other state provisions and practices. In addition to removal of criminal penalties, it must be noted that the substitute reduces the civil sanctions and no longer provides for punitive damages. In short the substituted bill has had its teeth almost entirely drawn.

CSSB 352, you will note, has added the sections with which your subcommittee was most interested, dealing with consumer paper. This addition, identical to the governor's bill, seems to be a recognition of the importance of taking consumer paper out of the holder-in-due-course doctrine presently provided by the UCC.

Thank you for your patience in this matter. I hope that these supplemental comments will be of help to you.

Sincerely,

G. KENT EDWARDS
ATTORNEY GENERAL

By: William Edward Spear
Assistant Attorney General

GKE:WES:em

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

February 9, 1970

The Honorable Tom Fink, Chairman
Subcommittee on Consumer Fraud
House Commerce Committee
Sixth State Legislature
Juneau, Alaska 99801

Dear Representative Fink:

This is in response to your request for a comparison of HB 444, the proposed consumer fraud bill of the Legislative Council, and HB 446, the Governor's bill on the same subject.

For your information, also included in the analysis is SB 352, the only other comprehensive consumer fraud bill now pending before the legislature, and which was introduced by Senator Terry Miller.

For convenience, the bills have been broken down into several particular areas so that the parallel features of the bills may be scrutinized separately.

I. Prohibited Acts.

(HB 446, pages 1 and 2 to line 22, page 6, lines 7-26)
(HB 444, pages 1, 2 and 3 to line 19)
(SB 352, pages 1 and 2 to line 28)

All of the bills in question are quite similar in their coverage of consumer fraud down to the ninth and tenth subsections, though there are a few minor changes. Subsection (1) of HB 446 contains language which was felt to be more specific than the term "pass off" used in the other bills, though all the subsections (1) contain language which specifically outlaws the age-old fraud of passing off consumer goods. Subsection (3) of the Governor's bill is essentially a combination of subsections (2) and (3) of the other two bills. [Note: The "of" in line 21 is a typographical error and should have been "or". This subsection must be amended accordingly in order to make sense.] Subsections 2, 4, 5, 6, 7, 8,

9 and 10 of HB 446 are all included in HB 444 and SB 352. The latter two bills contain a subsection (11) which is not included in the Governor's bill. This section sets out a specific fraud which, though not covered specifically in HB 446 would be actionable under its subsections (11) and (12).

Subsections (11) and (12) of HB 446 are not included in either of the other bills nor are there similar provisions in the other proposals. Subsection (11) requires that one be damaged by the fraud but does not require intent while subsection (12) states that the deception would be actionable "whether or not" damage has occurred but requires intent. Combined with the power to make regulations (see below) these sections are potentially very valuable and would enable the enforcement official (the Attorney General in all bills) to reach all forms of practice which are unfair or deceptive to consumers. As such, it is felt these subsections provide more complete and comprehensive protection to the public against all of the various trade practices which unfairly injure or are calculated to injure consumers.

An important difference between the prohibitions in the Governor's bill and those in the other bills is the lack, in most sections, of an intent, or knowledge requirement to constitute a violation. It would appear that a few of the prohibitive acts in the other two bills do not require the element of intent either. For an instance, subsection (4) of both HB 444 and SB 352 does not refer to intent or knowledge. Likewise, subsection (12) of both bills appears not to require the element of scienter. The position that the element of intent not be required to constitute a violation in the Governor's bill is similar to that taken by several states (for instance Texas) and recognizes the essential nature of the activity sought to be prohibited as a fact accomplished, i.e. that someone has been damaged. This is especially true in any civil action where intent or knowledge has no part in such litigation for the salient point here is whether or not a person has been damaged. It is the position of this office, therefore, that the element of intent should not be included in the prohibited acts but if it is so included in the final bill intent should not be required in any civil action and that in a criminal action there should be an evidentiary presumption, rebuttable by the defendant, that the act was done with intent.

HB 444 contains several subsections which are not in either the Governor's bill or the Senate bill. To-wit, subsections (13), (14) and (15) are unique to the council proposal. In inverse order, (15) would appear to be covered at least by (6) of the same section, (6) of SB 352 and (5), (11) and (12) of the Governor's bill. Likewise, the prohibition against 'bait and switch' advertising in (14) of HB 444 would probably be covered by (9) of the same section, (9) of the Senate bill and (8), (11) and (12) of the Governor's bill. This section includes the advantage of clear, specific prohibitions but may prove to contain loopholes or allow their creation by the imaginative and ever alert mind of the swindler. Subsection (13) of HB 444 again sets out a specific prohibition which is not included in either of the other bills. It is not precisely clear on the face of the subsection as to what transactions it might cover but may prove to be a useful addition to the prohibited acts section.

Both HB 444 and SB 352 contain identical subsections (b) and (c) which are not included in HB 446. It is not apparent what the specific purpose of subsection (b) is. It is probable that this subsection is aimed at giving an evidentiary advantage where there has been consumer fraud, to one either prosecuting or seeking damages in an anti-trust action, as it refers to injuring competition and competitors. Since, at the time the bill was drafted Alaska had no anti-trust provisions or proposed bills, it was not included in HB 446. However, the intent of the subsection may have been to aid in litigation begun under the several federal anti-trust laws, and may have value as such in the final bill. Subsection (c) was not considered necessary in HB 446 in light of AS 01.10.010 which makes the common law applicable in Alaska where it is not contrary to the State or Federal Constitutions.

A major provision which appears in the Governor's bill, but which does not appear in either of the other proposed bills, is the section on the non-negotiability of certain consumer paper found on page 6, line 7 of HB 446. A similar provision is still pending before the legislature in HB 362, though the technical statutory approach is somewhat different because that bill actually amends the Uniform Commercial Code. The Uniform Commercial Code presently permits a waiver of defense clauses in commercial transactions and the execution of a negotiable instrument is made equivalent thereto, but, in

effect, cedes to each state the power to set its own policies with respect to their use. Thus, in AS 45.05.726(a) the code permits the waiver of defenses "Subject to a statute or decision. . . . " The section of HB 446 presently under discussion would constitute the statute to which this section would refer. This section is intended to reach only paper which is described as negotiable for the purposes of AS 45.05.726(a) for it is this section that automatically forces a waiver of defenses agreement on a buyer signing a negotiable instrument. Thus, it is clear that many types of paper transactions in the consumer market would not be covered by this provision.

Present Alaskan law works a genuine hardship and great injustice on consumers in the state when it permits the transferee of consumer paper to cut off the consumer's defenses. When one buys goods it is his reasonable expectation that if the vendor does not live up to his end of the bargain, he, the consumer, may refuse to pay. In actual fact, however, he very often finds that the note has been assigned away to a third party with whom he has not dealt and of whom he may have never heard, and he is left only with a cause of action against the seller which, assuming the presence and solvency of the seller, means an expensive and time consuming law suit.

There is a considerable and increasing use of the holder of the due-course-doctrine in Alaska for fraudulent purposes. Very often a group moves in, makes a fantastic offer to consumers which is never intended to be fulfilled, takes a note for the products or services, negotiates it, and skips the jurisdiction before anyone even realizes they have been taken. As a practical matter, the consumer has no recourse, least of all against the holder of his note to whom he is legally liable. Very often it is impossible for law enforcement officers to stop the dishonest or sharp dealer before the damage is done. However, an essential part of any such scheme is the sale of the paper taken. If the institutions who close their eyes to the people with whom they are dealing realize that it is they, not the consumer, who will be left holding the bag, the incidence of consumer fraud of this nature will decrease markedly.

It may be noted that the Uniform Consumer Credit Code (U3C) also takes a dim view of negotiable consumer paper, and offers the legislature another alternative in accomplishing the objective sought in the present section, as the U3C has been introduced as SB 211. One of the stated aims of the

U3C in deciding what credit or practices to prohibit or limit, was to insure that there were very real and corresponding benefits to the consumer because of the recognition that restrictions on rights of creditors could lead to higher credit costs and interest rates (see N. Butler, Summary of the Uniform Consumer Credit Code 3, 1968). One of the very first practices outlawed by the U3C was the use of negotiable promissory notes and consumer sales (see 4.850 UCC4, in SB 211, page 46, line 29). The code also contains two alternative proposales as to the question of defenses and their waiver by the buyer as to an assignee of a consumer contract.

Obviously, the thrust of all these proposals is to curtail the abuse of the holder-in-due-course doctrine presently provided under the UCC, as noted above. The purpose of this doctrine is, of course, to insure, as far as it can, the free flow of commercial paper and to encourage investment. The supposition of the typical holder-in-due-course incident is that there are two innocent parties: the obligor who has been wronged by the obligee, and the assignee who took the note from the obligee without notice of the defense. The law, by favoring the holder of the note, seeks to keep the paper moving and relieve the anxieties of prospective transferors. However, the code, as noted, recognizes the difference between consumer paper and other loans, though it allows the local law to determine what the consequences of the distinction, if any, shall be. (It is interesting to note that the UCC originally sought to deny third party freedom from defenses in the case of consumer goods [Uniform Commercial Code § 9-2061 (1952 version)] which version was originally adopted in Pennsylvania.)

One question to be asked and answered, therefore, is whether the holder in due-course-doctrine, as applied to consumer paper, is really having this classic effect on the money market. It is submitted that it does not. Consumer paper passes from dealer to financer as readily in states that subject the assignee to defenses as in states that do not. The possibility of consumer defenses is merely one of several risks taken by the assignee and the price he pays for the paper and the recourse or reserve arrangement he makes with the dealer are considered at the time the paper is negotiated. Consumer paper is not typically sold between financial institutions (saving perhaps some bulk transfers in which the

second assignee is probably indifferent to the defenses of individual consumers) but if bought directly from the dealers, and it is here that the crux of the situation may be seen most clearly.

Without question the financial institution who is in the consistent practice of buying paper from particular dealers is in the best position to police his retail activities; presently, however, he has no reason to do so. By making the financial institution subject to the defenses of buyers, however, the effect will be to make those institutions put pressure on retailers to improve shoddy or dishonest dealings and force them to examine more carefully the paper sought to be sold by fly-by-night businesses. Moreover, what is the social or economic policy of allowing a financial institution to deal with a disreputable dealer and then stand free of liability while the consumer bears the loss?

There is the possibility that the increased protection afforded by requiring buyers of paper to be a bit more selective in their purchases and by making them subject to the defenses of consumer notes will result in some increased credit costs. However, the small increase, if any, is justified by the amount of lost consumer dollars in personal financial difficulties that may be avoided by this legislation. Moreover, there are aspects of this section which may actually decrease the cost of credit which cannot be ignored; notably the reduction in personal bankruptcies and increased percentages of collections from satisfied customers.

II. Exemptions and Exceptions.

(HB 446, page 2, line 24 to page 3, line 5)
(HB 444, page 3, line 20 to page 4, line 6)
(SB 352, page 2, line 29 to page 3, line 12)

All three bills contain common exceptions and exemptions in subsections (1) and (2), HB 446 and SB 352 being almost identical. These two exceptions are almost always provided in the similar state laws regarding consumer fraud and are considered necessary to protect the parties concerned. It must be noted that HB 444 does not repeal, as do the other two bills, the present sections on false or misleading advertising which contain a provision (AS 45.50.490(b)) similar to all the subsections (2). The retention of this exception in HB 444 presumably is to insure that it will apply to both the civil actions it provides and the criminal actions in the present law.

HB 444 also contains a third exception dealing with a pending action and appeals, and a fourth dealing with trademarks and tradenames used prior to the effective date of the statute.

III. Investigatory, Regulatory, and Subpoena Powers of the Attorney General.

(HB 446, page 3, lines 6 and 7)
(HB 444, page 4, lines 7 to page 5, line 24)
(SB 352, page 3, line 13 to page 5, line 1)

One of the most marked differences between the Governor's bill and the other bills is the inclusion in the latter of very broad powers of investigation centering in the office of the Attorney General. Most of the states enacting this type of legislation have included these powers and they have apparently proven to be a useful enforcement aid primarily in states where court calendars are very crowded and immediate judicial action is difficult or impossible to obtain. It was felt, at the time 446 was drafted, that these extraordinary powers were not necessary to the enforcement of the act for several reasons. At this time, court calendars are not generally so overcrowded in Alaska as to make it difficult to hear motions for restraining orders or injunctions nor are the offices of the Attorney General so far distant from the court rooms that it would be impossible or inconvenient to act quickly in the necessary case. In addition, the relative isolation of the state combined with the relatively small population tends to discourage the fly-by-night or fast moving operator for whom most of these extraordinary powers are required from using Alaskans as his 'dupes'.

It must be noted that the powers granted by these two bills are both exceptional and substantial. The Attorney General, if these provisions are understood correctly, may upon his belief that some deceptive practice is or has taken place, (1) make the person in question file a detailed report in writing and under oath, (2) examine and cross-examine the person, (3) examine the property, records, books, and documents, (4) make copies of any of the above. The only investigation over which a court has any authority apparently is where the Attorney General wants to impound a sample of the property. In addition to these powers the Attorney General may issue subpoenas on his own power. These powers are reinforced by remedies against those refusing to cooperate in the investigation.

Should the legislature decide to include these powers in the final bill, the following general comments are offered for your consideration. SB 352 has identical powers to HB 444. However, it does not contain the safeguards against their abuse as does the latter bill (see HB 444, page 7, lines 5 to line 28). HB 444 recognizes the constitutional problems of self-incrimination which would be inherent in using material directly or indirectly uncovered as a result of an investigation conducted with these powers in any criminal action. (Though it must be noted that HB 444 provides for no criminal sanction.) The powers would, of course, be invaluable in opening up a violator to civil damages or injunction but their aid in convicting a person of a crime is doubtful. This distinction should be made where the broad investigatory powers are provided.

Likewise, HB 444 recognizes the possible abuse of the powers in question by requiring discovered material to be kept confidential. This protection will prevent persons from being pilloried in newspapers, stigmatized, or otherwise attacked unless the Attorney General, in his investigation has found evidence substantial enough to justify litigation. In this line of thought, some consideration might be given to the protection of trade secrets, secret trade information, or other privileged matter. Some states (Massachusetts notably) require that the demand for information shall not contain any requirements which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court. Further court control could be obtained by providing for a motion by the person of whom the information is requested to extend the period of time or even satisfy the demand for good cause. In addition, some consideration should be given to the time and place that such information could be demanded (regular business hours, regular place of business, etc.).

It should be noted here that all three bills allow for regulatory power in the office of the Attorney General. This provision will enable the Attorney General to pinpoint specific schemes and rackets by regulation so that there can be no mistake as to what acts are prohibited. It is an important and useful tool in insuring that comprehensive and effective protection is afforded the public in consumer matters and the provision which will allow in the long run greater fairness to the business man by outlining prescribed conduct with precision.

IV. Restraining Orders, Injunctions, Voluntary Compliance.

(HB 446, page 3, line 8 to page 5, line 3)
(HB 444, page 5, line 25 to page 7, line 28)
(SB 352, page 5, line 2 to page 6, line 12)

Any law seeking to regulate such a sensitive area as consumer fraud requires that a broad spectrum of ways to deal with violators, whose activities may range from borderline to flagrant, be available to the authority charged with enforcement. Though the development of a body of effective regulations as to what specific acts are prohibited will go a long way toward putting the business man on notice as to what activity is prohibited, the use of assurances of discontinuance or voluntary compliances are particularly useful in cases where an honest business man unwittingly may have used a practice that could be considered deceptive. As a practical matter, long standing usages by businesses or industry which would be illegal under a new law may continue unnoticed and such cases should not necessarily be brought into court though something beyond a specific warning may be needed. Also, the use of this device will aid the enforcement officers and courts by giving an alternative to actual litigation for every use of deception. The provisions for voluntary compliance in HB 444 and SB 352 are substantially the same except that the latter adds a subsection (c) (page 6, line 8) which would seek to make a violation of the assurance prima facie (rebuttable) evidence of the violation of the law in civil actions by the Attorney General. This provision attempts to overcome the shortcoming of the voluntary assurance that if it is violated the Attorney General must proceed as if it had never been made.

The Governor's bill does not include it, as do the other bills, the provision for the voluntary payment by the alleged violator of investigative costs or damages on a stipulation to the assurance. This section does not appear to add a great deal to the bill because unless such an agreement were specifically prohibited by statute it could always be entered into regardless of its mention in the consumer fraud bill. Moreover, the Governor's bill does contain substantial provisions for private recourse, and in no way would prohibit this payment which is stated to be voluntary.

The power of the Attorney General to seek injunctions, whether permanent or temporary is common to all three bills and

is a valuable and traditional tool of enforcement and one which we believe is essential to effective enforcement of a deceptive trade practice act.

V. Penalties.

(HB 446, page 6, line 27 to page 7, line 20)
(HB 444, page 7, line 29 to page 8, line 13)
(SB 352, page 6, line 13 to page 7, line 9)

SB 352 and the Governor's bill both provide for criminal sanctions for a violation of the act. HB 444 in marked contrast does not provide for any criminal sanctions. It is submitted that criminal sanctions are often the only way to deal with the purveyors of consumer fraud and that any bill without them would be of little help in actually curbing the incidents of consumer fraud in Alaska. A bill providing only civil penalties seems to assume that the victims of fraud are intelligent middle class individuals who are all aware of their rights, are familiar with and at ease in the courts, and are willing to bring actions to enforce their rights. Many times the persons hardest hit by these frauds are the poor, the illiterate, the feeble, the old, immigrants, the unaware, the unintelligent, and others who need to be protected from the unscrupulous. We are rarely concerned in these laws with the brilliant confidence artist who executes a multi-million dollar stock swindle against the financial wizards of Wall Street; we are talking here about individuals who take advantage of people who are already disadvantaged and prey upon the weakest members of our society. This is criminal activity and should be treated as such.

It is the apparent theory of HB 444 that the present criminal law is sufficient to protect the general public. The only additional public protection afforded by this proposal is the ability of the Attorney General to seek an injunction, which, if broken, could result in a civil penalty of up to $10,000. In other words, the purveyor of fraud has nothing to lose by engaging in fraudulent acts. Even if the Attorney General identifies him, seeks and obtains an injunction, (or assurance of discontinuance) the defrauder has lost nothing. He is free then to find another racket in which to engage so long as the court's order is not violated. The only fear under HB 444 would be from civil suits of those who are aware of the fraud, can prove damage, and are willing to prosecute

their cases. However, as noted below, these civil claimants are given no evidentiary advantage and no specific provision for punitive or treble damages. Moreover, it is difficult to imagine a defrauder entering into an assurance of discontinuance with the Attorney General if the most than can be done is to get an injunction against him. The lack of criminal sanctions negates the use of this manpower saving tool. In short, the bill contains no real deterrent to fraudulent practices and next to no way to punish those who do engage in fraud. HB 444, despite its extensive and carefully drawn provisions prohibiting acts, providing for investigations, etc., will, in fact, change very little the present law which is inadequate to deal with the mounting incidence of consumer fraud in Alaska.

In comparing HB 446 and SB 352, it is notable that upper limit of the fine in the latter is $1,000, while in the former it is $10,000. Both provide for one year imprisonment. It is submitted that the fine will be used much more extensively by the courts than the jail sentence and that a $1,000 fine is an insufficient deterrent to the crimes set out in these bills. Consumer fraud is big business and $1,000 to many of these organizations would be a mere slap on the wrist, and easily written off as a 'business expense'. In addition the civil penalty limit for violation of a court order in SB 352 is only $10,000 as compared with $25,000 in the Governor's bill. Obviously these upper limits are not aimed at small operators but at the large, nation-wide organizations who may be well heeled and may retain 'house counsel' or other advantages.

All of the bills provide for private civil actions but again HB 444 is considerably less helpful than the other two bills. It provides only for actual damages where, in the proper case, the other bills would allow punitive damages (SB 352) or treble damages (HB 446). It does not specifically provide for class actions; nor does it give the evidentiary edge (prima facie) to private litigants where there has been a permanent injunction or final judgment as does the Governor's bill in subsection (e) of 45.50.540 (page 6, line 2). This point is not a minor one for in consumer fraud cases the main difficulty in getting a judgment is the investigation and accumulation of evidence which can be prohibitively expensive. Neither HB 444 or SB 352 provide for this feature. The deletion of this evidentiary advantage is particularly damaging to HB 444 which relies only on the Attorney General's ability to get an injunction and the possibility of private civil recovery for sanctions.

Allowing for private civil actions in a consumer fraud law is extremely helpful to the enforcement agent because it has the effect of making the law 'self-enforcing' to a degree, and especially with regard to the smaller or occasional claims. As a general rule, every such case which is brought by a private party means one less that must be prosecuted by the state. The enforcement officer is thus freer to investigate the professional or organized operations which are of important public concern and which may be prevented before they begin. In addition, it must be noted that the civil action gives the injured party a chance to recover his damages.

In our opinion the Governor's bill and, to the extent applicable, SB 352 are more sensitive than HB 444 to the need for a wide range of alternatives for enforcement. It includes higher limits for violation of orders or injunctions; it provides for a civil action by the state and class actions by injured groups; it provides for revocation of a corporate franchise as a proper case; it provides for a receivership where the court deems such extreme action necessary; and it recognizes the ability of private actions to aid in enforcement.

VI. Definitions.

(HB 446, page 7, line 21 to end)
(HB 444, page 8, line 15 to end)
(SB 352, page 7, line 10 to end)

In HB 444 "person" seems unnecessary in light of AS 01.10.060(7).

I hope these observations have been of help to you in your study of this important legislation. If you have questions concerning it, please do not hesitate to contact this office.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By William Edward Spear
William Edward Spear
Assistant Attorney General

GKE:WES:agm

AMERICAN RETAIL FEDERATION

1616 H STREET N.W., WASHINGTON, D.C. 20006

RECEIVED
Department of Law

FEB 27 1970

AM 7,8,9,10,11,12,1,2,3,4,5,6 PM

Basis of HB446

August 20, 1969

TO: STATE ASSOCIATION EXECUTIVES

FTC URGES STATES TO ENACT "UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW"

The Federal Trade Commission has renewed its recommendation originally made in 1966 that the states enact laws to protect the public from deceptive and unfair trade practices. The recommended legislation which is similar to language contained in Section 5 of the Federal Trade Commission Act, would enable the Attorney General or some other designated state official to investigate and obtain court injunctions with respect to unfair methods of competition and unfair or deceptive acts or practices in trade or commerce.

This year's draft, contains a provision authorizing the court to decree restitution of money or property to anyone who suffers damage from unlawful acts or practices, to appoint a receiver or revoke a license or certificate for doing business. Provision is also made for injured parties to initiate suits for the recovery of their own damages as well as losses sustained by others who have been similarly damaged and for payment of attorney fees and court costs. FTC chairman, Paul Rand Dixon, in discussing the current proposal, stated that ordinarily the amount involved in the consumer transaction is not sufficient to warrant bringing private suit, with result that thousands of consumers suffer small losses without any remedy being available. Under the new proposal, minimum relief of $200 is authorized and the court may, in its discretion, award up to three times the actual damage.

Another new section added to the model law this year, is designed to eliminate the holder-in-due-course doctrine for

consumer installment transactions. The section provides that a consumer's promisory note or other evidence of debt is different from ordinary commercial paper and if it is transfered to a finance company or other third party, the consumer may assert all the defences against the note holder that he would have asserted against the original seller or lessor of the goods or services. The Commission feels that eliminating the holder-in-due-course doctrine for consumer installment transactions will help to eliminate consumer deception and the hardships which consumers suffer as a result of high pressure selling methods.

The Council of State Governments has endorsed the draft recommended by the Commission with three changes:

1- in the prefatory explanation regarding the limitation of the holder-in-due-course doctrine, the Council added a footnote reminding state legislatures to consider this change in conjunction with the Uniform Consumer Credit Code;
2- in the civil damage section, the Council changed treble damages to punitive damages; and
3- the Council deleted the section which would have provided criminal penalties. This was done on the motion of a member who expressed the view that their inclusion would unduly complicate and delay investigation under the law, and that state criminal fraud laws are already more or less adequate, the great need being for a law which provides civil procedure and remedies.

Douglas R. Gordon
Manager, Government Affairs Division

Suggested Legislation

(Title should conform to state requirements. The following are some suggestions: "An Act to prohibit unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"; "Unfair Trade Practices and Consumer Protection Law"; or "Buyer Protection Act".)

(Be it enacted, etc.)

Section 1. Definitions.

As used in this Act,

(a) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(c) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(d) "Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material or copy thereof.

Section 2. Unlawful acts or practices.

Alternative Form No. 1:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 2:

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 3:

The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

(1) passing off goods or services as those of another;
(2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
(3) causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
(4) using deceptive representations or designations of geographic origin in connection with goods or services;
(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
(6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
(8) disparaging the goods, services, or business of another by false or misleading representation of fact;
(9) advertising goods or services with intent not to sell them as advertised:
(10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
(11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
(12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or
(13) engaging in any act or practice which is unfair or deceptive to the consumer.

Section 3. Interpretation.

(a) It is the intent of the legislature that in construing Section 2 of this Act due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the

Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended; and

(b) The attorney general may make rules and regulations interpreting the provisions of Section 2 of this Act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C., 45(a)(1)), as from time to time amended.

Section 4. Exemptions.

Nothing in this Act shall apply to:

(a) Actions or transactions permitted under laws administered by the state public service commission or other regulatory body or officer acting under statutory authority of this State or the United States (or the state fair trade law).

(b) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement, and did not have a direct financial interest in the sale or distribution of the advertised product or service.

Section 5. Restraining prohibited acts.

Whenever the attorney general has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by Section 2 of this Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary or permanent injunction the use of such method, act or practice, upon the giving of appropriate notice to that person. The notice must state generally the relief sought and be served in accordance with Section 13 of this Act and at least three (3) days before the hearing of the action. The action may be brought in the (trial court of general jurisdiction of the county or judicial district) in which such person resides or has his principal place of business, or, with consent of the parties, may be brought in the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this Act, and such injunctions shall be issued without bond.

Section 6. Additional public relief.

The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practice in this Act declared to be unlawful, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

Section 7. Powers of receiver.

When a receiver is appointed by the court pursuant to this Act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice declared to be illegal and prohibited by this Act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

Section 8. Private and class actions.

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 2 of this Act, may bring an action under rules of civil procedure in the (trial court of general jurisdiction of the county or judicial district) in which the seller or lessor resides or has his principal place of business or is doing business, to recover actual damages or $200 whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this Section may, if the unlawful method, act or practice has caused similar injury to numerous other persons similarly situated and if they adequately represent such similarly situated persons, bring an action on behalf of themselves and other similarly injured and situated persons to recover damages as provided for in subsection (a) of this Section. In any action brought under this Section, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

(c) Upon commencement of any action brought under subsection (a) of this Section the clerk of court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(d) In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs.

(e) Any permanent injunction, judgment or order of the court made under Section five of this Act shall be prima facie evidence in an action brought under Section eight of this Act that the respondent used or employed a method, act or practice declared unlawful by Section two of this Act.

Section 9. Non-negotiability of consumer paper.

(a) If any contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, such note, instrument or evidence of indebtedness shall have printed on the face thereof the

words "consumer paper," and such note, instrument or evidence of indebtedness with the words "consumer paper" printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code -- Commercial Paper.

(b) Notwithstanding the absence of such notice on a note, instrument or evidence of indebtedness arising out of a consumer credit sale or consumer lease as described in this Section, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease. Any agreement to the contrary shall be of no force or effect in limiting the rights of a consumer under this Section. The assignee's liability under this Section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. Failure to imprint the words "consumer paper" on such note, instrument or evidence of indebtedness shall subject the seller or other responsible person to appropriate civil and criminal sanctions as provided in this Act.

Section 10. Assurances of voluntary compliance.

In the administration of this Act, the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the Act from any person who has engaged or was about to engage in such method, act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of (trial court of general jurisdiction of the county or judicial district) in which the alleged violator resides or

has his principal place of business, or the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest, pursuant to Section 5.

Section 11. Investigation.

(a) When it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this Act, or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any act or practice declared to be unlawful by this Act, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(b) At any time before the return date specified in an investigative demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the (trial court of general jurisdiction of the county or judicial district) where the person served with the demand resides or has his principal place of business or in the (trial court of general jurisdiction of the county or judicial district) where the State Capitol is located.

Section 12. Subpoenas, hearings, rules and regulations.

To accomplish the objectives and to carry out the duties prescribed by this Act, the attorney general, in addition to other powers conferred upon him by this Act, may issue subpoenas to any person, administer an oath or affirmation to

any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms and promulgate such rules and regulations as may be necessary, which rules and regulations shall have the force of law; provided that none of the powers conferred by this Act shall be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture; and provided further that information obtained pursuant to the powers conferred by this Act shall not be made public or disclosed by the attorney general or his employees beyond the extent necessary for law enforcement purposes in the public interest.

Section 13. Service of notice, demand or subpoena.

Service of any notice, demand or subpoena under this Act shall be made personally within this State, but if such cannot be obtained, substituted service therefor may be made in the following manner:

(a) Personal service thereof without this State; or

(b) The mailing thereof by registered or certified mail to the last known place of business, residence or abode within or without this State of such person for whom the same is intended; or

(c) As to any person other than a natural person, in the manner provided in the (rules of civil procedure) as if a (complaint or other pleading which institutes a civil proceeding) had been filed; or

(d) Such service as a (trial court of general jurisdiction of the county or judicial district) may direct in lieu of personal service within this State.

Section 14. Enforcement of investigative demands.

If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the attorney general, the attorney general may, after notice, apply to a (trial court of general jurisdiction of the county or judicial district) and, after hearing thereon, request an order:

(a) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(b) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this State or revoking or suspending the certificate of authority to do business in this State of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

(c) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand.

Any disobedience of any final order entered under this Section by any court shall be punished as a contempt thereof.

Section 15. Civil and criminal penalties.

(a) Any person who violates the terms of an injunction issued under Section 5 of this Act shall forfeit and pay to the State a civil penalty of not more than twenty-five thousand dollars ($25,000.00) per violation. For the purposes of this Section, the (trial court of general jurisdiction of a county or judicial district) issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the State may petition for recovery of civil penalties.

(b) In any action brought under Section 5 of this Act, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by Section 2 of this Act, the attorney general, upon petition to the court, may recover, on behalf of the State, a civil penalty of not exceeding two thousand dollars ($2,000.00) per violation.

(c) Any person who engages in a fraudulent course of conduct declared unlawful by Section 2 of this Act shall, upon conviction, be fined not more than five thousand dollars ($5,000.00), imprisoned for not more than one year, or both, in the discretion of the court; provided that nothing in this subsection shall limit any other provision of this Act.

(d) For purposes of this Section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 2 of this Act.

Section 16. Forfeiture of corporate franchise.

Upon petition by the attorney general, the (trial court of general jurisdiction of a county or judicial district) may, in its discretion, order the dissolution or suspension or forfeiture of franchise of any corporation which violates the terms of any injunction issued under Section 5 of this Act.

Section 17. Duties of County and City attorneys.

It shall be the duty of the County and City attorneys to lend to the attorney general such assistance as the attorney general may request in the commencement and prosecution of actions pursuant to this Act, or, the County or City attorney with prior approval of the attorney general may institute and prosecute actions hereunder in the same manner as provided for the attorney general; provided that if an action is prosecuted by a County or City attorney alone, he shall make a full report thereon to the attorney general, including the final disposition of the matter.

Section 18. Severability.

If any provision of this Act is declared unconstitutional, or the application thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

Section 19. Effective date.

(Insert effective date.)

PROPOSALS FOR STIMULATING COMPETITION AS AN AID TO LOW-INCOME CONSUMERS IN THE INNER CITIES

Studies conducted by the Federal Trade Commission indicate that low-income consumers in the inner cities pay more for food, furniture, clothing and other necessaries, due in large part to lack of competition among retailers in those areas.[1/] The Commission is convinced that to break the cycle of poverty and despair in these areas, one important corrective action needed is the restoration of competition which would give these consumers opportunity to purchase quality goods at fair prices.

Competition in the low-income market areas of the inner cities can and must be revived by encouraging new entry of business firms and by improving the efficiency of firms now there.

The Federal Trade Commission accordingly recommends that the appropriate agencies of Federal, State and local government take action designed to stimulate competition in low-income areas of the inner cities. The following specific proposals are made:

(1) That subsidies, low-cost loans, insurance guarantees or tax incentives be granted to firms entering the low-income market, including special incentives for the local resident who wishes to start a business in the low-income market;

(2) That existing management and clerical training programs for residents of low-income areas be expanded and new ones established;

(3) That educational programs for low-income market retailers be established to enable them to run their

1/ F.T.C. Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers (March 1968), F.T.C. Report on District of Columbia Consumer Protection Program (June 1968), and Record of F.T.C. National Consumer Protection Hearing (November-December 1968). An F.T.C. report to be published in 1969 on food chain selling practices in the District of Columbia and San Francisco areas is expected to contain similar findings.

businesses more economically and efficiently and to pass the savings on to consumers;

(4) That improved and expanded educational programs be designed to stimulate the low-income consumer to comparison shop, to seek reasonable credit terms, and generally to allocate his scant resources more wisely, and to look for assistance instead of remaining silent when he is bilked;

(5) That the feasibility of federally financed (or private) insurance programs to protect from undue losses retailers extending low-cost credit to residents of low-income areas be investigated.

The Commission believes that immediate and dramatic steps like these are necessary if vigor is to be restored to the low-income market and if low-income consumers are to be assured the same benefits of competition that their affluent neighbors take for granted.

SEPA.. E STATEMENT OF COMMISSIONER MACINTYRE

Subject: Council of State Governments -- Federal Trade Commission's Suggestions for State Legislation Regarding Holder-in-Due-Course Doctrine.

It is my view that the Commission, before making a recommendation on this particular subject, should await its analysis, review, and consideration of the record of its National Consumer Protection Hearing.

Therefore, I am reserving my judgment and decision on this subject until the consideration of it is completed as I have indicated and the Commission makes a report on its Consumer Protection Hearing.

Alaska Retail Association

Jackson

PROPOSED AMENDMENTS

Section 45.50.501 - POWERS OF ATTORNEY GENERAL

(a) The attorney general may make rules and regulations interpreting the provisions of Section 45.50.481 of this act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5 (a) (1) of the Federal Trade Commission Act (15 U.S.C., 45 (a) (1)), as from time to time amended.

(b) It is the intent of the legislature that in construing Section 45.50.481 of this act due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45 (a) (1)), as from time to time amended; and

(c) In any action instituted under this act it shall be an absolute defense to show that the challenged practices are subject to, and comply with statutes administered by the Federal Trade Commission, or any rules, regulations or decisions interpreting the substantive law of such statutes.

Alaska Retail Association

Section 45.50.550 - PRIVATE AND CLASS ACTIONS

When any person in any action brought by the attorney general under section 45.50.520 of this title, has been enjoined from committing any act or practice, whether after final adjudication or by consent decree; any person claiming to have been adversely affected by the act or practice giving rise to such injunction may bring suit and recover actual damages, and the costs of suit, including reasonable attorneys' fees, and when appropriate additional damages, restitution, reformation, rescission and other equitable relief.

Alaska Retail Association

Jackson

PROPOSED AMENDMENTS TO CSSB 90

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Section 45.50.471. DECEPTIVE TRADE PRACTICES DEFINED.

(a) A person engages in a deceptive trade practice when in the course of business, vocation or occupation, he knowingly:

(1) falsely passes off property or a service as that of another;

(2) makes a false representation as to the source, sponsorship, approval or certification of property or services;

(3) makes a false representation as to his affiliation, connection or association with, or certification by another;

(4) uses deceptive representations or designations of geographic origin in connection with property or services;

(5) makes a false representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of property or services, or a false representation as to the sponsorship, approval, status, affiliation or connection of a person with the property or services;

(6) represents that a property is original or new if it is not;

(7) represents that a property or service is of a particular standard, quality or grade, or that a property is of a particular style or model, if he knows or should know that it is of another;

(8) disparages the property, services or business of another by false or misleading representation of fact;

(9) advertises property or services with intent not to sell the property or services as advertised;

(10) advertises property or services with the intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) advertises under the guise of obtaining sales personnel when in fact the primary purpose is to first sell property or services to the sales personnel applicant; or

(12) makes false or misleading statements of fact concerning the price of property or services, or the reasons for, existence of, or amounts of price reductions.

(b) The deceptive trade practices set out in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under the laws of this state.

Sec. 45.50.491. EXCEPTIONS TO THE PROHIBITED TRADE PRACTICES.

The provisions of secs. 471 - 580 of this chapter do not apply to

(1) actions or transactions permitted under laws administered by a regulatory body or officer acting under the laws of this state or the United States; or

(2) acts by any person in the publication or dissemination of an advertisement, supplied by another when the person has no knowledge of the false, misleading, or deceptive character of the advertisement.

Sec. 45.50.550 LIABILITY FOR ACTIONS OF EMPLOYEE.

The provisions of this chapter apply to a person whose employees

engage in deceptive trade practices in the course of and scope of employment with said person under sec. 431 of this chapter.

New section - fit in toward the end of the bill

Sec. _____. LIMITATION OF ACTIONS. No action may be brought under this act more than one year after discovery of the unlawful conduct which is the subject of the suit.

Certain sections should be renumbered to conform to changes in section numbers.

BOI

STATEMENT OF RANDOLF H. AIRES BEFORE
ALASKA HOUSE COMMERCE COMMITTEE
CONCFRNING S.B. 352 AND RELATED BILLS

I am Randolf H. Aires, an attorney in the Pacific Coast Legal Department of Sears, Roebuck and Co. I appreciate the opportunity to appear before your Committee, both on behalf of my company and on behalf of the Alaska Retail Association, to express the retailing industry's concerns with all three consumer protection bills before your Committee and with CSSB 352 in particular.

The retail industry, which acts as the purchasing agent for the consumer, believes that the interests of its customers are paramount. The words "consumer protection" are magic words these days, and we believe that the honest and legitimate merchants in your communities have a lot to gain from good consumer legislation. Thus we support and will continue to support good and reasonable consumer legislation.

You know, we are all consumers, and I am still young enough to remember painfully how I was taken advantage of as a young newly married person, before going to law school, by a door-to-door salesman with a glib line and plenty of high pressure. The misrepresentations he made really hit me the morning after we signed the contract, and I wish that a law such as your door-to-door solicitation bill being considered here tonight would have been available to me then, so that I could have rescinded that sale.

Your proposed door-to-door solicitation law is just one of twenty significant consumer protection features contained in the Uniform Consumer Credit Code, presently before the Alaska Legislature. We support the UCCC and we hope that it will be studied seriously some time later in the year.

Now, in these three consumer protection acts before you, we're dealing with deceptive trade practices. The twelve enumerated practices in CSSB 352 are practices which we feel should be dealt with in proper legislation.

We believe that a customer who feels he has been defrauded, and who cannot obtain satisfaction through the normal complaint procedure is entitled to a remedy. President Nixon's Special Assistant for Consumer Affairs, Mrs. Virginia Knauer, who has received so much publicity recently, has pointed out that the remedy should be "convenient, expeditious, and effective."

We submit that the consumer class action provision contained in CSSB 352 and H.B. 446 would not provide that type of remedy to the consumer. We believe that indiscriminate class action legislation will create more evils than it will remedy.

Class actions do not result in a speedy and efficient determination of claims. Ask any attorney who has been involved with one. On the contrary, notice requirements, unwieldly pre-trial procedures required when there are numerous litigants, protracted trials, difficult damages determinations, and a heavy burden of management which is placed on the courts, all lead to excessively long and complex proceedings benefitting only the lawyers. I know that you are attempting to deal with the problem of overburdened courts in Alaska this year.

Up to now, courts all over the country have been reluctant to permit traditional class actions, under the existing restrictive rules of civil procedure and court rules allowing class actions, because these actions are likely to benefit practically nobody other than the lawyers who bring them and because they often create lawsuits without merit

where none would have previously existed.

Now we have this new approach which has appeared on the scene - the proposed statutory consumer class action. It first came on the scene last year in the Federal Congress with people such as Senator Tidings championing it. This year we are seeing it at the state legislative level. To my knowledge no state has passed a consumer class action law so far this session.

What are the dangers as we see them with the consumer class action? It is relatively simple for an enterprising attorney (there are many) to marshall an expansive list of plaintiffs through the class action notice provision. You can develop hundreds and thousands of unknown clients just like that. The potential of high legal fees will cause many attorneys to bring unwarranted class actions relating to technical violations of law and against innocent businessmen. The class action might be brought against a businessman who would be willing to resolve, on an informal basis, a valid claim of a consumer. But when maybe only one out of the hundreds or thousands who might be in the so called "class" has a valid claim and the others don't, how could you possibly settle with the lawyer representing the amorphous class?

Add to this the fact that in your bills before you, each so called "injured person" will recover at least two hundred dollars. There is no certainty concerning this provision, but there is the possible interpretation that the two hundred dollar minimum for each person applies to the consumer class action as well as to the private individual action. If this is true, even the people with valid claims may be damaged only in the amount of several dollars, and yet each person in the class would be asking for two hundred dollars or more, whether they have a valid claim or not. It doesn't

take much imagination to see the potential for severe harassment against the legitimate retailer under these conditions.

In class actions such as these, the lawyer becomes less counsel and more the participating litigant and real party in interest, because the financial interest of the attorney for the class may be far more substantial than the interest of any member of the class.

We believe that consumer class actions could impose great economic consequences for the defendant. A class action, even if completely unwarranted, necessitates substantial time and expense in the preparation of a defense. This type of harassment could drive some completely honest small businessmen right out of business.

The astuve lawyer will obviously search for defendants who can be subjected to large damage recoveries rather than the judgment proof "fly-by-night" operators who prey upon the unsophisticated. Thats the tradgedy of this whole misguided concept of consumer class actions in bills such as are before you.

Here are some examples of technical violations which could be used against a legitimate enterprise in a consumer class action: an unintentional omission of an address in a guaranty form; a mistake in using the term "regular price" when an article was actually "originally" rather than "regularly" offered at such price; the designation of a product as "imported" but with the omission of the specific country of origin, even though such country produces goods of desirability to the consumers; the advertising of a television picture tube as "23 inch" without referring to it as a "diagonal measurement."

There has been no demonstrated need for a consumer class

action statute, especially here in Alaska, as distinguished from other forms of remedies presently available. Before jumping into this type of legislation, we believe that experimentation and pilot programs involving other methods could be pursued.

Section 45.50.511 of CSSB 352, which gives the Attorney General basic powers, provides that the court may make any order or judgment necessary to restore to the individual money or property acquired because of a deceptive trade practice. So the court would be equipped to take care of the individual without the necessity of the individual bringing his own lawsuit.

Furthermore, small claims courts are available in Alaska for amounts up to $500.00 in damages, where the individual can go into court without the expense and need of an attorney.

The Federal Trade Commission and the Attorney General's office should be available to a consumer who has been defrauded. There is increased emphasis being placed in this direction. In the State of Washington, there are presently three or four attorneys in the Consumer Protection Division of the Attorney General's office, doing their thing for the consumers, and they are quite active. We have no objection to this kind of strick enforcement at the governmental level.

The whole point of all of this is that much more study should be made of this whole area of how to give the consumer a fast and judicious remedy to take care of his small grievances, and it would be quite unwise, in our judgment, to pass this kind of legislation at this time.

We respectfully submit that if the Alaska Legislature is prepared and determined, however, to deal with this complex

subject at this time, the best approach is that being followed by the Nixon Administration at the Federal level. That approach, put into effect at the state level, would involve your Attorney General and his staff, who would effectively prosecute violators of these deceptive trade practices, and if successful, the individual could bring his lawsuit based on the violation and get all the relief necessary from the court. We have given you a suggested amendment to this effect. This approach, we submit, would prevent the harassment from unwarranted private and class actions, and at the same time give the consumer who has a valid grievance his day in court.

Another proposed amendment which we have given to you deals with the rule making powers of the Attorney General under such a law as CSSB 352. Our concern in this area is that we don't feel that merchants should be subject to separate and possibly conflicting interpretations and rulings on what constitutes a deceptive trade practice and on any related matters. Deceptive trade practices listed in your bills, particularly in CSSB 352, are keyed into the Federal Trade Commission Act dealing with deceptive trade practices. We propose that it should be made clear that it is the intent of the Alaska Legislature that the construction of your act will depend in large part upon the interpretation of the Federal Trade Commission and the federal courts who have operated in this area for many years.

Further, we think it should be an absolute defense to an action brought under this act if it can be shown conclusively that the conduct complained of was authorized by the Federal Trade Commission or any rules, regulations or decisions interpreting the Federal Trade Commission Act. This is only fair.

We suggest that four other amendments be considered for

Seven of the twelve defined deceptive trade practices have a requirement for intent or knowledge on the part of the person or company perpetrating the practice. It is difficult to know why this distinction has been made. We feel that all twelve defined practices should have this knowledge or intent requirement. The requirement is particularly necessary because some of those definitions are so broad and open to interpretation.

We suggest that the exception provided in Section 45.50.491 (2) should be extended to any person who merely uses some advertising matter which is supplied to him by his supplier, and not just to the newspaper, radio and television people.

We feel that it is only reasonable that a statute of limitations be placed in this bill or any other bill of this nature, granting a one year statute of limitations after the discovery of the unlawful conduct involved.

We recommend that Section 45.50.550 of CSSB 352, dealing with the liability for actions of employees, be clarified to state that the deceptive trade practice perpetrated by the employee would have to arise in the course of and in the scope of his employment with the employer. Otherwise, broadly read, this could apply to something the employee did when he wasn't working for his employer, such as on a moonlighting situation, or it could apply to something which the employee did without any authority, or in connection with some type of activity not in the scope of his assigned duties.

With the adoption of the amendments which we have recommended and given to you, we could support CSSB 352. If H.B. 444 and H.B. 446 are considered by the House, our comments concerning CSSB 352 will apply with equal force to

those bills. Further, we would want some other minor modifications to H.B. 444, and we feel that H.B. 446 would have to be drastically changed before we could support it. In particular, I refer to the sections in H.B. 446 dealing with the Attorney General's regulations, the powers of receivership, the forfeiture of the corporate franchise, and the civil and criminal penalties provided therein.

Since you are also considering tonight H.B. 411 and S.B. 188, I would like to state that we are in favor of both of these consumer bills.

Thank you. I will be glad to try to answer any questions you may have.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

SB-358

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

LEGISLATIVE AFFAIRS AGENCY

May 23, 1970

Barry:

Your HCS for SB 239 is attached. I made the two changes we discussed earlier this morning. In addition, I put the whole thing in a separate chapter in Title 11, ~~X~~ and I deleted "or organization" from the phrase "person or organization" several places because that is taken care of in the definition of "person" in AS 01.10.060(7).

I don't know why a minimum ~~x~~ imprisonment is specified in proposed AS 11.22.050(a), 070(b), 080(b),090(b) and 100(a). It isn't necessary in order to make the crime a felony, the effect of specifying the minimum can be avoided by suspending part of the sentence, and the statement of it implies a legislative intent to limit judicial discretion in sentencing.

Also, it looks to me like the list in proposed AS 11.22.080(a) should read "stolen, forged, expired or revoked", especially since there is a reference to secs. 10 -- 60.

Art A.

FOR IMMEDIATE RELEASE

SENATOR PHILLIPS INTRODUCES CONSUMER PROTECTION BILL TO DISCOURAGE FRAUDULENT USE OF CREDIT CARDS

JUNEAU, ALASKA -- A credit card crime act designed to protect credit card holders in Alaska from fraud will be introduced in the current session of the legislature by Senator Vance Phillips (R) of (hometown). The proposed legislation is needed and timely, Senator Phillips said, because the growing use of credit cards in today's economy is rapidly making obsolete the existing outdated state laws by which fraudulent users are punished for their crimes.

Laws similar to that proposed for Alaska by Senator Phillips have been adopted, in recent months, by California, Florida, Virginia, New Jersey, North Carolina and Mississippi, and are being introduced in current legislative sessions in many other states, among them New York, Massachusetts, Connecticut, Indiana, Georgia, Arkansas, Pennsylvania, Maryland, Arizona, New Hampshire, New Mexico, and Washington.

They are based on a model credit card act drafted over a year ago by a team of researchers at Columbia University Law School, on a grant from American Express Company. The Columbia Law research team examined the statutes of all 50 states with respect to their punishment of credit card crimes and found them, for the most part, inadequate and out of date.

(more)

According to Senator Phillips, the current credit card popularity is a post-World War II phenomenon of huge dimensions, involving a tremendous number of transactions in credit buying by consumers for goods and services from airlines, banks, oil companies, restaurants, hotels and motels, department stores, and many other businesses. A credit card is, in effect, sort of a continuing "letter of credit", the Senator pointed out. Since these convenient little cards potentially can represent vast amounts of consumer buying power, it is imperative that those who own them are protected. Under antiquated laws presently on the books in most states, Senator Phillips said, the theft or other fraudulent possession or use of a credit card is punishable only as a misdemeanor, implying nothing more than the intrinsic value of the plastic rectangle -- in other words, a penny or two. This, he said, is tantamount to a $1,000 bill being worth only the paper it's printed on.

In citing the tremendous rise in credit card buying in the U.S., and thus to underscore his growing concern for adequate legislation to protect the many legitimate cardholders in this state, Senator Phillips cited these facts:

1. There are currently over 200 million credit cards issued in the U.S. annually, and the figure increases by approximately 25% each year.

2. Credit card losses are estimated currently at about $50 million per year, and this is pure guesswork. Many authorities, however, view this figure as far below $50 million [illegible], perhaps by as much as double the amount.

3. Losses are sustained by gasoline companies, retail establishments, banks, airlines, auto rentals, and major national "travel and entertainment" credit card companies (American Express, Diners Club, etc.) and their customers.

4. The principal perpetrators of frauds, according to police authorities, are (a) individual criminals, (b) organized crime. In the case of individual fraud, credit cards are usually stolen or picked up when lost and then used illegally for direct purchases.

5. Over the past few years, organized crime appears to have moved into the credit racket generally in a major way. Cards are stolen (sometimes even on order) by criminals in jobs where they serve the public, and sold quickly to syndicate outlets for relatively large ($50 - $250) amounts of money. The crime organisation then transfers the cards to its "agents", who use them to purchase expensive airline tickets and other merchandise and services for fast re-sale to third parties.

(more)

6. Many major cities and their law enforcement agencies have entered into cooperative agreements on credit card fraud investigation and apprehension. Local police and District Attorneys' offices work closely with credit card companies' investigation and security departments, such as the American Express security force headed by Milton Lipson, a former Secret Service agent ho directs the work of 300 investigators and staff personnel around the world.

7. Department stores, which generally absorb credit (or charge) card losses, are also heavily hit. Here prosecution is particularly difficult, since a high percentage of these credit card frauds are actually committed by relatives of the card holder. Some department stores will pay a reward -- to persons other than their own personnel -- for the return of stolen credit cards. For instance, one big New York store pays $25 apiece for its returned stolen cards -- no questions asked.

8. What the credit card theif can expect from American Express, they claim, is swift prosecution. The company makes it a policy to carry all cases through to the courts. One cannot get out of an indictment involving

8. (continued)

American Express credit cards simply by paying off the amount of the fraud. However, both companies do offer rewards to service establishments who pick up lost or stolen credit cards from illegal users. American Express, for example, offers anywhere from $25 to $100 for cards returned by retail establishments, and can go even higher when a conviction results. This practice helps to take such cards out of circulation, and generally sharpens the awareness of establishments to credit card fraud attempts.

9. American Express and Diners Club emphasize that their security forces are in existence solely for the protection of their customers. Neither company's security force plays any part in checking or investigating the credit of valid card holders or applicants.

10. Corrective measures recommended by most issuers of credit cards are: a) Improved laws to tighten the loopholes in current statutes and interstate regulations; b) Faster communications between businessmen, credit card companies and law enforcement agencies; c) Better credit card care by card holders.

11. The Senator's proposed legislation will help improve the state's laws; the credit card industry is at work on

11. (continued)

faster intercommunication; and to ensure better care by cardholders, he recommends the fo'lowing procedures:

a. Keep them on your person -- don't leave them lying around, any more than you'd be careless about cash.

b. Check frequently to make sure you have all your cards in your possession. If one is missing, report its loss immediately to the issuer -- first by phone or wire, then by letter.

c. Keep a record of all numbers and issuers of cards, in order to hasten and simplify reporting a loss.

d. Screen your cards. Decide which ones are valuable enough to serve most of your needs. Destroy those that you really don't need or could lead to trouble for you if lost or stolen.

e. Destroy outdated or unwanted cards by cutting them in half.

f. Always make sure your card is returned after you've made a purchase with it.

# # #

AMERICAN EXPRESS

AMERICAN EXPRESS COMPANY, GENERAL COUNSEL'S OFFICE, 65 BROADWAY, NEW YORK, N. Y. 10006
TELEPHONE (212) 944-2000

GENERAL COUNSEL'S OFFICE

February 10, 1969.

Senator Vance Phillips
Pouch V
Juneau, Alaska.

Dear Senator,

Mr. Jack Fones has asked that I send you a copy of the Model Credit Card Crime Act as drafted by Professors Weinstein and Farer of Columbia University Law School. Enclosed you will find a copy of the first 45 pages of the Study which contains the draft of the statute and comments.

Yours very truly,

Rita Berkowitz

Rita Berkowitz
Attorney.

RB/SK.

AMERICAN EXPRESS

AMERICAN EXPRESS COMPANY, GENERAL COUNSEL'S OFFICE, 65 BROADWAY, NEW YORK, N. Y. 10006
TELEPHONE (212) 944-2000

GENERAL COUNSEL'S OFFICE

February 20, 1969.

Senator Vance Phillips
Alaska State Senate
Pouch "V"
Juneau, Alaska 99801.

Dear Senator Phillips,

Re: State Credit Card Crime Act - Alaska

Mr. Jack Fones has asked me to review the draft of the Bill which you sent to him.

The draft provides general proscriptions of the variety of credit card abuses that have been the center of massive criminal activities for many years. I think that the enactment of such legislation would greatly benefit the citizens of Alaska. I see from the draft you have omitted the Presumptions which are an important aspect of the Model Act. I would like to suggest that the Presumptions be added to the following Sections:

Add to Section 11.20.710. "A person who has in his possession or under his control credit cards issued in the names of two or more other persons is presumed to have violated this section".

Add to Section 11.20.770. "A person who possesses two or more credit cards which are so signed is presumed to have violated this section".

Add a new section which would define the importance of these Presumptions which would read: "When this Act establishes a Presumption with respect to any fact which s an element of a crime, it has the following consequences:

1. When there is sufficient evidence of the facts which give rise to the Presumption to go to the jury, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly negatives the presumed fact; and

2. When the issue of the existence of the presumed fact is submitted to the jury, the court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the Presumption as sufficient evidence of the presumed fact".

If there is anything that we at American Express Company or any of the others in the credit card industry can do to be of assistance to you in the promotion of this legislation, please feel free to contact me.

Yours very truly,

Rita Berkowitz

Rita Berkowitz
Attorney

c.c. Mr. Jack Fones

RB/SK.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

STATE CREDIT CARD CRIME ACT

Jack B. Weinstein,
Tom J. Farer

Law School,
Columbia University,
December, 1966

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by
American Express Company

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(Prepared by Professor Farer only)

STATE CREDIT CARD CRIME ACT

SUMMARY

Section 1. Definitions

(a) Cardholder

(b) Credit Card

(c) Expired credit card

(d) Issuer

(e) Receives

(f) Revoked credit card

Section 2. False statement as to financial condition or identity.

Section 3. Theft of credit card by taking or retaining possession; theft of credit card lost, mislaid, or delivered by mistake; purchase or sale of credit card; obtaining control of credit card as security for debt; dealing in credit cards of another; forgery of credit card; signing credit card of another.

(a) Theft by taking or retaining possession of card taken.

(b) Theft of credit card lost, mislaid, or delivered by mistake.

(c) Purchase or sale of credit card of another.

(d) Obtaining control of credit card as security for debt.

(e) Dealing in credit cards of another.

(f) Forgery of credit card.

(g) Signing credit card of another.

Section 4. Fraudulent use of or representation of authority to use illegally obtained or illegally possessed credit card, forged credit card or revoked, expired or fictitious credit card.

Section 5. Fraud by person authorized to provide goods or services.

(a) Illegally obtained or illegally possessed credit card; forged, revoked or expired credit card.

(b) Misrepresentation to issuer.

Section 6. Possession of machinery, plates, or other contrivance or incomplete credit cards.

Section 7. Receipt of money, goods, services or anything else of value obtained in violation of Section 4.

Section 8. Defenses not available.

Section 9. Presumptions.

Section 10. Penalties.

(a) One year or $1000.

(b) Three years or $3000.

Section 11. Act not exclusive.

Section 12. Severability.

STATE CREDIT CARD CRIME ACT

SECTION 1. Definitions

(a) Cardholder. "Cardholder" means the person or organization named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer.

(b) Credit Card. "Credit card" means any instrument or device, whether known as a credit card, credit plate, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value on credit.

(c) Expired credit card. "Expired credit card" means a credit card which is no longer valid because the term shown on it has elapsed.

(d) Issuer. "Issuer" means the business organization or financial institution which issues a credit card or its duly authorized agent.

(e) Receives. "Receives" or "receiving" means acquiring possession or control or accepting as security for a loan.

(f) Revoked credit card. "Revoked credit card" means a credit card which is no longer valid because permission to use it has been suspended or terminated by the issuer.

SECTION 2. False statement as to financial condition or identity.

A person who makes or causes to be made, either directly or indirectly, any false statement in writing, knowing it to be false and with intent that it be relied on, respecting his identity or that of any other person, firm or corporation, or his financial condition or that of any other person, firm or corporation, for the purpose of procuring the issuance of a credit card, violates this section and is subject to the penalties set forth in subsection (a) of section 10 of this act.

SECTION 3. Theft of credit card by taking or retaining possession; theft of credit card lost, mislaid or delivered by mistake; purchase or sale of credit card; obtaining control of credit card as security for debt; dealing in credit cards of another; forgery of credit card; signing credit card of another.

(a) Theft by taking or retaining possession of card taken. A person who takes a credit card from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so

taken, receives the credit card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder is guilty of credit card theft and is subject to the penalties set forth in subsection (a) of section 10 of this act. Taking a credit card without consent includes obtaining it by conduct defined or known as statutory larceny, common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretense, false promise or extortion.

A person who has in his possession or under his control credit cards issued in the names of two or more other persons is presumed to have violated this subsection.

(b) Theft of credit card lost, mislaid, or delivered by mistake. A person who receives a credit card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder is guilty of credit card theft and is subject to the penalties set forth in subsection (a) of section 10 of this act.

(c) Purchase or sale of credit card of another. A person other than the issuer who sells a credit card or a person who buys a credit card from a person other than the issuer violates this subsection and is subject to the penalties set forth in subsection (a) of section 10 of this act.

(d) Obtaining control of credit card as security for debt. A person who, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else

of value, or any other person, obtains control over a credit card as security for debt violates this subsection and is subject to the penalties set forth in subsection (a) of section 10 of this act.

(e) Dealing in credit cards of another.

A person, other than the issuer, who during any twelve-month period, receives credit cards issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute credit card theft or a violation of section 2 of this act or subsection (c) or (d) of this section violates this subsection and is subject to the penalties set forth in subsection (b) of section 10 of this act.

(f) Forgery of credit card. A person who, with intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, falsely makes or falsely embosses a purported credit card or utters such a credit card is guilty of credit card forgery and is subject to the penalties set forth in subsection (b) of section 10 of this act. A person other than the purported issuer who possesses two or more credit cards which are falsely made or falsely embossed is presumed to have violated this subsection. A person "falsely makes" a credit card when he makes or draws, in whole or in part, a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because the issuer did not authorize the making or drawing, or alters a credit card which was validly issued. A person "falsely embosses" a credit card

when, without the authorization of the named issuer, he completes a credit card by adding any of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder.

(g) Signing credit card of another.

A person other than the cardholder or a person authorized by him who, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, signs a credit card, violates this subsection and is subject to the penalties set forth in subsection (a) of section 10 of this act. A person who possesses two or more credit cards which are so signed is presumed to have violated this subsection.

SECTION 4. Fraudulent use of or representation of authority to use illegally obtained or illegally possessed credit card, forged credit card or revoked, expired or fictitious credit card.

A person, who, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value, or any other person, (i) uses for the purpose of obtaining money, goods, services or anything else of value a credit card obtained or retained in violation of section 3 of this act or a credit card which he knows is forged, expired or revoked, or (ii) obtains money,

goods, services or anything else of value by representing without the consent of the cardholder that he is the holder of a specified card or by representing that he is the holder of a card and such card has not in fact been issued, violates this subsection and is subject to the penalties set forth in subsection (a) of section 10 of this act, if the value of all money, goods, services and other things of value obtained in violation of this subsection does not exceed $500 in any six-month period; and is subject to the penalties set forth in subsection (b) of section 10 of this act, if such value does exceed $500 in any six-month period. Knowledge of revocation shall be presumed to have been received by a cardholder four days after it has been mailed to him at the address set forth on the credit card or at his last known address by registered or certified mail, return receipt requested, and, if, the address is more than five hundred miles from the place of mailing, by air mail. If the address is located outside the United States, Puerto Rico, the Virgin Islands, the Canal Zone and Canada, notice shall be presumed to have been received ten days after mailing by registered or certified mail.

SECTION 5. Fraud by person authorized to provide goods or services.

(a) Illegally obtained or illegally possessed credit card; forged, revoked or expired credit card. A person who is authorized by an issuer to furnish money, goods, services

or anything else of value upon presentation of a credit card by the cardholder, or any agent or employees of such person, who, with intent to defraud the issuer or the cardholder, furnishes money, goods, services or anything else of value upon presentation of a credit card obtained or retained in violation of section 3 of this act or a credit card which he knows is forged, expired or revoked violates this subsection and is subject to the penalties set forth in subsection (a) of section 10 of this act, if the value of all money, goods, services and other things of value furnished in violation of this subsection does not exceed $500 in any six-month period; and is subject to the penalties set forth in subsection (b) of section 10 of this act if such value does exceed $500 in any six-month period.

(b) Misrepresentation to issuer. A person who is authorized by an issuer to furnish money, goods, services or anything else of value upon presentation of a credit card by the cardholder, or any agent or employee of such person, who, with intent to defraud the issuer or the cardholder, fails to furnish money, goods, services or anything else of value which he represents in writing to the issuer that he has furnished violates this subsection and is subject to the penalties set forth in subsection (a) of section 10 of this act, if the difference between the value of all money, goods, services and anything else of value actually furnished and the value represented

to the issuer to have been furnished does not exceed $500 in any six-month period; and is subject to the penalties set forth in subsection (b) of section 10 of this act if such difference does exceed $500 in any six-month period.

SECTION 6. Possession of machinery, plates or other contrivance or inomplete credit cards.

A person other than the cardholder possessing two or more incomplete credit cards, with intent to complete them without the consent of the issuer or a person possessing, with knowledge of its character, machinery, plates or any other contrivance designed to reproduce instruments purporting to be the credit cards of an issuer who has not consented to the preparation of such credit cards, violates this subsection and is subject to the penalties set forth in subsection (b) of section 10 of this act. A credit card is "incomplete" if part of the matter other than the signature of the cardholder, which an issuer requires to appear on the credit card, before it can be used by a cardholder, has not yet been stamped, embossed, imprinted or written on it.

SECTION 7. Receipt of money, goods, services or anything else of value obtained in violation of section 4.

A person who receives money, goods, services or anything else of value obtained in violation of section 4 of this

act, knowing or believing that it was so obtained violates this section and is subject to the penalties set forth in subsection (a) of section 10 of this act. A person who obtains at a discount price a ticket issued by an airline, railroad, steamship or other transportation company which was acquired in violation of section 4 of this act without reasonable inquiry to ascertain that the person from whom it was obtained had a legal right to possess it shall be presumed to know that such ticket was acquired under circumstances constituting a violation of section 4 of this act.

SECTION 8. Defenses not available.

In any prosecution for violation of this act, the state is not required to establish and it is no defense:

(i) that a person other than the defendant who violated this act has not been convicted, apprehended or identified; or

(ii) that some of the acts constituting the crime did not occur in this state or were not a crime or elements of a crime where they did occur.

SECTION 9. Presumptions.

When this act establishes a presumption with respect to any fact which is an element of a crime, it has the following consequences:

(i) when there is sufficient evidence of the facts which give rise to the presumption to go to the jury, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly negatives the presumed fact; and

(ii) when the issue of the existence of the presumed fact is submitted to the jury, the court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

SECTION 10. Penalties.

(a) One Year or $1000. A person who is subject to the penalties of this subsection shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Three years or $3000. A person who is subject to the penalties of this subsection shall be fined not more than $3,000 or imprisoned not more than three years, or both.

SECTION 11. Act not exclusive.

This act shall not be construed to preclude the ap-

plicability of any other provision of the criminal law of this state which presently applies or may in the future apply to any transaction which violates this act, unless such provision is inconsistent with the terms of this act.

SECTION 12. Severability.

If any provision of this act or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Notes to State Credit Card Crime Act

The notes which follow are descriptive of the proposed State Credit Card Crime Act. Extensive citations of the statutes and cases applicable to credit cards which were considered in drafting this act are set out in the accompanying memorandum on "Credit Card Frauds: The General Criminal Law", the "Tabular Analysis of American Criminal Law Statutes Specifically Covering Credit Cards," texts of the American credit card statutes, the summaries of reported state and federal criminal cases on credit cards and case abstracts.

SECTION 1. Definitions

(a) Cardholder. The cardholer is defined as the person or organization named on the credit card. It includes individual members or agents of a business organization who receive credit cards in their own names at the request of their company. A credit card issued to a named person at the request of his company is intended to be included as one issued at the request of the "cardholder" since the application for the card is made at his expressor implied "request." See subdivision (b) of this section.

(b) Credit Card.* The credit card is defined in the broadest way to include cards and tokens issued by the supplier of goods or services (often referred to as a two-party device) and cards and tokens issued by an issuer which does not itself supply the goods and services (often referred to as a three-party device). Examples of the former category are department store charge plates and credit cards issued by an airline; food or services are supplied by the issuer which bills the cardholder directly. Examples of the latter category include cards issued by American Express and Diners Club; the credit card is issued by one agency and is used by the cardholder to make purchases of goods and services at retail establishments listed in the issuer's directory or displaying its insignia; the seller of the goods sends vouchers signed by the cardholder to the issuer; the issuer reimburses the seller and bills the cardholder.

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* As originally prepared the Act defined a credit card as one "issued at the request of the cardholder". Defined

(footnote cont'd)

thusly, the Act would have been inapplicable to crimes committed through use of a credit card which had been issued without obtaining an application from the cardholder.

On further consideration it was decided to delete this requirement. The person who fraudulently uses a credit card does not know how that card was issued and is guilty of a crime in any event. He should not fortuitiously receive immunity from prosecution by virtue of the fact that the card he used was issued without application.

Should a legislature decide that credit cards should not be issued without an application, it should specifically legislate on this subject rather than create an inconsistency in the criminal law.

(c) Expired credit card. A cardholder should not be penalized for using an expired card unless he has actual knowledge of its expiration. The simplest and safest way to remind him is to place on the face of the credit card either the terms during which it will be effective (for example, 1966-67) or the specific date of expiration. Either will suffice. Credit cards which do not have a term shown on their face cannot be "expired" under this act, although they may be expired under other provisions of criminal or civil law. See section 11, supra, on lack of exclusivity of this act. A credit card without a term on its face can, under this act, be terminated by revocation, pursuant to subdivision (f), or by destruction.

(d) Issuer. This term covers both the two-party and three-party categories described in the notes to subdivision (b) of this section as well as authorized agents.

(e) Receives. This definition was designed to preclude judicial application of restrictive common law distinctions among the terms "acquisition of title," "possession," "custody" and "control"

in defining the various kinds of credit card fraud which are the target of subsections (a), (d) and (e) of section 3. Such a broad approach is consistent with that of the Model Penal Code which states "that the essential idea sought to be expressed is acquisition of control whether in the sense of physical dominion or of legal power to dispose." American Law Institute, Model Penal Code, Tentative Draft No. 2, 94-95 (1954).

(f) Revoked credit card. Under this definition, a credit card can be revoked without notice, but its subsequent use does not in itself violate this act unless the user knew of the revocation. Where notice of revocation has been sent to the cardholder in the manner prescribed in section 4, he will, after the stated period, be presumed to know about the revocation. The effect of presumptions under this act is set forth in section 9, infra.

SECTION 2. False statement as to financial condition or identity.

Section 2 in substance duplicates criminal provisions adopted by a number of states. See, e.g., Ore. Rev. Stat. § 165.615. It is applicable without regard to whether or not the card has

actually been issued. Perhaps its most significant aspect is the intentional omission from its coverage of a person who allegedly makes a false statement with respect to his "intent to pay." A substantial majority of the states have refused to hold that a false statement concerning future action (which is sometimes called a false promise) constitutes a fraudulent misrepresentation. Some ten jurisdictions, including California, have adopted the view that a present intention not to perform a promised future action should be punished as a misrepresentation of a material fact, namely the promisor's state of mind.

It cannot be denied that a misrepresentation of intent is a misrepresentation of a fact, state of mind. Nevertheless, for the purposes of this proposed credit card statute, such a misrepresentation is not made criminal. This restriction avoids the danger of a factfinder's improperly imputing a fraudulent state of mind to a person on the basis of his subsequent use of the card. The factfinder's inevitable temptation is to apply some kind of reasonable man standard. So, if the defendant has run up vast bills immediately after obtaining a credit card, he could be found guilty of defrauding

the issuee. But in fact he may have simply been dazzled by his sudden ability to participate fully without ready cash in the affluent society. It is doubtful that a man should be subjected to criminal penalties because euphoria overcomes prudence. In any event, this is the kind of normal commercial risk which an issuer can guard against fairly effectively by careful credit checks. Section 2 is directed at the person who seeks to frustrate the issuer's effort to assure that the card is being placed in sober, safe hands.

Adoption of this proposed credit card statute would not affect the applicability to credit card matters of general statutes covering misrepresentations of present intention in the states which follow the minority rule. See section 11, infra, on lack of exclusivity of this act.

SECTION 3. Theft of credit card by taking or retaining possession; theft of credit card lost, mislaid or delivered by mistake; purchase or sale of credit card; obtaining control of credit card as security for debt; dealing in credit cards of another; forgery of credit card; signing credit card of another.

(a) Theft by taking or retaining possession of card taken. This subsection is directed against a wide range of unlawful activities which fall within a variety of traditional criminal law categories. The object is to avoid the many technical distinctions among various types of larcenous activity that have evolved over the centuries and have more than once provided lacunae through which the criminal is able to slip after apprehension. More specifically, it eliminates all distinctions based on the location of legal title or the identity of the party deprived of possession or control. It should also be noted that larcenous intent - which is commonly an element of crimes against property - need not be proved for credit card theft. In the case of a taker, the prosecution only must prove the taking without consent; in the case of the receiver from the taker, the prosecution must establish receipt with knowledge of the unlawful taking and intent to use, sell or transfer the card.

Any state having a broad definition of larceny may substitute its inclusive term for the listing of common law crimes in this subsection. See, e.g., American Law Institute, Model Penal Code, Proposed Official Draft (1962), section 223.1; New York Penal Law, section 155.00 (effective September 1, 1967).

In terms of culpability, there seems no material difference between the following cases all of which fall within this subsection:

(i) X, a cardholder, gives his card to Y, a girl friend for her personal use. Y then sells the card to Z and tells X that her pocketbook was snatched. In most, if not all, jurisdictions, Y would be guilty of embezzlement; she is guilty under subsection (a). Z would in some states be a receiver of "stolen property." But in others, property obtained by embezzlement is not deemed "stolen". Z is guilty under subsection (a). Both Y and Z are also guilty under subsection (c).

(ii) Y picks the cardholder's pocket or burglarizes the cardholder's premises and obtains his credit card. This simple theft is covered by subsection (a).

(iii) If Y, a pickpocket or burglar who took the credit card from the cardholder's possession, transfers it to Z and Z knows it was acquired illegally, Z is guilty of credit card theft under subsection (a) if he had any intent to use the card. Since it is clear from the face of the card that X has no right to transfer it, Z's unexplained possession of a stolen credit card probably would

permit the case to go to the jury on the issue of knowledge; some independent evidence of intent to use, sell or transfer would be required and it might be supplied by prior or subsequent criminal activities in connection with credit cards.

If Y or Z has in his possession credit cards issued in the names of two or more other persons, then the case will go to the jury even if the defendant has some explanation, unless a reasonable man would have to accept the explanation as precluding culpability. The effect of presumptions under this act is set forth in section 9, infra.

(b) Theft of credit card lost, mislaid or delivered by mistake.

In its purpose and reach, this subsection is modeled upon the equivalent provision, section 223.5, of the Model Penal Code. American Law Institute, Model Penal Code, Proposed Official Draft (1962). The draftsmen's comments with respect to that section are apposite here:

1. Assumption of Control Required.

Theft penalties are not imposed on persons who merely learn of the whereabouts of lost

property but do not assume some control over it. If it is desirable to provide criminal sanctions to compel people to communicate helpful information to the owners of lost property, this should be done by separate legislation not carrying the moral imputation of theft and presumably with lower sanctions. Mere handling of a lost article for purposes of examination would not be an assumption of control within this section. The likelihood of restoration to the owner will often be increased rather than diminished by non-interference of casual finders.

2. Omission as Essence of the Crime.

Even though a finder may take possession with intent to keep the property from the owner, he is not liable to conviction under this section if within a reasonable time he acts to restore the property to the owner. Thus essentially finders are punished for failure to act rather than for an initial misappropriation.

Common law theory of larceny as an infringement of another's possession required a determination of the actor's state of mind at the moment of finding, for an honest state of mind at that point would preclude the felony conviction . . . .The realistic objective in this area is not to prevent the initial appropriation but to compel subsequent acts to restore to the owner. Therefore the section permits conviction even where the original taking was honest in the sense that the finder then intended to restore, but subsequently changed his mind; and it bars conviction where the finder acts with reasonable promptness to restore the property, even though he may have entertained a fraudulent purpose at some time during his possession.

3. Negligent Failure to Restore Not Theft.

Statutes dealing with theft by finders commonly refer to failure to take measures to restore where there is reasonable means of identifying or locating the owner, without expressly requiring the actor to be aware of the

reasonably available information or means...Section 206.5 [section 223.5 of Proposed Official Draft (1962)] is limited to purposeful omission to take steps to restore. No one should be punished as a thief merely because he stupidly or carelessly failed to follow a course of action which would have been apparent to another. American Law Institute, Model Penal Code, Tentative Draft No. 2, pp. 83-84 (1954).

The Model Penal Code has adopted a slightly harsher test than this proposed credit card statute in that it imposes liability for "failure to take reasonable measures to restore" as well as for intent to use. Because of proof problems, in practice the distinction is likely to be of limited significance.

(c) Purchase or sale of credit card of another.

This subdivision covers transfer of a credit card for consideration of any kind. Only wholly gratuitous transfers are exempted. There can be no lawful objective in buying a credit card from a person

other than the issuer or in selling it. If the cardholder sells it, he does so with knowledge not merely that he is violating a contractual agreement, but that he is subjecting the issuer and an unpredictable number of merchants to potential liabilities which they have expressly sought to avoid by the issuer's evaluating the cardholder's credit prior to issuance of his credit card. Moreover, the person purchasing the card must either fear that he would be unable to obtain a card from the issuer or may intend to use the card in such a way that it would be awkward or dangerous for the issuer to know his true identity.

In this latter regard, subsection (c) is a complement of section 2. It would be anomalous to penalize a man for seeking to trick the issuer directly but to offer no deterrent to the man who, fearing that he will be unable to deceive the issuer, obtains a card by purchase from a party other than the issuer. In such a case, it is not unlikely that the card was obtained originally at the instance of the purchaser and that the card-holder was intended to serve merely as a conduit.

This subdivision section covers the return of a credit card to the issuer or cardholder in exchange for some consideration but does not apply to a reward given to a person who, for example, finds a card and returns it without demanding consideration.

(d) Obtaining control of credit card as security for debt. The characteristic person to whose activities this subsection applies is the unscrupulous factor or "loan shark" who, with fraudulent intent, forces a cardholder in serious financial straits to acquire goods with the card or to transfer the card to him. Compare the definition of extortion in subsection (a) which is broad enough to be interpreted to cover this subsection. See also the broad definition of "receives" in subsection (e) of section 1.

The problem is explicitly covered to give notice that this dangerous activity is criminal. A typical fact pattern is one in which the creditor permits the cardholder to retain possession of the credit card but compels him to purchase large quantities of goods for which he will not be able to pay the issuer and then either to turn the goods over to the creditor or to convert them into cash which the creditor then takes as partial or complete payment of the debt.

(e) Dealing in credit cards of another.

The fraudulent use of credit cards threatens to become a big and well organized business. Pickpockets and other thieves are encouraged to steal credit cards by the knowledge that they can be disposed of for ready cash, thus avoiding the risk, attendant on any attempted use, of apprehension by an observant merchant. The dealer is a particular threat to the efficacy of this important commercial device not merely because he encourages theft, but also because he is an expert in the use and disposal of credit cards and goods and services illegally obtained by means of their use. He will often be familiar with the uses which offer the least danger of apprehension and the maximum opportunity to secure valuable goods and services. Moreover, he will often be part of a highly developed organization which is capable of moving the card quickly from place to place to permit full exploitation before word of its loss has reached all merchants, and which also has facilities for disposing of goods so obtained.

In most states, statutes penalizing receiving or dealing in stolen goods require the prosecution to establish the dealer's actual knowledge that the goods were obtained by means of a larcenous taking. This does not seem inappropriate where there is a legitimate market in the goods; but there cannot be such a market for credit cards. Therefore this act merely requires the jury to find that the defendant had reason to know that the credit cards in his possession were taken or retained in violation of section 2 or by means of credit card theft. Again, because of the intrinsic illegitimacy of any traffic in credit cards, this subsection does not require the state to prove that the dealer or receiver intended to use or sell the credit cards over which he has obtained control.

For the reasons indicated above, the dealer is more dangerous to society (and, being a "business man", more susceptible to deterrence) than the man who picks pockets or snatches purses. Hence, even if a dealer also participates in the original taking, he should be subject to the more

severe penalties of subsection (b) of section 10. See the notes to section 8, defenses not available, infra, for a discussion of culpability of a dealer defendant who is also a thief.

(f) Forgery of credit card.

Credit card forgery is normally an act of a professional criminal. An effective forgery requires careful preparation and some considerable skill. It is a substantial threat to commercial confidence. Hence the forger is a serious obstacle to the exchange of goods and services. But forgery can be profitable, so there must be ample deterrence.

A forger may produce a completely false credit card or he may alter a card that was actually issued. Both cases are covered by this subsection. Many issuers manufacture cards which are complete except for a few items which depend on the identity of the cardholder and the date of the card's issuance to him. Matter such as the name and address of the cardholder and the date of expiration will subsequently be embossed on the card after an application has been accepted and just prior to issuance. A fraudulent embossment consists of placing such matter on the face

of cards without the consent of the issuer. Normally the cards will have been stolen from the issuer or its manufacturer where the issuer does not manufacture the cards itself.

It is possible that a man in possession of one falsely made or issued card could have found it or otherwise acquired it innocently. But it is extremely unlikely that a man in possession of two or more such cards is unconnected with their creation. Thus it seems highly reasonable to apply a presumption in such a case. The effect of presumptions under this act is set forth in section 9, infra.

Subsection (g). Signing credit card of another.

A principal means of obstructing the fraudulent use of a card is to provide space on the card for the signature of the cardholder and to require such signature as a pre-condition to its use. Some cardholders carelessly neglect to sign their cards. Other cards may, for one reason or another, never reach the cardholder. A person finding or otherwise coming into possession of an unsigned card is likely to recognize that for a time it will not be difficult

to impersonate the real cardholder if he signs the cardholder's name in his own handwriting. Persons who sign with the intent to use the card to obtain goods and services are manifestly preparing to defraud either the issuer or the merchant from whom they propose to obtain goods and services; they should be subjected to criminal penalties. But in many instances they will not be professional criminals, but, rather, fairly ordinary men overcome by sudden temptation. Therefore, they are subject to the lesser penalties of subsection (a) of section 10.

SECTION 4. Fraudulent use of or represenation of authority to use illegally obtained or illegally possessed credit card, forged credit card or revoked, expired or fictitious credit card.

The section is designed to penalize use of cards obtained in violation of prior sections of the act. It also penalizes the practice of charging goods and services to the credit card of another by calling the party dispensing such goods and services and impersonating the legitimate holder.

Some false pretenses statutes appear to require that the fraudulent misrepresentations have been made to

the party who will bear the ultimate loss as a consequence of the misrepresentation. A person, unlawfully using a credit card which is not issued by the merchant but by a third party (the "three-party" credit cards described in the notes to subdivision (b) of section 1), may thus evade criminal liability. This act rejects that distinction which seems to have evolved at a time when the three-party arrangement was not envisaged.

Statutes designed to protect the integrity of telephone credit cards are widespread. See, e.g., Hawaii Rev. Laws §309 B-1 (supp. 1965). Section 4 is designed to cover the case of a caller giving the telephone operator someone else's telephone credit card number or name or telephone number in order to have a call placed without paying for it.

Throughout this statute an attempt has been made to penalize more heavily the professional criminal. Here and in section 5 this distinction is expressed in terms of the quantity of goods and services obtained within a six-month period. It is, without doubt, a very rough rule of thumb; but it is consistent with the traditional manner of distinguishing the petty from the

serious crime. Adequate discretion is granted the sentencing judge to meet the particular punishment needs of any defendant, see section 10, infra.

A presumption with respect to receipt of notice of revocation can be found in a number of existing credit card statutes. See, e.g., Idaho Code Ann. § 18-3117. The time periods specified, which must elapse before the presumption becomes effective, are at least as generous as those found in existing statutes. See, e.g., Ind. Ann. Stat. § 10-2132. The presumption itself rests on two related considerations: first, in the vast majority of cases, registered or certified letters are accepted and signed for by the person to whom they are addressed or someone in immediate contact with him; second, if the case prosecuted is one of those few exceptional instances where the card-holder received no notice, the cardholder is in a far better position to explain why he did not receive notice. For instance, if he shows that he had moved to a new address before the letter is presumed to have arrived or that he was traveling at the time of presumptive arrival,

he would rebut the presumption.

It should be noted that the cardholder is not guilty under section 4 of illegally using a credit card which has been revoked if he had no intent to defraud. The definition of a presumption in section 9 would permit the court to dismiss the case if it were satisfied that a reasonable man would have to have a reasonable doubt that the defendant was aware of the revocation or that, if he were aware, that he had any intent to defraud. A verdict on these issues could never be directed in favor of the state. The effect of a presumption under this act as set forth in section 9, infra.

SECTION 5. Fraud by person authorized to provide goods or services.

Few, if any, credit card statutes manifest recognition that persons authorized by an issuer to provide goods and services on the strength of the issuer's card properly presented by a cardholder sometimes play a role in credit card frauds. Subsection (a) focuses on collusive arrangements between the merchant and a party using a credit card in violation of the provisions of section 4. Subsection (b) deals with a variety of

recorded situations. Perhaps the most common one is the sales voucher which is altered or added to after the cardholder has signed. It is not unusual for the cardholder to sign before the voucher is completely filled in. This is particularly true of the tip, because some cardholders will pay the tip in cash. After a cardholder has signed, a waiter may simply fill in the blank in a manner he deems appropriately generous.

Another problem may arise in the case of the merchant who is on the edge of bankruptcy. In order to raise cash quickly, he may attempt to sell each article in the store several times. To do so he may obtain the assistance of one or two friends with credit cards. They will sign a sales slip but will not receive the stipulated goods or services. Then they will report that their card was lost or stolen. The goods will meanwhile be sold to another party. In this manner their value is effectively doubled or tripled. Another dangerous scheme is to imprint several sales slips with the card of an unsuspecting cardholder. After he leaves, the merchant may fill in the slips and forge the cardholder's

signature. It is sought to distinguish, by means of different penalties, between the petty abuse and sustained unlawful activity. See the discussion of grading of penalties in the notes to section 4.

SECTION 6. Possession of machinery, plates or other contrivance or incomplete credit cards.

Section 6 permits the indictment of forgers who are caught before they are able to consummate their plans for manufacture and distribution. Since forgery includes the unauthorized completion of cards that were manufactured by the issuer, a necessary step in certain conspiracies to forge is the acquisition of incomplete cards. Since, as one would expect, incomplete cards are very carefully safeguarded by issuers, possession of two or more of such cards by one other than an agent of the issuer is a natural basis for grave suspicion and gives rise to a presumption. The effect of a presumption under this act is set forth in section 9, infra.

SECTION 7. Receipt of money, goods, services or anything else of value obtained in violation of section 4.

Section 7 is the natural complement of section 4.

A well-organized conspiracy for the fraudulent use of a credit card will normally have as its objective the conversion of large quantities of valuable goods into cash. Such a plan requires a receiver who is prepared to avoid asking awkward questions as consideration for an unusually attractive price.

Probably the most massive conspiracy involving credit cards is directed towards the procurement and sale of transportation services. The following is a typical case. A credit card is stolen in a Los Angeles hotel room and turned over to a dealer. His agent immediately takes the card to the airport and procures thousands of dollars worth of tickets from different airlines. Card and tickets may then be flown to New York where another spate of ticket buying occurs. Although tickets purchased with credit cards cannot be exchanged for cash, they can be exchanged for tickets to other destinations. In New York and certain other cities it is known in some quarters that discount tickets can be obtained by dialing a given number. Sale is normally effected unobtrusively in a bar or other public place. It appears that in many states a person

acquiring such tickets under these circumstances has no obligation to inquire as to their source and the basis for the very great discount offered. The circumstances are sufficiently suspicious to justify an obligation of reasonable inquiry.

SECTION 8. Defenses not available.

Persons accused of being receivers or dealers in stolen property, and persons accused of other activities illegal under this act, have sometimes raised one of the contentions which are listed in sub-paragraph (i) as invalid defenses. The state must prove beyond a reasonable doubt that the credit card was obtained under circumstances which constitute a violation of this act to prosecute a receiver of the card under section (a) of section 3 or a dealer under subsection (e) of section 3. To require, in addition, that the state have apprehended, identified, or convicted the thief or embezzler before it can prosecute the dealer would be absurd. It would be equivalent to holding that because one member of a conspiracy has escaped--for example, by fleeing the jurisdiction--it would be unsporting to try his confederates.

A defendant could not claim he was not guilty under one provision of this act because he was also guilty under another. For example, a dealer could not successfully demonstrate that he was not guilty of violating subdivision (e) of section 3 because he participated in the original taking from the cardholder in violation of subdivision (a) of section 3. The act has been drafted with the intention of avoiding such an interpretation. See notes to subsection (e) of section 3, supra.

Application of this act to credit cards obtained under circumstances which constitute a violation of this act but not the criminal law of the jurisdiction in which the taking occurred is important principally because of the growing international movement of credit cards and the concomitant growth of international criminal conspiracies sensitive to the opportunities it presents for fast profits. This situation as covered by sub-paragraph (ii).

The issue is particularly important in a case where a violation of section 4, for fraudulent case, depends upon proof of a violation of section 3, for credit card theft. The businessman

or tourist may have his pocket picked in Cairo, Bangkok, Istanbul or a host of other exotic places. A card so obtained is very unlikely to find its way back to the United States except through professional criminal channels. It would be virtually impossible to establish what the law of say Saudi Arabia is with respect to credit cards. Even if the taking of a credit card actually violated the foreign law, the difficulty of proving that law to the satisfaction of the factfinder may be insuperable. Some courts might indulge in the assumption that the law of the foreign jurisdiction is the same as the law of the forum, but it does not seem appropriate for ciminal liability to flow from what will often be a mere fiction. It seems far preferable to face the problem directly.

SECTION 9. Presumptions.

The definition of a presumption and its effect follows subdivision (5) of section 1.12 of the Model Penal Code. American Law Institute, Model Penal Code, Proposed Official Draft (1962).

SECTION 10. Penalties.

The penalties provided are comparable to the penalties recommended in the Model Penal Code for grand and petty larceny. They do, however, give the court a wider range of discretion than does the Code. Section 10 does not, for example, distinguish between first and second offenders. However, such a distinction may be read into the act in any state where it is included in the criminal code. In any event, it seems reasonable to assume that the courts will recognize this and other sentencing distinctions which have evolved over the years by statute and judicial decision as guides to the allocation of punishment in particular cases.

SECTION 11. Act not exclusive.

At the present time there is a split of authority as to the exclusivity of credit card statutes in cases where they are silent on the question. There is no good reason why such an act should be held exclusive either with respect to substantive crimes or penalties. If a state should decide that the taking of any property, in a defined way, as by robbery committed with a gun,

is pecularily reprehensible or dangerous to society, it should not be prevented from imposing a more severe penalty where the thing taken is a credit card because of the existence of a specific credit card statute.

It is not altogether clear just what exclusivity would mean. At its most absurd, it would prevent the application of the general criminal law to any transaction involving credit cards. Thus a form of larcenous taking which by inadvertence had not been covered by the credit card statute might seem immune to penal sanction. Such a result would, of course, be intolerable. The statute should only be found to preempt the field in cases where the general criminal law is in direct conflict. An example would be a rule that a false representation must be made to the party who will suffer loss if it is to be indictable. With respect to credit cards, that approach has, of course, been supplanted.

This act assumes the applicability of the usual state statutory and case law general concepts dealing with such matters as conspiracy, attempts and principals. In a state such as Wyoming which does not have a general attempts statute, but deals

with attempts in the definitions of each crime, appropriate changes in this act can be made to cover the particular state lacunae.

SECTION 12. Severability.

This is the usual severability clause used in acts drafted by the National Conference of Commissioners on Uniform State Laws.

NO.3

SB

SB 364

Judiciary Committee Report

on

HCS for SENATE BILL NO. 364

This bill establishes a system of compensating victims of bodily crimes for their out-of-pocket expenses incurred as a result of the crime. One of the most fundamental functions of a government is the protection of its citizens; therefore, when the various statutory deterrents, law enforcement activities and conditions of the society fail to provide this protection, it is only reasonable that the government compensate the victims of that failure. Under present law, when the person who commits the crime is not financially responsible, the innocent victim who suffers the personal injury is left to his own resources. This obviously works an especial hardship on the poor and the elderly.

The bill is limited to personal injuries and to out-of-pocket expenses in order to avoid the likelihood of collusion. The total amount payable is limited, and the bill specifies additional limitations on and factors to be considered in awarding compensation. Information presented in an August 1969 report of the Arkansas Legislative Council indicates a rather low cost for such a system. In California, with a population of approximately 19,163,000, the 1967-68 fiscal year budget for the system was $22,411; in the 1968-69 fiscal year the budget was $105,374; and the proposed budget for the 1969-70 fiscal year was $127,000. The costs rise as more people become aware of the availability of compensation for their injuries. According to the Arkansas report, as of early 1969, at least five states had enacted victim compensation systems such as this one, and at least six others and Congress (for the District of Columbia) were considering similar legislation. In the preparation of this bill, the relevant provisions in the law of Hawaii, California, Massachusetts, and Maryland were reviewed.

Barry W. Jackson
Chairman
House Judiciary Committee

SB-403

ALASKA NATIONAL BANK
of Fairbanks
NORTHWARD BUILDING "The Friendly Bank" FAIRBANKS, ALASKA - 99701

April 20, 1970

To the Honorable Representatives Anderson,
Bradner, Holm, Jackson, Miller, Orbeck and Young
Alaska State House of Representatives
Juneau, Alaska 99801

Gentlemen:

Senate Bill No. 403 "An Act Providing for the Collection and Deposit of State Money and the Collateralization of Deposits of State Funds; and Providing for an Effective Date" contains sections which would be extremely detrimental to the State of Alaska and to the banking institutions located within the State.

Section 1 (e) which states in part "the following, while not in default, if issued, made or created after January 1, 1970, constitute eligible collateral" is not only an untenable restriction but one that could be dangerous to the State and the banking institutions operating therein. We recommend that the State outline the types of collateral acceptable and establish a percentage of deposits to be covered thereby but completely eliminate any reference to date of origin of collateral meeting those requirements. Alaska National Bank, for example, holds $5,385,000 of State deposits against which are pledged $5,686,000 of U. S. Direct and Agency Obligations, State and Municipal Bonds, and FHA mortgages. Senate Bill 403 if passed would make ineligible every penny of the collateral which we currently have pledged and would require substitution as State Time Certificates mature starting May 26, 1970.

Included in Alaska National Bank's collateral are $345,000 of State and Municipal bonds issued by the State of Alaska or by municipalities within the State of Alaska. Some of these were purchased, as for example Nome Bonds, at the request of the State. Is our State Administration now saying that Alaskan bonds are not acceptable quality. "Outside" investors would take a dim view of this attitude. Orderly and healthy expansion of Alaska's financial institutions is essential if the State is to continue to properly expand. No doubt most of the Alaskan banks are in the same position as Alaska National and to render all of Alaskan bank's collateral ineligible as State Time C.D.'s mature and are removed would create a catastrophic

situation. We are in sympathy with the aims of the Administration to put to work for Alaskans deposits given to Alaskan banks but this is not the way to do it and in fact defeats the purpose as it could result in a withdrawal of State funds from Alaskan banks, not an increase. Dropping the collateral requirements to 35 per cent is the best approach to putting State money to work for Alaskans. The amount of collateral to be pledged should be based upon the dollar value of State deposits in each bank not on the total deposits held by each bank. Until the State allows banks to use 65 per cent of the State Time Certificate deposits without requiring back-up collateral the people of Alaska will not see the true benefit from those deposits. Every dollar of State deposits which a bank is required to tie up in collateral is in effect a sterile deposit as far as benefiting the people of Alaska.

We, therefore, recommend complete removal of any reference to issue date of acceptable collateral, and a reduction in percentage of collateral required to 35 per cent of State deposits.

Yours very truly,

William J. Green
Vice President and Comptroller

WJG:js

FORM SA-1B

SB 444

MEMORANDUM

State of Alaska
DEPARTMENT OF NATURAL RESOURCES

TO: The Honorable Barry Jackson
Chairman
House Judiciary Committee

DATE : May 20, 1970

FROM: Thomas E. Kelly
Commissioner

SUBJECT: SB 444

Pursuant to your request of May 19, the following list enumerates violations of park regulations that we have experienced and which are not enforceable under present statutes, thereby making passage of the captioned bill of utmost importance.

(1) TRAFFIC VIOLATIONS - Excessive speed, reckless driving and other moving vehicle violations.

(2) DURATION OF STAY - Camping in State wayside and recreation areas for periods in excess of the two week limitation. This deprives visiting tourists and Alaskan citizens of the opportunity to find room for camping in our parks. It is a particular problem in view of the influx of migrant, jobless workers and hippies who seek parks as their haven.

(3) ILLEGAL USE -

(a) Camping and day use facilities which are not designed for overnight stay. These include picnic areas which are not set up for pitching tents or parking camp trailers.

(b) Erection of shacks and lean-tos which constitutes environmental intrusion.

(c) Misuse including sites for rallies. Regulations provide for permits to be issued under specific conditions for big gatherings. Abuse of this privilege in the absence of enforcement laws increases deterioration in our parks.

(d) Driving off of gravel paths and walkways or around barricades which we set up for safety purposes.

(e) Violations of water safety including driving power boats through swimming areas.

(4) RESIDENTIAL GARBAGE - Accumulation of refuse and garbage in the parks as a result of nearby residents using trash barrels for their garbage disposal. The barrels and trash cans are placed in the parks for individuals using the park facilities. We do not have the means to provide residents garbage pickup and it is particularly onerous to have a dump site surrounding filled trash barrels.

The above list summarizes some of the problems we are continually faced with in park administration and maintenance. It is our desire and goal to provide the finest in park facilities for Alaskan residents and tourists. We believe that adoption of the captioned bill in the law will go a long way in achieving this goal.

The Legislature has recently adopted a similar law (Chapter 95 SLA 1970) to protect historic sites which I feel is analogous to the protection sought by this bill.

SB446

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER / POUCH M—JUNEAU 99801

April 14, 1970

The Honorable Irwin Metcalf
House of Representatives
State of Alaska

Dear Representative Metcalf:

In response to your request regarding Senate Bill 446, this Department urges the passage of this bill as we feel the historic and scientific sites of interest in Alaska are valued by the public and measures should be taken to protect them from damage and abuse. The increase in fine from $500 to $1,000 is in order as this will more closely cover the cost of any damage to the sites and possibly prevent some future damage.

If any further information is required please advise as the enactment of this bill is needed.

Sincerely,

Thomas E. Kelly
Commissioner

SB 475

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99801

May 6, 1970

Barry,

Your CS for SB 475 is attached. However, at the point where you suggested changing "consider" to read "give due consideration to", I left "consider" in. First of all, the drafting manual (at p. 19) states "Use finite verbs instead of corresponding noun-or-adjective forms denoting action as: 'consider' instead of 'give consideration to'; 'know' instead of 'have knowledge of'." Secondly, the word "due", as an adjective, is quite inadequate. It is either used for its legalistic sound (in which case it should be dropped) or it is used as a more-or-less synonym for such words as "serious", "formal", "appropriate", "weighty", "lengthy", "proper", etc., (in which case the more accurate word should be used). It seems to me that the phrase "give due consideration to", in the instant situation, places no greater requirement on the court than the simple, direct word "consider".

Regarding sec. 4 in this final version, cf. AS 47.10.020(a), which allows for informal adjustment or disposal.

A.
Art

SB 475

43 Mile Steese Highway
Box 5-309
College, Alaska 99701
April 17, 1970

Hon. Tury Anderson, Mike Bradner, John Holm, Barry Jackson,
Gene Miller, Ed Orbeck and Don Young
Alaska State House of Representatives
Juneau, Alaska 99801

Dear Sirs:

SB 475

I feel so strongly about the "Christian Science Bill" that I am prompted to write you all as my Representatives from the 16th District.

Please consider this bill most carefully. To permit its passage, with the rider which states that a court could order medical care for a child whose parents refused because of religious convictions, would be a staggering blow to our religious freedom- a freedom that our forefather's emigrated here to achieve. It is contrary to the First Amendment to the Constitution of the United States. It is contrary to the spirit of freedom under which our country has developed and prospered for so many years.

Both religion and medicine have been free to try and gain; they have been free to try and lose. Because of the popularity of one system is the other automatically to be judged wrong because it is in a minority? Are we to prevent a minority from the full and free expression of their faith? Our country founded upon a spirit of fairness, how can this spirit survive when one's freedom of religion has been restricted?

Why not let time be the judge? Is the State of Alaska going to start judging a person's religion? It would seem that way by the court in effect saying, "you as parents because of your religious convictions, which the State finds archaic,

SB475

superstitious and totally ineffectual, are not mentally capable of caring for your child in a manner which the State regards as proper, therefore we are issuing a court order that the child be placed under medical care." In effect, the State is setting up a religion that all must follow.

Is medicine such an exact science that all men should now be forced to practice it? If medicine is such a science why are not all who go to a hospital healed? How many of those in graves today are there as the result of a mistake, a wrong diagnoses, or a wrongly prescribed cure? We continually hear about the successes of medicine, seldom its failures. It is the opposite with a healing religion- we hear about the failures, seldom the successes.

Human progress cannot have reached the point where the Alaska Legislature can now say,"Medicine and surgery are the only reliable remedial agents. Therefore, we will see that all citizens follow its dictates and practices, even if it conflicts with one's deepest religious convictions."

I sincerely urge you to consider your vote on this bill and in the spirit of freedom for trial and error, of freedom for the progress and improvement that our founding fathers guaranteed us in the Constitution vote against the restrictive rider to the bill.

Sincerely yours,

H. Wesley Redhead

H. Wesley Redhead
Box 5-309
College, Alaska 99701

4-29-70

3/23/70

HOUSE JOURNAL

Judiciary Committee Report

on

HCS for SENATE BILL NO. 481

This bill is similar to Sec. 2015.5 of the California Code of Civil Procedure. It allows a person to "certify under penalty of perjury" certain documents required or authorized to be made upon oath, thus eliminating the need to have the document signed by a notary or other person empowered to administer oaths. The House Committee Substitute follows the California version more closely than the original bill, making clearer which documents are covered and which are not. The Senate amendment to the original bill restricts this certification to situations in which no notary or other authorized official is available, and this provision is retained in the House Committee Substitute; the bill, either with or without that amendment, would be of particular benefit to the outlying areas of the State.

Barry W. Jackson
Chairman
House Judiciary Committee

SB 497

LAW OFFICES OF
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AREA CODE 907

HERBERT L. FAULKNER
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FRANK M. DOOGAN
DONALD L. CRADDICK
AVRUM M. GROSS
MICHAEL M. HOLMES

June 5, 1970

Mr. Barry W. Jackson, Chairman
House Judiciary Committee
State Legislature
Juneau, AK 99801

re: SB 497 Am.
Relating to Conveyances of Real Property

Dear Mr. Chairman:

The Juneau Bar Association has considered the above mentioned bill and has endorsed it. The members find there are many deeds of record made to married couples who intended or expected that the property would go to the survivor of them in case of death of one of them, whereas in fact it will not happen because they failed to specify that they took the property as tenants by the entirety. We do not believe this bill will have retrospective effect as to such deeds because we have a statute stating that no bill has retroactive effect unless it so states. Moreover, there have been many deeds purposely made to man and wife without the specification of tenants by the entirety because they wanted it that way for various reasons, the most common of which is to get a stepped-up tax basis by administration of the half interest of the deceased. We therefore object to any amendment making the bill retroactive.

As for future conveyances we approve the bill as we believe it will be better to make these poorly drafted conveyances create a tenancy by the entirety; and to state otherwise when the intention is otherwise.

The Juneau Bar has asked me to convey this information to you.

Yours very truly,

N. C. Banfield

NCB:rp
cc: Shirley Kohls, Pres.

SB 507

Alaska MUNICIPAL League

TELEPHONE
586-1325

MUNICIPAL BUILDING
JUNEAU, ALASKA 99801

March 16, 1970

The Honorable Barry Jackson
Chairman, House Judiciary Committee

Dear Mr. Chairman:

Last Friday, SB 507, pertaining to powers of a 4th class city, was given a special referral to your Committee. Basically, this was done as a courtesy to the League in order that we could have the opportunity to clarify a couple of problems which we think the bill poses.

The League is 100% in favor of what the bill is trying to do insofar as 4th class cities are concerned. However, we recommend that the title of SB 507 be changed to read: "An Act relating to the powers of general law cities including but not limited to 4th class cities within 3rd class and unorganized boroughs". It is our opinion that the bill as presently titled is in direct conflict with the areawide platting concept of Title 7.

In addition, we are respectfully submitting a further proposed amendment to SB 507. This amendment has been endorsed by both the city and borough members of the League as a means of eliminating one area of conflict which has occurred in the past under the planning and zoning statute in Title 7.

We certainly wish to thank you for your courteous consideration of this matter and if we can be of further help, please call on us at any time.

Sincerely,

Don M. Berry
Executive Director

DB/mm

ALASKA MUNICIPAL LEAGUE

PROPOSED AMENDMENT TO

SENATE BILL 507

For an Act entitled: "An Act relating to vacation of public ways."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. AS 07.15.340 is amended by adding a new section to read:

(d) No street, alley, or public thoroughfare may be vacated under the borough planning, platting and zoning authority in its entirety or in part unless vacation is approved by resolution of the governing body of the city or organized borough, or both, in which the public way is located, except that vacation of a street, alley or public thoroughfare located entirely within a city shall require approval of the city governing body only.

*Sec. 2. AS 40.15.160 is amended to read:

Sec. 40.15.160. HEARING AND DETERMINATION. At the hearing, the platting authority shall inquire into and determine the merits of the relief prayed for and make such order as justice and the public welfare require. Vacations ordered by the platting authority shall not be effective unless approved by the local governing body having jurisdiction as provided in AS 07.15.340(d).

March 20, 1970

Mr. Gregory Machyowsky
Legislative Affairs Agency
Pouch "Y", Capitol Building
Juneau, Alaska 99801

Dear Greg:

SB-507 has been referred to the House Judiciary Committee and I am researching this bill.

Enclosed is a copy of a letter and a proposed amendment of the Alaska Municipal League. Would you please review this material and the bill and be prepared to review it with me at an early date? I see a number of problems with the bill.

With respect to vacating streets, a fourth class city should also have the power to close streets and use them for other public purposes, otherwise vacation may simply cause the property to pass to the adjoining property owners.

In the area of bonding, it is difficult to see how a fourth class city could issue general obligation bonds since the power to levy a property tax seems to be, by definition, a part of the concept of government obligation bonding.

As city attorney of Fort Yukon, I wrote Local Affairs Agency on the bonding problem, laying out a number of problems. That letter may also be of assistance to you in reviewing this bill.

Sincerely,

Barry W. Jackson, Chairman
House Judiciary Committee

Enclosures - AML correspondence
Proposed amendment for SB-507

SB-527 ABORTION

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

March 18, 1970

M E M O R A N D U M

TO: Representative Barry Jackson

FROM: Hayden Kaden

SUBJECT: Abortion

AS 11.15.060 provides Alaska's abortion law in these terms: "A person who administers to a woman pregnant with a child any medicine, drug, or substance whatever, or who uses an instrument or other means, with intent to destroy the child, unless the action is necessary to preserve the life of the mother, is, if the death of the child or mother is thereby produced, guilty of manslaughter, and is punishable accordingly."

This statute was adopted by the Congress for the Territory of Alaska in the 1880's. It was taken from the Oregon Criminal Code and, but for minor wording changes, is identical to the present Oregon law, (ORS 163.060). The Oregon Supreme Court interpreted the term "death of the child" in the case of State v. Atwood, 102 P. 295 (1909). The court stated:

> "The term 'in case of death of such child,' which constitutes the consummation of the crime equally with the death of the mother, would seem to mean the death of the foetus, either before or after quickening."

The court also stated that an interpretation of the term "pregnant with child" was not necessary to its decision. However, according to the revisor's notes on the Oregon statute, the court in Atwood and in State v. Ausplund , 167 P. 1019 (1917), said that the term "pregnant with child" designates the fetus throughout the period of gestation.

The courts of the states are not in harmony concerning the interpretation of "pregnant with child" (Accord, 1 Am. Jur. 2d, sec. 6, p. 191.) Some have held with the Oregon court and others, including the Alaskan courts, have held that the fetus must be "quick" in order to be a child.

Thomas Aquinas, in the 13th Century, defined the soul as the first principle of life in those things that live, and life is signalized by two actions: knowledge and movement. Hence the rule of the common law framed by Bracton, a 13th Century jurist, that life does not commence at a certain number of days after conception, but at the moment of "quickening". Therefore Bracton said that killing the fetus after "quickening" was murder, before "quickening", no crime. Previous to

1803, abortion appears to have been largely regarded as a Church offense and was in actuality punishable only by religious penalties, at least in England. ("The Legal and Moral Status of Therapeutic Abortion", by Alan F. Guttmacher, M.D., from Progress in Gynecology, Vol. IV.)

The first English abortion statute, the law of 1803, removed the legal requirement that to be a crime abortion must be performed after "quickening." It made a distinction, however, between the "unquickened" and "quickened" fetus. Abortion was a felony in every instance, but punishable by death only after "quickening". (Guttmacher)

The first state in the United States dealing directly with abortion was Connecticut, which in 1821 passed a statute punishing any attempt to abort a fetus by poison after "quickening." In 1860, the law was extended to all pregnancies irrespective of "quickening" and for the first time an exception was made for acts necessary to preserve the life of the mother. (Guttmacher)

Quoting from retired Supreme Court Justice Tom Clark in the Loyola University Law Review (Vol. II, No. 1, 1969) in answering the question of whether abortion is murder, he says, based on legal precedent, "To say that life is present at conception is to give recognition to the potential rather than the actual..." "No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life."

While it is not known what interpretation of the term "pregnant with child" would be adopted by the Alaska Supreme Court if that issue were presented, an instruction was rendered in State v. Boswell, 61-109, Superior Court, 4th Jud. Dist. (1961) to the following effect:

> "'Pregnant with child' as used in our law means an unborn child so far developed as to be quick, that is, so far developed as to be capable of independent moving or stirring in the mother's womb to a degree perceivable by the mother. The law does not require that the mother in fact identified the movement or stirring; quickening is attained when movement, however slight, could be made to said degree by the foetus independent of any other force."

In another case, in 1958, an indictment for abortion against a doctor in Anchorage was dismissed because the foetus existed for only one month when it was aborted by the doctor and therefore the woman was not pregnant with "child".

The Alaska Attorney General's office has stated in an informal opinion that "since 'quickening' normally does not take place until approximately the fourth month of pregnancy, this interpretation emasculates the abortion law of this state. It is forseeable that this instruction (that given in Boswell) will continue to be given, and, while the Department of Law would advocate a contrary position, the state could not appeal the issue to the Supreme Court and a binding interpretation may never be made." (Letter to John Sackett, April 25, 1969).

In regard to the possible constitutional problems with Alaska's abortion law, assuming its applicability to all abortions, there have been several recent cases of importance bearing on the constitutional issues. Two decisions are of particular importance.

In State v. Belous, 458 P. 2d 194 (1969), the California Supreme Court held, under a statute similar to Alaska's, that the phrase, "unless the same is necessary to preserve her life," is unconstitutionally vague. The court said that the requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids.... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

The problem caused by the vagueness of the statute is accentuated because under the statute the doctor is, in effect, delegated the duty to determine whether a pregnant woman has the right to an abortion and the physician acts at his peril if he determines that the woman is entitled to an abortion. Rather than being impartial, the physician has a direct, personal, substantial, pecuniary interest in reaching the conclusion that the woman should not have an abortion. The delegation of decision-making power to a directly involved individual violates the 14th Amendment. The statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule. The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition of the relevant section of the penal code, she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: no criminal penalties are imposed when the doctor refuses to perform a necessary operation, even if the woman should in fact die because the operation was not performed.

The U. S. District Court in the District of Columbia, in U.S. v. Vuitch, 305 F. Supp. 1032 (1969), struck down the D.C. abortion statute. The court said that the statute making the inducing of an abortion a felony, unless done to preserve the mother's life or health, is invalid for failure to give that certainty which due process of law considers essential in criminal statutes and for impinging to an appreciable degree on significant constitutional rights of individuals. The statute does not prohibit all abortions. An abortion is permitted where done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine.

The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. The jury's nonacceptance or acceptance of an individual doctor's interpretation of the ambivalent and uncertain word "health" should not determine whether he stands convicted of a felony, facing imprisonment. There is no clear standard to guide either the doctor, the jury or the court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is

required to make an abortion conducted by a competent physician legal or illegal under the code.

Two other cases are of interest in light of the constitutional issues, both of which were relied upon by the Attorney General's office, in an informal opinion to Terry Miller and to Lowell Thomas, Jr., to conclude concerning Alaska's law that, "there are adequate legal arguments and decisions supporting the constitutionality of Alaska's current abortion law", and the Attorney General "would not be hesitant to carry out our statutory duty of defending its constitutionality if the issue should ever be raised in court."

A careful reading of both of these opinions cited by the Attorney General does little to dispel the notions of unconstitutionality raised by Belous and Vuitch, regardless of the Attorney General's opinion. In State v. Elliott, 383 P.2d 382 (Ore. 1963), the Supreme Court of Oregon reversed for a new trial the conviction of an abortionist. Reversal was on the basis of an erroneous jury instruction and that portion of the decision is not cogent to this discussion. The Attorney General's office relied for its above stated conclusions on a one sentence statement by the court that, "the defendant's arguments are so lacking in merit that we decline to consider them, except to state that, construing the acts together, they do not violate any requirements or provisions of either the state or federal constitutions." On what specific grounds the defendant argued the constitutional issues is not clear. He merely contended that because the Manslaughter by Abortion Act and the Medical Practice Act have been construed in pari materia when a physician is involved, the Abortion Act as applied to him, violates the 14th Amendment of the U. S. Constitution and Article I, Sec. 20, Article IV, Sec. 23(2) of the Oregon Constitution. It is presumed that he relied on an equal protection argument because one of the Oregon Constitutional sections deals with equality of privileges and immunities of citizens and the other prohibits the legislature from passing local or special acts for the punishment of crimes. Neither of these arguments were at issue in Belous or Vuitch and the abortionist raised none of the vagueness or privacy questions which were raised in those cases. Another distinction here is that Elliott was not a physician, as was the case in Belous and Vuitch, and thus could not take advantage of the Medical Practice Act exceptions to abortion prosecution, i.e., to preserve the health of the mother.

The other case relied on by the Attorney General's office was State v. Moretti, 244 A.2d 499 (N.J. 1968). The Supreme Court of New Jersey upheld the conviction of two defendants, neither of whom were physicians, for conspiracy to commit abortion. Once again, the relevancy of this case to a disposition of the constitutional issues raised by Alaska's abortion law, is highly in doubt. The New Jersey abortion statute reads as follows:

> "Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor."

The defendants claimed that the law was so vague and indefinite that it suffers a constitutional infirmity. This is based on the language, "without lawful justification," which, it is argued, is so indefinite a concept that no one could tell when an abortion would be justified. The court said that a construction of the phrase which confined the meaning to the preservation of the mother's life would avoid any constitutional attack based on vagueness. The court then briefly discussed the fact that this construction had been upheld in previous New Jersey cases and it discussed several dissenting opinions as well. In so doing, the court said, regarding Chief Justice Weintraub, who dissented here also, that only he "expressed doubts as to the constitutionality of the statute, but his discussion related solely to the statute's application to eugenic abortions." The court then said that "the concern for a re-examination of the values represented by the law of criminal abortion is reflected in the recent creation by the legislature of a commission to re-evaluate the abortion statute. However, in the circumstances of the case before us, the ascertainment of the perimeter of lawful justification is not presented and we need not concern ourselves with the questions...." Thus the court stated that it would not even reach the broader constitutional issues presented by the phrase "lawful justification."

However, the court did say that the only inquiry in this case was "whether the defendants had sufficient warning that their conduct was criminal". "(A) defendant whose conduct was such that he clearly could tell that it was prohibited will not be heard to say that the statute is overly broad and that another, in some hypothetical case, could be misled." (emphasis mine.) If, therefore, the statute gave sufficient warning to these defendants that the abortion they contemplated was not lawfully justifiable and thus was criminal, the statute is constitutional as applied to them." (emphasis mine) "That in some other case where the facts require it, we might be called upon to determine the specific limits of the statutory exception for abortions performed with lawful justification -- or to deal with a constitutional challenge made by a defendant claiming he was not adequately warned of the criminality of his conduct -- is of no aid to these defendants if their conduct was such as clearly fell within the prohibition of the statute."

The court then concludes that the defendants could not fail to be aware that the abortion would violate the statute. The defendants also offered no argument of lawful justification before the lower appellate court. In this court the defendants contended that they believed the abortion lawfully justified because it was to terminate an allegedly unwanted pregnancy. The court stated that if this was a lawful ground the statute was rendered meaningless because any abortion would be justified. It further stated that if there were any doubt that the defendants knew their actions were unlawful, it would be dissipated by their surreptitious actions revealed by the record.

Thus the court begs the larger constitutional issues because they are not presented for determination and because they can uphold the defendants' convictions and uphold the validity of the statute on narrower grounds. This is hardly good precedent for upholding the constitutionality of the New Jersey abortion law, much less Alaska's, under a broad-based constitutional attack in the proper circumstances (such as those in Belous and Vuitch), and the court so much as admits it.

Logic and good precedent, I believe, are on the side of any person, especially a physician, who would attack Alaska's law on void for vagueness and even right to privacy grounds.

HK:ic

SB-527

March 2, 1970

The Honorable Terry Miller, Chairman
Senate Judiciary Committee
Alaska State Legislature
Juneau, Alaska
and
The Honorable Lowell Thomas, Jr., Chairman
Senate Health, Education and Welfare Committee
Alaska State Legislature
Juneau, Alaska

Dear Senators:

In response to your request of February 24, 1970, our office has reviewed the case law pertaining to the constitutionality of abortion laws similar in language to that contained in AS 11.15.060. While there are two recent decisions which held the phrase "necessary to preserve the life" of the mother unconstitutionally vague, for the reasons noted below we do not believe it is possible to assert with any reasonable degree of certainty that Alaska's Supreme Court would concur with those decisions.

The two cases referred to are People v. Belous, 80 Cal. Rptr. 354 (1969), and United States v. Vuitch, 305 F. Supp. 1032 (1969). Each of these cases interpreted an abortion statute that for our purposes is identical to Alaska's which reads as follows:

> A person who administers to a woman pregnant with a child any medicine, drug, or substance whatever, or uses an instrument or other means, with intent to destroy the child, unless the action is necessary to preserve the life of the mother, is, if the death of a child or mother is thereby produced, guilty of manslaughter, and is punishable accordingly. (Emphasis added)

Each court determined that the phrase "necessary to preserve" is unconstitutionally vague.

Misc. 100

Belous, decided by the California Supreme Court, was a four to three opinion and Vuitch, a Washington, D. C. case, was a memorandum opinion written by one judge.

As one of the dissenting opinions in Belous pointed out, the phrase "necessary to preserve" is or has been in the abortion statutes of many states for over a century and was even employed at common law, and implicit in the countless decisions that have dealt with such language is the view that the phrase is not unconstitutionally vague. Belous at 367 (Burke J. dissenting).

In State v. Elliott, 383 P.2d 382, 384-5 (Ore. 1963), the Supreme Court of Oregon held that Oregon's abortion law, which contains the same "necessary to preserve" standard as Alaska's abortion law, does not violate the United States or Oregon constitutions. Although "vagueness" is not discussed as such, this Oregon court found the defendant's arguments relating to due process "so lacking in merit, that we decline to consider them, except to state that [the abortion law of Oregon] does not violate any requirements or provisions of either the state or federal constitutions." Id. at 384. Furthermore, a recent New Jersey opinion specifically stated that the statutory standard in abortion statutes of "necessary to preserve the mother's life" is not unconstitutionally vague. State v. Moretti, 244 A.2d 499, 504 (N.J.), cert. denied, 393 U.S. 952, 89 S. Ct. 376 (1968).

In this regard it is interesting to note that the majority in Belous was not able to cite any authority for its conclusion that the term "necessary to preserve [the woman's] life" is impermissibly vague. Belous at 370. The judge in Vuitch was able to cite only Belous. Vuitch at 1034. It should also be noted that neither of these two decisions are binding on Alaskan Courts. The United States Supreme Court has recently denied review of the Belous decision, 38 U.S.L.W. 3313, just as it had refused the year before to hear the New Jersey abortion law case of State v. Moretti, supra. Such action allows each state to decide for itself the constitutional issue in question.

In summary, this office believes there are adequate legal arguments and decisions supporting the constitutionality of Alaska's current abortion law. Thus, we would not be

hesitant to carry out our statutory duty of defending its constitutionality if the issue should ever be raised in court.

Sincerely,

G. Kent Edwards
Attorney General

GKE:jt

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

SB 531

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

October 2, 1968

M E M O R A N D U M

TO: Board of Chiropractic Examiners
Clarence O. Risch, D. C., President
Dr. Norma Godfrey, Vice President
D. L. Hammond, D. C., Secretary

SB 531

FROM: G. Kent Edwards
Attorney General

By: William Edward Spear
Assistant Attorney General

RE: License of one Burger

This memorandum deals with certain questions raised by members of the Board of Chiropractic Examiners concerning their powers and duties in issuing licenses to practice chiropractic in Alaska. Letters from all members of the board reveal the following facts and lie at the basis of the opinion stated herein.

FACTS:

One Burger and one Kary applied for licenses to practice chiropractic in the State of Alaska. Said applicants both attended Western States College; said Burger graduated from the school while said Kary apprently completed his work at another school and did graduate work only at the school and postgraduated. All members of the board approved said Kary's license which is not in issue here, but one member of the board refused to sign said Burger's license because she felt that Western States College does not fall within the ambit of AS 08.20.120(4) as an "accredited" school or college of chiropractic.

Western States College is located in Oregon and is licensed in that state to award chiropractic degrees. Likewise, it is licensed to train individuals for certain laboratories and issue lab and x-ray certificates to such individuals. The institution is approved by the Veterans Administration for veterans training in the profession; likewise, the Oregon Rehabilitation and Immigration authorities approve the institution to train foreign students. Dr. V. E. Marsh, President of the Alaska Association of Chiropractic Physicians and past president of the Board of Examiners states that the Board has approved Western States for all of the 15 years he has practiced in Alaska.

The objecting Board member is reluctant to issue the license because Western State does not appear on a list of "accredited" schools prepared by either of two accrediting agencies, to wit: the American Chiropractic Association or the International Chiropractic Association. It is stated that these two agencies evaluate chiropractic colleges and institutions on separate lists which do not overlap. It appears that the American Chiropractic Association at one time granted a provisional accreditation which was later rescinded. Since that time neither agency has granted accreditation.

QUESTION:

From the facts stated above may the Board lawfully issue a license to practice chiropractic in the State of Alaska to one Burger?

OPINION:

> "AS 08.20.090. QUORUM OF THE BOARD. A majority of the board constitutes a quorum for the transaction of business."
>
> "AS 08.20.120. QUALIFICATIONS OF APPLICANTS. Each applicant shall
>
> * * *
>
> (4) be a graduate of a legally chartered accredited school or college of chiropractic, approved by the board, which requires for graduation a residence course of instruction of not less than four years of nine months each; . . ."

It is unquestioned that the legislature has the power to regulate the practice of chiropractic because of its importance to the health, welfare, and safety of the citizens of Alaska. Neither is it questioned that the legislature may delegate this power of regulation to a board of administrators and/or examiners as long as the power it grants does not exceed its own. Conversely the board so created may not overstep the powers granted it by the legislature and it is precisely this point that is here drawn into question.

The boundaries of administrative discretion which the board may exercise in the prosecution of its business and duties are drawn by the language of the statute. In determining what

latitude the legislature granted the board in determining who could qualify for a license one must turn to AS 08.20.120, since qualifications are more clearly defined than others. For instance with respect to AS 08.20.120(1) the legislature has left the board little discretionary power; each applicant must be at least 21 years of age. Should the board issue a license to someone 18 years of age, it would constitute a clear breach of discretion.

However, AS 08.20.120(4) is not as definite as (1) and leaves the board much more discretionary power. This is not because the legislature could not be more definite in determining what constitutes an accredited school. In our Integrated Bar Act, for instance, one of the qualifications of an applicant is that he must have graduated from a school "approved by the American Bar Association." AS 08.08.130(4). The legislature, we must assume, may have provided if it so wished that the applicant have graduated from a school accredited by the American Chiropractic Association or the International Chiropractic Association or any other evaluating agency or body. The fact is that it did not. The only specific requirement the legislature requires other than that it be a "legally chartered accredited school or college of chiropractic, approved by the board," is that its requirements for graduation include a residence course of instruction of not less than four years of nine months each.

Therefore, in the lack of more positive language we must assume that the board is granted some discretion in determining what a "legally chartered accredited school or college of chiropractic" might be. It would seem that the words "approved by the board," set off by commas after the descriptive phrase does not grant ultimate, unfettered, positive power of determining accreditation to the board but rather is an additional requirement to be met after the accreditation has been established. It appears from the facts presented that Western States College of Chiropractic is legally chartered by the State of Oregon, which leaves only the word "accredited" to be given meaning.

It seems that "accredited" means something more than merely licensing or chartering, for those words were both available to the legislature when it enacted the section. Moreover, under this section the school in question must be both chartered and accredited; giving separate meaning to each work, "accredited" must mean something beyond "chartered." Licensing grants permission whereas accreding usually connotes achievement of high standards and the resulting recognition.

As previously noted herein, the legislature could have chosen to dictate that some national agency set the standards of accreditation, or they could have insisted that in order to be accredited, a school must appear on some national list. This they did not do. We do not feel that the legislature intended accreditation or the power to accredit to lie exclusively with any particular body. A more reasonable position is that "accredited" means some recognition beyond mere chartering, by any entity. "Accredited" means authoritatively approved. Certainly, a national evaluating agency could be an authority and the board would be correct in considering its approval. However, the Veterans Administration or the Oregon Rehabilitating and Immigration authorities may also be considered accrediting entities, and their approval could qualify as an act of accrediting.

The final requirement after chartering and accrediting is for the board itself to approve of the school. If the board wishes to agree with the accreditation given by another entity it will grant its approval. Here it would appear that a majority of the board does recognize Western States not only as being chartered, but sufficiently accredited as well, and has approved the institution as meeting the standards necessary for licensing a chiropractor in the State of Alaska.

GKE:WES:rw

MICHIGAN LEGISLATIVE INVESTIGATORS REPORT ON CHIROPRACTIC EDUCATION.

In December 1967, a committee of legislators from the State of Michigan visited Los Angeles College of Chiropractic, as a part of an inspection tour which included Palmer College of Chiropractic at Davenport, Iowa, and the Spears Chiropractic Hospital at Denver, Colorado.

The purpose of the investigation was to learn first hand about the education of the chiropractic physician, and the practice of chiropractic, so that this information could be given directly to the Michigan legislature. At LACC, the committee inspected the plant, sat in conference with the administration and the faculty, and conducted interviews at random on the campus.

A copy of their findings, with permission to publish was sought by Dr. George Haynes, Administrative Dean of the LACC.

The following report was submitted, and is published as received from the legislative committee, in full text and with no editing.

Ed.

SUB-COMMITTEE REPORT
Chiropractic Study Tour
December 3-9, 1967

The following is the report of Sub-Committee No. 3 of the State Affairs Committee for the period December 3 through December 8, 1967, in the study of Chiropractic Laws and Practices. The Sub-Committee consisted of: Representatives DeForest Strang, Chairman, Federic J. Marshall, Vincent J. Petitpren, and Thomas J. Anderson.

The study consisted of a review of chiropractic instruction, at selected colleges, as to duration, entering qualification, curriculum, and graduation requirements, and of a chiropractic hospital, with emphasis on type and efficacy of care. The study resulted from the confusion of testimony during committee hearings on Senate Bill 227 and hearing testimony, as well as floor debate during a prior session regarding 1966 House Bill 3381. An apparent conflict in the chiropractic profession was demonstrated in testimony, and an antipathy as well as a non-tolerance toward chiropractic generally was exhibited by members of the medical profession appearing before the committee.

The sub-committee was received cordially at three study locations, the Palmer College of Chiropractic in Davenport, Iowa, the Spears Chiropractic Hospital in Denver, Colorado, and the Los Angeles Chiropractic College in Glendale, California. Full assistance was given the committee in display of facilities and response to interrogation, and no objection was passed at any time to the use of the tape recorder during interviews of staff and faculty personnel.

The committee determined that chiropractic is divided by a schism of two conflicting philosophies, which ap-

parently contribute to non-acceptance by other professions.

The basic chiropractic philosphy, that originated in about 1895, holds that bodily health is controllable solely by proper nutritional balance, good physical habits, and the correct alignment of the several vertebra of the spine and the correct relationship of the vertebra to the central spinal cord and ancillary nervous system. There is heavy reliance on the use of X-ray for examining the patient's spinal system. The majority of the practitioners of this philosophy, numbering about 12% of the profession, are graduates of the Palmer College in Davenport. It is the committee's understanding that two or three other small chiropractic colleges in the United States also teach on the Palmer philosophy, based almost entirely on the spinal manipulation and suggestion to the patient of good habits and diet supplementation.

In this method, little work is done on human structural members other than the spine itself, and there is only limited attempt at diagnosis and use of the diagnostic tools used by the medical physician. This segment of the profession opposed House Bill 3381 in 1966. The committee was advised that it was felt the bill tended to authorize the unwarranted expansion of the chiropractor into the diagnostic and medical fields and could contribute to ultimate discrediting of the profession by medical authorities, with possible future punitive legislation. Members of this group are affiliated with the International Chiropractic Association.

The major portion of the members of the profession (about 88%) are graduates of more liberal colleges of chiropractic, of which the Los Angeles College of Chiropractic is an example, and are affiliated with the American Chiropractic Association. This group (ACA) professes a belief in the need for diagnostic appraisal of the patient's general and specific condition, full use of diagnostic tools, such as those used by the physician, and in manipulation of body extremities and joints other than the spine in addition to the correct alignment of vertebra and diet and health control acknowledged by the adherents to the more conservative ICA methods of practice. Approximately seven chiropractic colleges are instructing in this philosophy.

The Palmer College at Davenport is a full four-year institution providing full education in the basic sciences and approximately two years of classroom and clinical training in manipulative therapy directed at the spine. Special attention is paid to the study of the nerves and nervous system and its relationship to the spinal column. At Palmer, it is taught that most bodily malfunctions and disorders, and some diseases, can be corrected by chiropractic adjustments to correct spinal "subluxations" or vertebral misalignments which might cause interfering pressure on portions of the central nervous system affecting all parts of the body. The faculty stated it is their firm belief and teaching that proper nutritional and dietary control, and regular health habits, combined with correct functioning and alignment of the spinal column members, would assure optimum health in an individual and prevent bodily disorders.

Only minimal effort is made to instruct in recognition of bacterially or virally borne diseases. One year premedical training is preferred for entrance at Palmer, although a ninety-day pre-prep course in general sciences is given to entrants not having this qualification. The committee was advised that effective January, 1969, a two-year premed course would be requisite to admittance.

The Los Angeles College of Chiropractic, affiliated with ACA, is also a full four-year institution, requiring one year pre-medical instruction for admission. As at Palmer, full instruction is given in the basic sciences, and in the chiropractic manipulative technique. In addition, much attention is paid to diagnostic analysis of human ailments, and to the use of normal medical diagnostic devices and to various therapeutic treatments. Unlike Palmer, where nerve study and dissections are performed on animal carcasses (by reason of a limiting Iowa statute), at Los Angeles College of Chiropractic, human cadavers are used for laboratory study. The committee noted that the cirriculum at the Los Angeles institution included a broader treatment of the generally accepted

medical theories than at Palmer, where the efficacy of spinal chiropractic was held paramount over all other medical treatments. It appeared that the Los Angeles College (and ostensibly other college affiliated with ACA) treated chiropractic as an important branch of the medical sciences, to be ancillary to other phases of the treatment of human disorders, and at Palmer (and ostensibly other ICA affiliated colleges) that simple spinal chiropractic manipulation was treated as the primary and most effective treatment of ailments, with the medical practices of other branches of the sciences of lesser importance. This philosophical difference is the apparent chief cause of the schism in the profession of chiropractic.

Both institutions are seemingly adequately equipped in both staff and facilities to perform their function. The professional staff of both institutions appears competent as to background, based on the citations contained in the catalogues, and auxiliary personnel such as technicians, laboratory instructors and administrative aides, although not interviewed, were cited as competent. Facilities in both institutions include modern classrooms, laboratories, practice rooms, public clinical, limited medical library, and modern instructing devices and equipment.

There is one recognized chiropractic hospital, that being Spears Chiropractic Hospital at Denver, Colorado licensed by the State of Colorado. The hospital is affiliated with ACA and was founded in the 1940's by Dr. Leo Spears, now deceased, and currently operated by Drs. Daniel C. and Howard M. Spears, and has survived a long series of legal battles for existance under Colorado law. Approximately 130,000 patients have been treated since founding, many reportedly with startling success after the failure of other professions and hospitals to effect relief or cures. The committee viewed the hospital and was impressed with the seeming efficiency and effectiveness of the treatments given. Diagnosis is made of the condition of the entire body, and on the use of various traction and non-medical therapeutic devices for orthopedic and muscular adjustments. No medicines are administered at the hospital, nor is any surgery performed, except ocassionally by invited outside medical physicians in emergency situations. All staff members are chiropractic personnel and there is strong reliance on the chirporactic adjustment as corrective and preventative therapy.

The facilities of the hospital include a pediatrics ward, which was reported to have had remarkable effectiveness in certain crippling disablements, and a number of muscle building and therapy devices for assistance in recovery of atrophied members and limbs. The hospital maintains a regular schedule of advertising publications, mailed to the profession, and to the public. The circulars include citations and testimonials of successful treatments at the hospital and general advertising for the chirporactic treatment.

In summary, the committee found that members of the chiropractic profession are well trained in professional techniques and basic sciences and knowledge as to human anatomy. It is believed that both philoosophies (ICA and ACA) represent the ability of members of the profession to perform an important adjunctive service in the treatment of human disorders. The committee feels, however, that there is an excessive reliance in the ICA or Palmer concept on the efficacy of the spinal manipulation to correct and maintain bodily health. On the other hand, the ACA adherents would seem to move markedly close to the practice of medicine in its diagnostic and therapeutic actions on the human body.

Rep. DeForest Strang
Chairman
Rep. Frederic J. Marshall
Rep. Vincent Petitpren
Rep. Thomas J. Anderson

GET WELL SOON!

Dr. Josephine Stiers Tennyson, who has been very ill, is now convalescing nicely at home and would really appreciate hearing from all of her friends around the State. Get Well soon Dr. Tennyson!

NEW CRITERIA AND ANALYSIS THEREOF

ACCREDITATION

From two conferences (June 9 and July 14) with the Staff of the Accreditation and Institutional Eligibility Unit of the U.S. Office of Education (John R. Proffitt and Ronald Pugsley) and from two documents provided by them (Exhibit A - "List of Nationally Recognized Accrediting Agencies and Associations" and Exhibit B - "Examples of Documentation of the Criteria for Nationally Recognized Accrediting Bodies") some basic concepts become very clear:

1. Specialized agencies designed to accredit professional institutions are not carbon copies of regional agencies designed to accredit college programs in the arts and sciences. (Exhibit A - Page 1, last two paragraphs)

2. An accrediting agency designed to accredit instutitions preparing students for careers in a profession cannot divorce itself from that profession and operate in isolation. (Exhibit A - Page 1, paragraph 3, item 1; Exhibit B - Page 1, item 1, line 5; Page 2, item 4, (2); Page 4, item 11, lines 10 and 11)

3. The institutions must be centrally and significantly represented in the processes of accreditation. (Exhibit A - Page 1, paragraph 3, item 1)

4. The current trend is for representation from the general public. (Exhibit A - Page 1, next to last paragraph, line 4)

5. In the case of professions that require legal licensure or certification, representation from licensing bodies is desirable. (Exhibit A - Page 4, criterion 11; Exhibit B - Page 4, item 11, lines 6 and 7)

6. "It is unlikely that more than one association or agency will qualify for recognition." (Exhibit A - Page 4, next to last paragraph)

7. Only high standards of qualities are acceptable.

   a. Admissions standards

   b. Faculty qualifications

   c. Faculty-student ratio

   d. Facilities

   e. Financial stability

   (Quality was a major, if not the major, item stressed by the U.S. Office of Education staff in our two conferences.)

With these facts in mind, it appears logical to conclude that an accrediting agency composed of representatives of the institutions, the profession, the licensing bodies and the public would be acceptable provided there was only one agency extant, provided the minimum standards were high enough and sufficiently clear, and provided performance of the agency is qualitatively in line with the performance of similar national accrediting agencies.

HB 531

SUGGESTED QUESTIONS TO DR. HAMMOND AND OTHERS

1. Do you feel it is not being discriminatory to choose applicants only from one association?

2. What chance would there be for Board members to be chosen for membership of the Alaska Chiropractic Society?

3. What about doctors who might wish to serve on the Chiropractic Board but don't agree to belong to any organization?

4. Are there two national accrediting agencies?

   a. Do they make constant evaluations of the respective colleges?

   b. What is the purpose of these national accrediting agencies?

   c. When they decide to accredit or discredit a college, is this for the purpose of forcing those colleges to improve their image so that chiropractic colleges raise their standards to that of medical schools, etc.?

5. What college are you a graduate from, Dr. Hammond?

6. Does the International Chiropractors Association fully accredit Western States College?

   a. Does the American Chiropractor's Accrediting Agency fully accredit your college?

   b. Is it accredited at all by either of these agencies?

   c. Does Washington state allow graduates from your college to apply for a licensure in that state at the present time?

   d. Do you feel Alaska should allow these graduates to come here when Washington state feels they should be kept out?

e. Do you feel you are better qualified to judge the merits of the many chiropractic colleges than the national accrediting agencies?

f. Are any of the present board members from colleges fully accredited by either of the national accrediting organizations?

g. How many members of the Alaska Chiropractors Association are graduates from the unaccredited college you are from?

h. How many members of the Alaska Chiropractors Association are graduates from <u>fully</u> accredited chiropractic colleges?

i. How many paid up members are there in the Alaska Chiropractors Association?

j. Are the four members of the Alaska Chiropractic Society and the student members at the Palmer College of Chiropractic from a fully accredited college, accredited by either national organization?

k. If graduates from unaccredited colleges can become licensed, what assurance do you have that that college will ever raise their standards sufficiently to become fully accredited?

l. Would you object to having the chiropractic board chosen by the Governor, as in the past?

(1) Would you object to the board being composed of one member of the Alaska Chiropractors Association, one member of the Alaska Chiropractors Society, and one lay member chosen by the Governor?

(2) Do you object to having the board composed of members who are from colleges fully accredited?

QUESTIONS YOU MAY ASK ME

1. What do you think would happen to your profession if the Alaska Chiropractors Association were to decide who could become board members?

2. What do you think would happen to your profession if the Alaska Chiropractic Society were to decide who could become board members?

3. Would you object to a lay member on the board?

4. Are there other states with more than one association?

5. What happens on those boards?

6. Do you feel that colleges should be fully accredited?

7. Are the two national accrediting associations doing what they set out to do?

8. Are the accrediting standards of each national organization equal?

9. Do you have any evidence showing Western States College is not fully accredited?

10. Do you have any information indicating that Dr. Hammond has ever felt that the Chiropractic board should accept the national accredited agency as the arbiter in the matter of college accreditation?

11. Have you recently received an appointment to serve as a coordinator of legislative affairs on the national level?

12. Would your work on a national level have to do with problems such as these we are talking about today?

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

SB-536



Alaska State Federation of Fishermen's Associations

Box 455
Cordova, Ak 99574
April 22, 1970

Representative Joe McGill, Chairman
Resources Committee
Alaska State House of Representatives
Juneau, Alaska

COPY

Dear Joe,

We strongly urge the passage of CS-SB 536 am, prohibiting water pollution.

We feel this is a priority bill which seeks to prevent damage to our marine resources by pollution from oil tankers dumping dirty ballast.

Sincerely,

Richard Janson,
Acting Secretary

cc:
Barry Jackson, Judiciary Chairman
Mike Bradley, Rules Chairman

SB-536

Mr. Jackson, Chairman, and Members of the House Judicairy Committee.

For the record, my name is Roscoe Bell, Land and Legislative Consultant for BP Alaska.

It is my great personal pleasure to speak to you today, and as a representative of British Petroleum Alaska to recommend for your favorable consideration House Committee Substitute for Senate Bill 536.

BP, along with a number of other major international oil companies, has for the past several years sponsored the Clean Seas Program which has been responsible for international agreements and for the substantial decrease in ballast dumping on the high seas and territorial waters. But we all know that much more must be done. Alaska is rightfully concerned about the problems now and in the future relating the dumping of oily ballast.

This legislation is a step with which we agree in principle, although we cannot state with certainty that it will not be challenged in court. We firmly believe that oil spills are a joint responsibility of the shipping industry and the government. As major world oil shippers, the majors included in the Clean Seas Program have accepted their responsibility by developing new handling techniques for completely eliminating the dumping of oily ballast

and by installing ballast cleaning facilities at major loading terminals.

However, there still remains the area 50 miles out at sea where ballast dumping is approved under international agreement. We do not believe that dumping of oily ballast should be legal anywhere on the seas, and most certainly not not anywhere in the seas around Alaska.

Unfortunately, there are independent charter tankers which are not under the complete control of the shippers; although here, too, control is attempted through the terms of the long-term charter contracts as well as the spot charters.

We believe that international agreements should be strengthened. We commend the U.S. Government Water Quality Control Administration for their interest in eliminating, or reducing, the dumping of oily ballast, and we certainly commend the State of Alaska for considering this proposed legislation.

We have examined the legis lation and find that it is consistent with the federal legislation. This is a point in its favor. As you all know, in connection with management and operation of tankers, one of the principal problems is having rules that are consistent, that are generally understood, and that do not vary from port to port, and that can be easily made part of the terms of the charters and can be understood by the captains and other personnel of the ships. Many of the problems that have been

experienced have been human errors or human carelessness. This bill is another step in trying to control this kind of action. By cooperation of the oil companies, the shipping industry, the officials responsible for administration of this law and the federal laws, we will be able to protect Alaska's marine environment and resources.

We also commend the Legislature for the Senate Joint Resolution 95 and hope that the State will press for the international conference between the U.S. and Canada to see if a special zone cannot be set up under international law surrounding these countries where the dumping of oily ballast is completely prohibited.

I thank you for your time and the opportunity to talk with you on this very important subject. By its passage, this bill will further demonstrate Alaska's concern with the environment.

V

SB-536

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JARRED CARTER

ROOM 6420 STATE DEPT BLDG WASHDC

THE FOLLOWING IS A TEXT OF A BILL SENATE BILL 356
WHICH HAS PASSED OUR
STATE SENATE AND IS NOW BEING CONSIDERED BY THE HOUSE
RESOURCES COMMITTEE. IT WOULD BE APPRECIATED IF YOU
COULD REVIEW THE BILL FROM THE STANDPOINT OF FOREIGN
RELATIONS AND WIRE ME ANY COMMENTS WHICH YOU FEEL
MAY BE OF ASSISTANCE IN OUR DELIBERATIONS. AN ACT
PROHIBITING WATER POLLUTION SECTION 1 AS46.05 IS
AMENDED BY ADDING A NEW SECTION TO READ SECTION
46.05.173 BALLAST WATER DISCHARGE SECTION A NO PERSON
MAY POLLUTE OR ADD TO POLLUTION OF WATERS
OF THE STATE BY DISCHARGING FROM ANY VESSEL BALLAST WATER,
TANK CLEANING WASTE WATER OR OTHER WASTE CONTAINING
OIL IN EXCESS OF 100 PARTS PER MILLION OF OILY RESIDUE,
OR IN EXCESS OF A PERCENTAGE LEVEL TO BE ESTABLISHED BY
THE DEPARTMENT WHICH DOES NOT EXCEED 100 PARTS PER
MILLION OF OILY RESIDUE. SECTION B EXCEPT AS PROVIDED IN C
OF THIS SECTION, VESSEL TAKING ON OIL, PETROLEUM PRODUCTS
OF THEIR BY PRODUCTS AS CARGO SHALL ARRIVE
IN PORTS IN THE STATE WITHOUT HAVING DISCHARGED
BALLAST AT SEA, AND THE MASTER OF THE VESSEL SHALL
CERTIFY THAT FACT ON FORMS TO BE PROVIDED
BY THE DEPARTMENT SECTION C VESSELS EQUIPPED
WITH TANKS USED EXCLUSIVELY FOR BALLAST OR CAPABLE OF
PRODUCING BALLAST WITH AN OILY CONTENT
LESS THAN THAT PROVIDED FOR IN SECTION A
MAY BE CERTIFIED BY THE DEPARTMENT TO DISCHARGE

X ~~changed~~ eliminated

X changed

X changed

X eliminated

THAT BALLAST AT SEA, INCLUDING THE WATERS
OF THE STATE SECTION 2 AS46.05.210 IS AMENDED
TO READ SECTION 4605.210 IS AMENDED TO READ SECTION
46.05.210 PENALTIES SECTION A A PERSON WHO VIOLATES
PROVISION OF THIS CHAPTER OR AN ORDER ISSUED UNDER THIS
CHAPTER, OR WHO FALSELY CERTIFIES INFORMATION
REQUIRED UNDER THIS CHAPTER IS GUILTY OF A
MISDEMEANOR AND UPON CONVICTION IS PUNISHABLE BY FINE
OF NOT LESS THAN 500 OR MORE THAN 25,000 AND IMPRISONMENT
FOR NOT LESS THAN 30 DAYS NOR MORE THAN A YEAR EACH UNLAWFUL
ACT CONSTITUTES A SEPARATE OFFENSE SECTION B IN
ADDITION TO THE PENALTIES PROVIDED IN SECTION A. A PERSON
WHO VIOLATES SECTIONS 170-173 OF THIS CHAPTER IS LIABLE
IN A CIVIL ACTION FOR LIQUIDATED DAMAGES TO BE
ASSESSED BY THE COURT FOR AMOUNT NOT LESS THAN
5000 NOR MORE THAN 100,000 DEPENDING ON THE SEVERITY OF THE
VIOLATION SECTION C IN ADDITION TO THE PENALTIES PROVIDED IN
A AND B OF THIS SECTION, A PERSON WHO VIOLATES SECTIONS
170-173 OF THIS CHAPTER IS LIABLE IN A CIVIL
ACTION FOR DAMAGES IN THE AMOUNT NOT TO EXCEED $100 PER
GROSS TON OF THE VIOLATING VESSEL OR $14,000,000, WHCICH
EVER IS LESS. (DAMAGES) AS USED IN REMOVAL
OF A POLLUTANT AND REASONABLE RESTORATION OF THE
ENVIRONMENT TO ITS FORMER STATE

REPRESENTATIVE JOE MCGILL CHAIRMAN HOUSE
RESOURCES COMMITTEE POUCH V JUNEAU.

changed

X changed

SB-536

DEPARTMENT OF STATE

Washington, D.C. 20520

May 12, 1970

Mr. Joseph McGill
Chairman, Natural Resources Committee
House of Representatives
Juneau, Alaska 99801

Dear Mr. Chairman:

Mr. Jared Carter of my office has brought to my attention your telegram to him of May 2, 1970 asking the Department's views from the standpoint of foreign relations on legislation pending in your Committee. We have reviewed the draft bill and have the following comments:

Alaska's enactment of this legislation would create foreign relations difficulties for the United States by conditioning a ship's access to Alaskan ports upon that ship's adherence to standards in areas of the high seas beyond the jurisdiction of Alaska. The effect of the bill would be to impose conditions upon commercial maritime activities on the high seas. As explained in the attached press release, which was issued after the Canadian Government introduced into its Parliament bills on the limits of the territorial sea and fisheries and pollution control jurisdiction, the United States has long sought international solutions, rather than unilateral approaches, to problems involving the high seas. Specifically, we are seeking a new international means for controlling pollution on the high seas. Our efforts to obtain such international solutions would be greatly complicated if we ourselves attempt to solve these admittedly important problems on a unilateral basis. The problem is compounded by our federal system and the prospect of the several states imposing their own (possibly inconsistent) standards and regulations. For these reasons, the Department would be opposed to enactment of the bill set forth in your cable.

I hope these views are of assistance to you in your Committee's deliberations on this bill. If we can be of any further assistance, please let us know.

Sincerely yours,

John R. Stevenson
The Legal Adviser

Attachment:

Press Release.

DEPARTMENT OF STATE

APRIL 15, 1970 **FOR THE PRESS** NO. 121

CAUTION - FUTURE RELEASE

FOR RELEASE AT 1:00 P.M., E.S.T., WEDNESDAY, APRIL 15, 1970. NOT TO BE PREVIOUSLY PUBLISHED, QUOTED FROM, OR USED IN ANY WAY.

DEPARTMENT OF STATE STATEMENT ON GOVERNMENT OF CANADA'S BILLS ON LIMITS OF THE TERRITORIAL SEA, FISHERIES AND POLLUTION

Last week the Canadian Government introduced in the House of Commons two bills dealing with pollution in the Arctic, fisheries and the limits of the territorial sea. The enactment and implementation of these measures would affect the exercise by the United States and other countries of the right to freedom of the seas in large areas of the high seas and would adversely affect our efforts to reach international agreement on the use of the seas.

The bills seek to establish pollution zones in Arctic waters up to 100 miles from every point of Canadian coastal territory above the 60th parallel. Within these zones, Canada would assert the right to control all shipping, to prescribe standards of vessel construction, navigation and operation, and to prohibit, if Canada deemed it necessary, the free passage of vessels in those waters. Additionally, the legislation seeks to authorize the establishment of exclusive Canadian fisheries in areas of the high seas beyond 12 miles, such as the Gulf of St. Lawrence and the Bay of Fundy, and of a 12-mile territorial sea off Canada's coasts.

International law provides no basis for these proposed unilateral extensions of jurisdictions on the high seas, and the United States can neither accept nor acquiesce in the assertion of such jurisdiction.

We are concerned that this action by Canada if not opposed by us, would be taken as precedent in other parts of the world for other unilateral infringements of the freedom of the seas. If Canada had the right to claim and exercise exclusive pollution and resources jurisdiction on the high seas, other countries could assert the right to exercise jurisdiction for other purposes, some reasonable and some not, but all equally invalid according to international law. Merchant shipping would be severely restricted, and naval mobility would be seriously jeopardized. The potential for serious international dispute and conflict is obvious.

The United States has long sought international solutions rather than national approaches to problems involving the high seas. We are working for appropriate action within the United Nations framework looking toward the conclusion of a new international treaty dealing with the limit of the territorial sea, freedom of transit through and over international straits and defining preferential fishing rights for coastal states on the high seas.

We are also seeking new international means for controlling pollution on the high seas. Last fall 47 countries, including the United States and Canada, participated in the preparation of two international conventions establishing the right of a coastal state to take certain limited anti-pollution measures against vessels on the high seas, and also imposing strict liability upon the owners of vessels responsible for pollution.

These

These conventions which the United States has recently signed were concluded under U.N. auspices at Brussels. Other international approaches to control of pollution are underway at NATO and the U.N. Moreover, the United States is acutely aware of the peculiar ecological nature of the Arctic region, and the potential dangers of oil pollution in that area. The Arctic is a region important to all nations in its unique environment, its increasing significance as a world trade route and as a source of natural resources. We believe the Arctic beyond national jurisdiction should be subject to internationally agreed rules protecting its assets, both living and non-living, and have noted with pleasure the Canadian Prime Minister's public statement that Canada would be prepared to enter into multilateral efforts to develop agreed rules of environmental protection. To this end, we intend shortly to ask other interested states to join in an international conference designed to establish rules for the Arctic beyond national jurisdiction by international agreement. We would be pleased if Canada were to join us in organizing such a conference.

We regret that the Canadian Government, while not excluding these cooperative international approaches to our mutual problems involving the oceans, now proposes to take unilateral action to assert its own jurisdiction and establish its own rules pending the conclusion of international agreements satisfactory to it. For the reasons indicated earlier the United States can not accept these unilateral jurisdictional assertions and we have urged the Canadian Government to defer making them effective while cooperating in efforts promptly to reach internationally agreed solutions.

If, however, the Canadian Government is unwilling to await international agreement, we have urged that in the interest of avoiding a continuing dispute and undermining our efforts to achieve international agreement, that we submit our differences regarding pollution and exclusive fisheries jurisdiction beyond 12 miles to the International Court of Justice, the forum where disputes of this nature should rightfully be settled. Canada's action last week excluded such disputes from its acceptance of the International Court's compulsory jurisdiction. However, such action only prevents Canada from being forced into the Court. It does not preclude Canada voluntarily joining with us in submitting these disputes to the Court or an appropriate chamber of the Court.

With respect to the 12 mile limit on the territorial sea, we have publicly indicated our willingness to accept such limit, but only as part of an agreed international treaty also providing for freedom of passage through and over international straits.

The history of U.S.-Canadian relations is unique in world affairs for its closeness and cooperation. We are confident that, in this spirit, our two countries will continue to resolve our differences amicably and with mutual understanding.

* * *

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

SB538

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

LEGISLATIVE AFFAIRS AGENCY

May 19, 1970

Barry,

Your HCS for SB 538 (school lands) is attached. It incorporates the H&E amendment and Mr. Bell's amendment regarding equivalent values. In his amendment (the fourth sentence of the section), the second to last word could read "lower" instead of "higher". He also recommends deleting "privately owned lands" from the second sentence, because it allows for a negotiated sale instead of bidding, and it puts the administrator of the provision in a difficult spot. Since the committee didn't seem to reach an agreement on this point, I left the words in; they can easily be deleted.

A.

.rt

5/30/70

AMENDMENT

IN THE HOUSE BY The Judiciary Committee

TO: HCSSB 538

Page 1, Line 24:

Insert new Section 2 to read:

This Act does not apply to land which, on the effective date of this Act, is being advertised or negotiated for sale, lease or other disposal. has been or

SB 539

File - this bill may come to us

Alaska Court System

State of Alaska

ROBERT H. REYNOLDS
ADMINISTRATIVE DIRECTOR
Gerald A. Peterson
ASSISTANT ADMINISTRATIVE DIRECTOR
ERNEST Z. REHBOCK
LEGAL ASSISTANT

OFFICE OF ADMINISTRATIVE DIRECTOR
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

April 16, 1970

The Honorable Terry Miller
Chairman, Senate Judiciary Committee
Alaska State Senate
Pouch V, State Capitol
Juneau, Alaska 99801

RE: Senate Bill 539

Dear Senator Miller:

We have reviewed the provisions of Senate Bill 539 and are somewhat at a loss to provide an accurate fiscal note for same. This is due, in part, to the rather indefinite requirement for marriage counseling, and further, to the fact that it would take more time than we have available to predict the number and cost of forms to be devised, printed and distributed to the Masters provided by the act.

As far as marriage counseling is concerned, to be available, we would have to have at least three more marriage counselors, one in Fairbanks, one in Juneau, and an additional marriage counselor in Anchorage. Each of these marriage counselors would require a secretary. Furthermore, to make their services available, the counselors would necessarily be required to ride circuit in the "Bush", and there is no way we can accurately anticipate the need for them to travel.

It is my own opinion, without regard to the ultimate merits of the bill, that the matter needs further study to determine its true costs and other ramifications.

I enclose herewith a copy of a memorandum, evaluating this bill, which I directed to be prepared by my Legal Assistant, Dr. Ernest Rehbock. I share his conclusions for the most part.

Sincerely,

Robert H. Reynolds

Robert H. Reynolds
Administrative Director

RHR/grg

Encl

M E M O R A N D U M

April 3, 1970

TO: Robert H. Reynolds
Administrative Director

FROM: EZR

SUBJECT: Some Comments on Senate Bill 539 to Provide for Alternate Procedure in Actions for Divorce

You directed my attention to a senate bill introduced March 17, 1970, and purportedly favorably voted upon by the Committee on Health, Welfare and Education. The popular name for this bill seems to be the "quickie divorce action."

Under this statute provisions in the Code of Civil Procedure relating to divorce would be amended by adding new sections.

It appears that a non-adversary action for divorce would be established under AS 09.55.231 of this bill. Residence and domicile requirements under existing law are to be maintained.

Under proposed AS 09.55.232 family court masters may be appointed to carry out these provisions. I did not discover any provisions which provide special expertise in this master and must read the bill to authorize the appointment of a standing master or of a district judge or of any magistrate of the court of Alaska to conduct divorce hearings under this statute. The superior court judge is, however, authorized to conduct these hearings if he so elects.

AS 09.55.233 provides for the services of a family court marriage counselor to the extent available for a voluntary meeting. I should add at the present time only one such counselor has been budgeted for the entire state of Alaska.

AS 09.55.234 would make the procedure applicable to a divorce over which the court has jurisdiction where custody of minor children has been settled by agreement, and property issues are limited to support and alimony questions and property is limited to such items as dwelling, trade business, personal effects and similar items.

The action as herein provided shall be commenced under 09.55.235 by filing a fee and by filing documents.

It seems to be of some importance to take note of the documents which must be filed:

1. Statement under oath by both spouses that there is incompatibility of temperament.

2. Statement by both spouses under oath containing the necessary personal data and description of property owned.

3. An agreement signed under oath by both spouses expressing the desire to terminate the marriage, expressing their wishes as to custody of children, as to alimony and as to property award.

AS 09.55.236 would regulate the scope of hearing. The hearing officer may be the family court master or the superior court judge where applicable. The hearing is concerned with the question of children custody and the fairness of the agreement as to custody and as to support money provisions, as well as property division.

AS 09.55.237 would authorize entry of decree based on findings of fact and conclusions of law unless certain appropriate objections are being made or the superior court determines the unfairness or inadequacy of the settlement.

The following comments seem appropriate:

The social policy upon which the bill is grounded is apparently that a marriage which no longer represents a meaningful social and personal relationship should be terminated if so desired by both spouses without unnecessary litigation.

It is undoubtedly correct that both under statute and court decisions Alaska is committed to incompatibility of temperament as a ground for divorce absolute regardless of the question of who is at fault for the destruction of a meaningful relationship. In jurisdictions where divorce on objective grounds is known, it has always been recognized that there must be a deep disruption of the marital relationship and that on trifle grounds the court would not grant divorce. See material listed in Gobron v. Gobron, 2 Alaska Law Journal, p. 5 (1964), which defines the conflict

in personalities as one so deep as to be irreconcilable and to render it impossible for the parties to continue a normal marital relationship with each other.

The nature of this definition would seem to indicate that a judicial determination of the existence of this ground for divorce is necessary.

It is the policy of the state of Alaska that in all civil actions of some significance parties should be represented by counsel. Special provisions were made for the creation of the Alaska Legal Services Corporation for the express purpose that indigents may not be deprived of the benefit of advice of counsel.

The use of masters is encouraged under the Alaska rules and while masters are widely used under appropriate court orders for family matters, the use of masters has always been thoughtfully limited to fields of special expertise and has never been conceived as a matter which can be handled by random disposition or by voluntary submission of litigants to such a master.

In Alaska as in most jurisdictions, the drafting of legal documents pertaining to division of property, alimony and child support is considered practice of law. Litigants would not be forbidden to draft these papers themselves but any advice they may have to obtain with regard to such a settlement is legal advice and must, therefore, be forthcoming from attorneys authorized to practice law in Alaska.

In the matter of child custody and property division advice of counsel is so much more important because child custody can readily involve difficult jurisdictional questions and questions of determination of domicile and property division questions may involve technicalities of the law of real and personal property which may entirely escape the attention of the spouses or of a layman social advisor. Most of the masters which would be available to the Alaska court system to hear the so-called quickie divorce proceedings and to approve the documents submitted to them are laymen in the field of law. It must be remembered that magistrates and district judges have no jurisdiction in property actions and in equity actions and, therefore, may entirely lack the expertise necessary to make recommendations in a legal matter which concerns both property law and equity.

The fact that the superior court judge may if he so deems appropriate hear the matter himself or reverse the recommendations seems small consolation. Realistic consideration of Alaska geographic distances and of the heavy calendar with which a limited number of superior court judges have to contend will be a formidable obstacle to a meaningful review of the merits of the application and the details of the settlement in many instances.

Although the statement as to voluntariness of the action is made under oath, many litigants may not be fully aware of the nature of the action and its effect upon their children and their property possessions. Without mandatory advice of counsel such divorce action may be brought improvidently and in a manner inconsistent with the cultural and ethnic aspirations and ways of the spouses or dispositions may be made which could result in unfairness as to one of the parties.

It is my conviction that in this form at least, the bill defeats rather than implements the social policies of the state which are:

(1) Upon serious incompatability, divorce be granted.

(2) Advice of counsel shall be available.

(3) Utmost care should be taken that provisions of alimony and property divisions are in the best interests of the spouses and their minor children.

With regard to the last mentioned items, we should bear in mind that the state has a particular interest in the welfare of children. The order for custody and the provisions for child support must be so designed that the best interests of the child are protected. Neither parent is entitled to child custody as of right. AS 09.55.205. The important viewpoint of paramount consideration of the welfare of the child has been judicially expressed in numerous decisions. Bass v. Bass, 437 P.2d 324 (Alaska 1968); Ransier v. Ransier, 414 P.2d 956 (Alaska 1966). To say the least, it is unclear under the bill how the somewhat cavalier manner of submitting a statement of the parents to a master (in most cases a magistrate) can be a sufficient basis for this critical determination. In order to comport with the interest of the state, the custody and alimony disposition should in all cases have the judicial attention of the superior court judge on the basis of all relevant facts. Under the proposed bill, collusion through carelessness or ignorance may frustrate the child's interests.

I failed to mention that the question of jurisdiction over (a) the spouses (b) the custody of the children possibly out of the state and (c) alimony and support obligations, are difficult ones in divorce actions which may have multi-state aspects. It seems awkward to assume that any magistrate should be able to render such a decision without any opportunity afforded to counsel to present his views to a learned judge.

EZR/ld

The Legislature of the State of Alaska
FISCAL NOTE

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST
___THE HOUSE FINANCE COMMITTEE STAFF
___THE SENATE FINANCE COMMITTEE STAFF
___THE DIVISION OF BUDGET & MANAGEMENT
___RETAIN A COPY FOR YOUR FILES

Subject Marriage Counselors SB 539
requested by Senate Judiciary Committee
referred to date of request April 13, 1970
completion date requested date received

EXPENDITURE DETAIL	FY 70-71	FY	FY
100 PERSONAL SERVICES	$ 83,583.	$	$
200 TRAVEL	9,600.		
300 CONTRACTUAL SERVICES	21,480.		
400 COMMODITIES	2,700.		
500 EQUIPMENT	11,383.		
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
(Rounding)	(46.)		
TOTAL	$ 128,700	$	$
FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	128,700.		
Man Months	72		
Permanent Positions	6		
Temporary Positions	0		

FISCAL ANALYSIS

See Fiscal Detail Attached

DATE April 16, 1970 SIGNATURE Robert H. Reynolds

NAME & TITLE Robert H. Reynolds, Administrative Alaska Court System

SUPPLEMENT TO FISCAL NOTE FOR SB 539

ANCHORAGE - MARRIAGE COUNSELOR - RANGE 21

	TOTAL
100 - Personal Services - Salary 16,680; Benefits 2,002	$18,682.
200 - Travel - Transportation 2,000; Per Diem 1,200	3,200.
300 - Contractual - Communications 500; Repairs and Services 100; Printing and Advertising (Special Forms) 2,000; Space Rental 1,650; Transportation of HIRE 1,500	5,750.
400 - Commodities - Legal and Office Supplies including copy machine supplies and expense	700.
500 - Equipment - Desk 264; Chair, swivel 130; Credenza 225; Bookcase 150; Chairs, side (4) 418; Cabinet, 5-drawer, legal w/lock 154; Table, pedestal, 30" x 60" 154; Coatrack 50; Dictating, Transcribing Units 990	2,535.
	$30,867.

SECRETARY I (Range 10)

100 - Personal Services - Salary 7,572; Benefits 908	$ 8,480.
300 - Contractual - Space Rental 1,320	1,320.
400 - Commodities - Office Supplies	200.
500 - Equipment - Desk, typewriter 190; Chair, steno 45; Electric Typewriter 468; Chairs, side (2) 209; Cabinet, file, 4-drawer, legal w/lock, fireproof 330	1,242
	$11,242.

TOTAL:	$42,109.
Rounding	(09)
NET:	$42,100

SUMMARY

100 - Personal Services	$27,162.
200 - Travel	3,200.
300 - Contractual	7,070.
400 - Commodities	900.
500 - Equipment	3,777.
	$42,109.
Rounding:	(09.)
TOTAL:	$42,100.

SUPPLEMENT TO FISCAL NOTE FOR SB 539

FAIRBANKS - MARRIAGE COUNSELOR - RANGE 21

	TOTAL
100 - Personal Services - Salary 17,964; Benefits 2,156	$20,120.
200 - Travel - Transportation 2,000; Per Diem 1,200	3,200.
300 - Contractual - Communications 500; Repairs and Services 100; Printing and Advertising (Special Forms) 2,000; Space Rental 1,950; Transportation of HIRE 1,500	6,050.
400 - Commodities - Legal and Office Supplies including copy machine supplies and expense	700.
500 - Equipment - Desk 264; Chair, swivel 137; Credenza 225; Bookcase 150; Chairs, side (4) 418; Cabinet, 5-drawer, legal w/lock 154; Table, pedestal 30" x 60" 154; Coatrack 50; Dictating, Transcribing Units 990	2,542.
	$32,612.

SECRETARY I (Range 10)

100 - Personal Services - Salary 8,160; Benefits 979	$ 9,139.
300 - Contractual - Space Rental 1,560	1,560.
400 - Commodities - Office Supplies	200.
500 - Equipment - Desk, typewriter 210; Chair, steno 45; Electric Typewriter 468; Chairs, side (2) 209; Cabinet, file, 4-drawer, legal w/lock, fireproof 350	1,282.
	$12,181.

TOTAL:	$44,793.
Rounding:	7.
NET:	$44,800.

SUMMARY

100 - Personal Services	$29,259.
200 - Travel	3,200.
300 - Contractual	7,610.
400 - Commodities	900.
500 - Equipment	3,824.
	$44,793.
Rounding:	7.
TOTAL:	$44,800.

SUPPLEMENT TO FISCAL NOTE FOR SB 539

JUNEAU - MARRIAGE COUNSELOR - RANGE 21

	TOTAL
100 - Personal Services - Salary 16,680; Benefits 2,002	$18,682.
200 - Travel - Transportation 2,000; Per Diem 1,200	3,200.
300 - Contractual - Communications 500; Repairs and Services 100; Printing and Advertising (Special Forms) 2,000; Space Rental 1,500; Transportation of HIRE 1,500	5,600.
400 - Commodities - Legal and Office Supplies including copy machine supplies and expense	700.
500 - Equipment - Desk 264; Chair, swivel 130; Credenza 225; Bookcase 150; Chairs, side (4) 418; Cabinet, file, 5-drawer, legal w/lock 154; Table, pedestal, 30" x 60" 154; Coatrack 50; Dictating, Transcribing Units 990	2,535.
	$30,717.

SECRETARY I (Range 10)

100 - Personal Services - Salary 7,572; Benefits 908	$ 8,480.
300 - Contractual - Space Rental 1,200	1,200.
400 - Commodities - Office Supplies	200.
500 - Equipment - Desk, typewriter 175; Chair, steno 45; Electric Typewriter 468; Chairs, side (2) 209; Cabinet, file, 4-drawer, legal, w/lock, fireproof 350	1,247.
	$11,127.

TOTAL:	$41,844.
Rounding:	(44.)
NET:	$41,800.

SUMMARY

100 - Personal Services	$27,162.
200 - Travel	3,200.
300 - Contractual	6,800.
400 - Commodities	900.
500 - Equipment	3,782.
	$41,844.
Rounding:	(44.)
TOTAL:	$41,800.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

SB-543

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF COMMERCE

ALASKA TRANSPORTATION COMMISSION

750 MACKAY BUILDING
338 DENALI STREET—ANCHORAGE 99501

May 9, 1970

The Honorable Barry Jackson, Chairman
House Judiciary Committee
State Capitol Building
Juneau, Alaska 99801

Re: Senate Bill 543 am "An Act relating to the Alaska Transportation Commission...." which provides for removal of commissioners and the employment of hearing officers.

Dear Chairman Jackson:

The following comments are offered by the Alaska Transportation Commission to explain why such legislation is needed.

Sec. 1. Amendment to As 42.07.021(d) Removal of Commissioners

Although generally classified as an administrative body within the framework of the administrative branch of government, the Alaska Transportation Commission functions in fact, as an arm of all three branches of government. It interprets and administers the statutes intended by the legislature to provide the tools for development of a dependable, adequate and sound transportation industry and network to serve the public needs. The legislature prescribes the enabling statutory tools. However, the commission itself must develop within that statutory framework the policy, expertise and judgment which will bring about the legislature's intended result. In this task the commission must look entirely to the guidance of the legislature as expressed

by statute rather than the guidance of the executive branch of the state government. Until the commission has developed a substantial body of expertise, procedure, precedence and law to fall back upon, the degree of success of the commission hinges primarily on its ability to do its job with the organization and funds provided by the legislature and the integrity, judgment, and knowledge of the appointed commissioners.

It must be recognized that the expertise essential to good regulation of the transportation industry is not acquired in a day no matter what the previous background of the commissioners may be. It is also true that optimum policies, procedures, regulations and laws are a matter of evolution and precedence.

As with the judiciary, it is necessary that a substantial degree of continuity of procedure, policy and decisions be established. Otherwise the transportation industry will be without guidelines and benefit of precedence. It is an essential ingredient of good regulation that the regulated industry and the public have confidence in the regulatory agency and some assurance of a steady direction of that agency.

All of this boils down to the factor that "commissioner" of the ATC should not be a position in which the appointee serves at the pleasure of the governor. We know of no federal or other state regulatory agency with similar regulatory responsibilities which is required to conduct its regulatory affairs and shape a transportation policy in the interest of the public under such a tenuous arrangement. The subject bill would

remedy this situation by providing for removal for cause.

The commissioners should be given this assurance that they will be able to initiate and carry out long range policies, procedures and programs which will be of benefit to the public and the industry. The challenge of the objectives is the only real inducement to this job of commissioner. Neither the work load nor the pay scale are such as to attract highly qualified people to this position; and if there is no reasonable prospect of an assurance of tenure there is little inducement for well qualified people to either take the job or to remain in it.

Sec. 2. Amendment to AS 42.07.101 Hearing Officers

The commission is a quasi judicial body. It must determine in the context of the public interest the relative rights and obligations of parties who come before it. Its hearings for this purpose are governed by and conducted in substantially the same manner as a civil proceeding in a court of law. A commission decision in a contested case is analogous to a court's judgment and is appealable to a court in the same manner as a judgment.

The overriding consideration of the commission is the public interest.

Commission proceedings differ from court civil proceedings in at least one very obvious and material way. The court proceeding is typically an adversary one. The parties present opposing cases t the court and the court then decides as between the parties, which one should receive the relief sought.

The typical proceeding before the commission, however, is essentially one of fact finding. Since it is the public interest that is of primary concern in most such proceedings.

the relative relationship of opposing parties is not the predominant issue. The overriding public interest consideration necessitates the development of an adequate record upon which the commission can base a reasoned decision. And where the parties have not developed an accurate or adequate record at a hearing it is essential that the commission (through the participation of its staff as a party in the hearing) help develop the facts.

Under the present organizational setup of this commission, the three commissioners have the duties of all of the administration of the agency including the investigation and enforcement activities from which many of its formal actions begin. Further, the commissioners must hear all of the cases, render all opinions and then issue the final orders of the commission. This, in substance, requires that they be enforcement agents, jury, prosecutor, and judge for every proceeding coming before the commission.

This coagulation of all functions of the commission under the direct day to day supervision of the commissioners effectively precludes the commissioners from adequately performing what is perhaps the most important responsibility assigned to them by the legislature. In the policy statements of the various transportation Acts the legislature outlines its objectives. AS 02.05.010, for example, provides:

> "The purpose and policy of this chapter is to
>
> (1) recognize and preserve the inherent advantage of air commerce;
> (2) foster sound economic conditions in air commerce and among air carriers in the public interest;
> (3) promote adequate, economical and efficient service by air carriers, and reasonable charges therefor,

without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices;
(4) provide for the competition necessary to assure the sound development of an air transportation system properly adapted to and adequate to meet the needs of the commerce of this state;
(5) improve the relations between and coordinate transportation by and regulation of air carriers;
(6) provide for the administration and enforcement of this chapter to avoid conflict with the regulation of air carriers by the federal government;"

The legislature wisely recognizes these elements as essential ingredients to adequate, viable, healthy, integrated transportation networks capable of satisfactorily meeting the transportation needs of the state. Transportation is the state's most basic and vital industry.

But the legislature's objectives are not attainable by simple mechanical processes.

How to accomplish these objectives initially and in the future under rapidly changing conditions is the fundamental and most important responsibility the legislature has assigned to the Transportation Commission. Unfortunately, as matters now stand this Commission has little time available to meet this responsibility. Or if it takes the time, as it frequently must (See for example the attached Exhibits A, B and C relating to CAB and ATC air service investigations, jurisdiction, policies, procedures, etc.) then hearings, decisions and other such matters become further backlogged.

This is not to say the commissioners should not have the overall responsibility for the performance and functioning of the commission staff. It is simply that there should be a much

greater delegable capability, not only in the routine staff functions but in the hearing process itself. The ICC has delegated responsibility for the conduct of hearings to hearing officers since about 1906; the FTC since about 1914. Today, as Professor Kenneth Davis, one of the leading scholars on administrative law, points out, among all the federal administrative agencies, only in the Tax Court (which is an administrative agency) does the agency head actually hear and receive the evidence, conduct the hearings, personally study the record, and thereafter render his personal decisions. Says Davis:

> "Theoretically this system (of the Tax Court) could be used for handling the business for all agencies now using examiners. Why not?
>
> "The answer is that such a system would be grossly uneconomical. The evidence-taking process is slow and cumbersome. The job of presiding unually does not call for skills of top personnel. . . . The special skills and understanding of the agency heads should be reserved for issues of policy and overall supervision, and for troublesome problems of fact finding..... The tendency of nearly all adjudicating agencies (is) to move away from personal decisions toward institutional decisions (i.e. a decision made by an organization and not by an individual or solely by agency heads).....
>
> "Able administrators in many agencies acting independently of one another, have experimented and have searched for the most effective means of deciding hosts of difficult cases, and they have almost uniformly concluded that deciding officers should have the assistance both of reviewing staffs and of agency specialists."
>
> Davis, supra, §11.10 pp. 83, 84 and 87. Emphasis added.

It is physically impossible for the commissioners either collectively or acting individually to adequately direct the day to day operations of the staff, concurrently hold hearings and

render decisions on what are frequently very complex issues and questions of fact and law, keep abreast of the ever changing transportation needs of the state and shape the policy and procedures mandated by the legislature.

As a matter of fact it is impossible for the commissioners to conduct all hearings required by the statute and decide all such cases within a reasonable time. New applications for operating authority or transfer, etc., are now coming in at an average rate of about 20 to 25 per month. Most of these are required by law to be noticed and virtually all are protested. This is true even of applications for transfer of authority. This means that since early 1969 nearly all applications have had to go to hearing; and a rapidly increasing number of these hearings are lengthy and complex. Three hearings within the past 9 months each lasted for two weeks. The transcript for the most recent of these was over 2200 pages and nearly 100 Exhibits were received in evidence. (2200 pages of transcript require about 300 hours to transcribe and type.)

Where the formal hearing of a year ago averaged about 1 to 1 1/2 days in duration, the average now is from four to five days. This, coupled with at least a 50 percent increase in applications means that hearing time requirements have magnified approximately 500 percent since a little over one year ago.

Exhibit D shows a breakdown of present hearing workload. The number of hearings yet to be held would be substantially greater but for the fact that all applications have not been noticed yet or time for protest has not yet run. As shown in

Exhibit C all applications for scheduled air carrier authority are being deferred for action pending further progress in the CAB ALASKA SERVICE INVESTIGATION.

The Commission wishes to thank you and your Committee for this opportunity to testify in behalf of SB 543.

Sincerely,

Dennis L. Marvin, Commissioner

George L. Benesch, Commissioner

Jake Johnson, Commissioner

SB 543

HOUSE JOURNAL

Judiciary Committee Report

on

House CS for SENATE BILL NO. 543

This bill strengthens the Alaska Transportation Commission by (1) providing that commissioners may be removed only for cause, which is necessary to attract and retain professionally qualified persons; (2) allowing for the appointment of hearing officers in appropriate cases, which is necessary to cope with the overwhelming increase in caseload and complexity of cases, increases making it physically impossible under present law for the commissioners to keep up with current applications let alone reduce the backlog; and (3) clarifying the effect of an ATC permit for collection and disposal of garbage in an area which is annexed by a local government, which is necessary in order to avoid the inequity of a local government being able to drive a garbage hauler out of business by extending its boundaries to include all or part of the area served by him and then furnishing its own municipal garbage service under AS 29.10.156.

With regard to this third point, the committee believes that the local government should not be able to nullify, without compensation, a permit granted by the ATC and that a rate structure approved by the ATC should not be undermined by action of a local government in providing garbage service at a reduced rate. In basing fair market value on the economic loss to the permit holder, when the local government exercises the power of eminent domain to acquire the operating authority from the permit holder, the effect on the remaining portion of his business, if any, is to be considered.

It is the understanding of the committee that under changes in AS 42.10, enacted in CH. 107 SLA. 1970 (HCS CSSB 271 am H), garbage-hauling services are subject to regulation by the ATC.

Barry [illegible], Chairman
Chairman
House Judiciary Committee

EXHIBIT "A"

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

ALASKA SERVICE INVESTIGATION DOCKET 20826

PETITION BY ALASKA TRANSPORTATION COMMISSION

FOR JOINT BOARD PROCEEDING

Communications with respect to this document should be sent to:

G. KENT EDWARDS
ATTORNEY GENERAL
By Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission
338 Denali St., 750 Mackay Bldg.
Anchorage, Alaska 99501

Anchorage, Alaska

April 28, 1970

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

ALASKA SERVICE INVESTIGATION DOCKET 20826

PETITION BY ALASKA TRANSPORTATION COMMISSION
FOR JOINT BOARD PROCEEDING

COMES NOW the ALASKA TRANSPORTATION COMMISSION (ATC) and petitions the Civil Aeronautics Board to implement the provisions of the Federal Aviation Act of 1958 (49 USC 1324) which authorize the C.A.B. to hold joint hearings and otherwise perform such acts, to issue such orders and to make such procedure as necessary to carry out the provisions of the Act relating to cooperation with State regulatory agencies; and in keeping with the objectives of such provisions, the ATC petitions the C.A.B. to reconstitute the Alaska Service Investigation as a Joint Board proceeding to be conducted and decided jointly by the C.A.B. and the ATC.

In support of its petition, the ATC respectfully states as follows:

I

The ATC is the duly constituted regulatory agency of the State of Alaska as provided by law (Chapter AS 42.07); and as such, is the agency responsible for the regulation of intrastate air commerce under the Alaska Air Commerce Act, Chapter AS 02.05.

II

The ATC is presently a party intervenor in the Alaska Service Investigation and as such is limited to participation on the evidence-producing level and to making recommendations to the C.A.B. without first having benefit of a complete record.

III

Approximately 95 percent of all scheduled intrastate air service in Alaska is provided by air carriers regulated exclusively by the C.A.B.; and between approximately 75 and 95 percent of all traffic moving between points in Alaska is intrastate rather than interstate movement and subject to regulation by the State.

IV

The ATC has conducted informal public hearings throughout Alaska in connection with the Alaska Service Investigation. It has done this as a

response to numerous requests of the public for such hearings and by virtue of the commendable understanding of the Board's Hearing Examiner in the Alaska Service Investigation who granted an extension of time to the Commission for this purpose. (All parties concurred in an extension of time substantially as requested by this Commission.) As a result of such hearings, and the Commission's additional investigations and familiarity with the intrastate air commerce needs of Alaska, the Commission has submitted, as a direct exhibit, a Position Paper directed primarily to the matters of CAB-ATC jurisdiction, regulatory objectives, and essentiality of substantially closer cooperation between the C.A.B. and this Commission. The summary of this Position Paper is attached to this petition and by reference made a part of this petition in support thereof.

V

It is essential that the jurisdictional questions be squarely faced and the utmost in cooperative effort be pursued by both the C.A.B and the ATC. This Commission currently has in its files a substantial number of applications for intrastate scheduled authority. The Commission has deferred consideration of all such applications (upon which hearings have not been held in the past six months) pending the outcome of this Alaska Service Investigation. Even where hearings had been held previous to this policy decision, the granting of authority where warranted by the public convenience and necessity has been limited to a one-year period.

It is presently intended by the Commission to systematically review the scheduled service requirements of limited geographical areas in a series of State regional service investigations and to provide for certificated service as needed in the many areas of the State.

If the C.A.B. and the ATC failed to integrate their efforts in these matters which so vitally affect the public interest, effective regulation would be very substantially frustrated.

The ATC recognizes that these matters and this petition should have been submitted to the C.A.B. at a much earlier stage in the Alaska Service Investigation proceeding (ideally at its inception or at least prior to the prehearing conference).

Unfortunately, this was not possible. The Commission was completely reorganized by repeal and reenactment of the Alaska Transportation Commission Act in May 1969 (Chapter 104, SLA 1969).

The policy developed herein is that of the new three-man Commission which Commission was not complete until January 1970. (Only one of the present three Commissioners was appointed to office prior to the prehearing conference in September 1969.)

It is the Commission's belief, however, that the Alaska Service Investigation proceeding can still be restructured as a Joint Board proceeding even at this less timely stage particularly since no new issues will be added to delay the present proceeding schedule.

WHEREFORE, the Alaska Transportation Commission respectfully requests the Civil Aeronautics Board to reconsider the unilateral nature of the Alaska Service Investigation and to more appropriately in the overall interest of the public, reconstitute it as a Joint Board proceeding by the C.A.B. and the ATC.

Respectfully submitted,

G. KENT EDWARDS
ATTORNEY GENERAL

By: Shirle A. Debenham
Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission

April 28, 1970.

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of April 1970 mailed true and correct copies of the PETITION BY ALASKA TRANSPORTATION COMMISSION FOR JOINT BOARD PROCEEDING, properly addressed and postage prepaid to all parties of record in this proceeding.

Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission

EXHIBIT "B"

EXHIBIT
ATC No. 1

IN THE MATTER OF:

THE ALASKA SERVICE INVESTIGATION

DOCKET 20826

POSITION PAPER

ALASKA TRANSPORTATION COMMISSION

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POSITION PAPER

OF

ALASKA TRANSPORTATION COMMISSION

STATE OF ALASKA

The official position of the Alaska Transportation Commission (ATC) in this proceeding, the ALASKA SERVICE INVESTIGATION, can be summarized as follows:

1. That this investigation of primarily-intra-Alaska service should have been initiated by the Civil Aeronautics Board (CAB) as a joint board proceeding (as provided for in 49 USC 1324) thereby combining the regulatory efforts of both the CAB and this Commission in this matter. However, having failed to initiate it as a joint proceeding, the investigation should, nevertheless, be concluded in that vein with a joint decision.

2. That the Alaska Transportation Commission is a state regulatory agency with responsibilities on the state level similar to the responsibilities of the CAB on the federal level; that the limited role of "party" relegated to the Commission, notwithstanding its major function as a decision making body, is highly inappropriate in this proceeding; that this Commission cannot and should not develop recommendations as to specific route authorities, realignments, competitive service, subsidies, mail service, etc., without first having before it all evidence, briefs, etc., of all parties; that further, this Commission cannot and should not make any such specific recommendations without close coordination of its policies and conclusions with the policies and conclusions of the CAB; and that this review and close coordination can only be accomplished at the decisional level of this proceeding.

3. That the standards of performance and adequacy of service being provided by CAB certificated carriers in Alaska bear directly and forcibly upon the issues in this proceeding; that the importance of these questions pervades the entire spectrum of issues; and that fact-finding, public hearings as provided for

in CAB regulations [302.14 and 399.61(c)], are an essential ingredient of this proceeding if an informed decision on the issues is to evolve.

4. That the CAB is completely out of touch with the real operational conduct of its carriers in this State; that that conduct as measured in terms of service, effort, concern, public interest and operational integrity is deplorable; and that these conditions must weigh heavily in the CAB's determination of its future course of action in the exercise of its jurisdiction.

5. That the recent mergers and purchases of CAB-regulated carriers engaged in Alaska air transportation appear to have led to a substantial deterioration of intrastate service to virtually all communities and areas except those major cities where competition exists in fact.

6. That a formal and thorough investigation into matters of rate levels, rate discrimination, other discriminatory practices, accounting practices relating to separation of scheduled air transportation activities from other activities, efficiency, claims and refund practices and other matters of similar nature of Wien Consolidated Airlines and Alaska Airlines should be initiated by the CAB on its own motion as a logical outgrowth of this Service Investigation.

7. That approximately 95 percent of the scheduled intrastate air service in Alaska is being provided directly or indirectly by carriers certificated by the CAB over routes authorized thereto by the CAB and thus far regulated exclusively by the CAB. This situation has outlived its justification and has become a substantial burden on the public of Alaska.

8. That the exercise of regulatory authority by the State of Alaska should be substantially extended (preferably in cooperation with the CAB) over intrastate routes and over all carriers serving such routes. Over those routes where it remains essential or otherwise desirable for the CAB to exercise primary jurisdiction, the

machinery should be established for joint regulation by the CAB and the ATC, or in the alternative, regulation by the CAB upon consultation with the ATC.

9. That the practice whereby CAB-certificated carriers subcontract the scheduled performance of segments of their routes to local state-regulated carriers is not in the public interest. It is the position of this Commission that such subcontracts are unlawful and constitute a usurpation by the CAB carrier of the regulatory jurisdiction of this Commission.

10. That the contractual arrangements for the intrastate transportation of mail are outdated, inadequate and inappropriate. This matter needs a complete review toward the end of providing better service and adequate compensation to the carrier actually performing that service.

11. That matters relating to subsidy needs of, and payments to, carriers engaged in intrastate air service (including mail service) and the use to which such subsidies are put in competitive practices are of major concern to this Commission as well as to the CAB. A realistic and imaginative review should be made of the basis and need for subsidy and the qualifications for and the formulas under which subsidies should be paid.

12. That all carriers which serve Alaska and are regulated by the CAB, including those providing on-line interstate gateway service, should be required by the CAB to file concurrently with the ATC copies of all applications for routes, exemptions, tariff changes, transfers, and all other such documents which relate to Alaskan air commerce and which are filed with the CAB. It is essential that the State of Alaska be adequately and fully apprised of those matters affecting air commerce to and within the State.

13. That there is a serious need for closer cooperation and consultation between the CAB and the ATC. This Commission recognizes that the actions taken by each agency can, and frequently do, have a significant effect on those carriers regulated

by the counterpart agency. The expertise, long experience and competent staff of the CAB could be of great benefit to this Commission. Similarly, this Commission could materially assist the CAB with its need for local information, surveillance and general local contact.

INTRODUCTORY NOTE

The foregoing summary delineates those matters upon which the Commission takes a position at this time. The body of this Position Paper elaborates on the points raised in the summary. It provides in greater specificity some of the more important reasons for stressing those points, and it develops in greater depth some rather compelling considerations involving jurisdiction and cooperation between the CAB and the ATC.

Submitted also are a number of exhibits in three separate series groups. The "100" series is composed of ATC requested or prepared exhibits presented primarily in an informational context. The "200" series contains published economic studies relating to the economy of individual communities or areas. The "300" series consists of statements, etc., pertaining primarily to sufficiency and standard of service.

So as not to unnecessarily burden this proceeding with repetitious evidence pertaining to sufficiency and standard of service, the Commission determined to present rather extensively the views of a single community as representative of prevailing views throughout the State. This approach presupposes, of course, that a substantial identity of view exists among people throughout the State as to compatibility of evidence. Indeed, after an extensive survey, the Commission found that such an identity or view does exist to a substantial degree.

The rather extensive written expressions received from the Bethel area (Exhibits ATC-300-312) are accordingly submitted as representative of views not only throughout the Wien Consolidated route system, but (to a slightly lesser degree) throughout Alaska Airlines' system as well. 1/

These expressions from Bethel form a major part of the ATC-300 series; the remainder of that series consists of a few typical written expressions from various other communities throughout the State. The Common elements in all these expressions will easily be noted.

1/ Views of the people of Anchorage and Fairbanks and their immediate environs were not surveyed and have not been considered in arriving at these conclusions.

The official position of this Commission is expressed in this Paper and comparison of that position with the community expressions in the ATC-300 series will indicate substantial identity of view. In fact, this Paper will refer hereafter to some of those exhibits as supporting basis for various aspects of the Commission's position. The Commission does not necessarily concur in all of the community and individual views expressed in the ATC-200 and 300 series of exhibits.

THE ALASKA TRANSPORTATION COMMISSION, REGULATORY ARM OF THE STATE

The Alaska Transportation Commission was created as a separate and distinct State regulatory agency in 1966 (Chapter 139 SLA 1966, establishing Chapter AS 42.07). Prior to that time, the Alaska Air Commerce Act of 1960 was administered by the Alaska Public Service Commission. The ATC was substantially reorganized by Chapter 104 SLA 1969 in which a three-man Commission was provided in place of the previous two-man Commission.

The Commission is responsible for the administration and enforcement of the Alaska Air Commerce Act of 1960. As a general proposition, that Act provides for the regulation of air commerce within the State of Alaska in the public interest.

Three general classifications of air carrier are established by the State Air Commerce Act. They are the scheduled carrier, air taxi carrier, and the contract carrier. The Alaska law provides that for a carrier to engage in intrastate air commerce within the State, it must first be certificated by the Alaska Transportation Commission within one of these three general classifications.

In addition to certification, the Commission also regulates in varying degrees (depending upon the classification) the routes, rates, tariffs, safety of operations of aircraft, base of operations, etc., of intrastate air carriers.

The Commission also has the authority to grant exemptions to the certification requirements under specified conditions and for a limited period of time. In all cases, applications for new or revised authority must meet public convenience and necessity tests.

MORE THAN 75 PERCENT OF TOTAL PASSENGER TRAFFIC CARRIED BY CAB CARRIERS BETWEEN ALASKAN POINTS IS INTRASTATE -- THE SUBJECT OF STATE REGULATION

A review of the informational responses of Alaska Airlines and Wien Consolidated Airlines discloses that the vast majority of passengers carried between Alaskan points by CAB carriers is actually moving in intrastate commerce only.

Wien's Exhibit (WC-IR-201) containing O & D information for the month of October, 1969, shows that slightly over 90 percent of all of Wien's passenger load (including on-line and inter-line traffic) was intrastate only. And, if the number of interstate passengers who did not move intrastate beyond the points of entry into Alaska (other than between Juneau and Fairbanks) is subtracted, it can be seen that approximately 96 percent of the passenger movement over Wien's intrastate interior system was in no way involved in interstate commerce.

Similar information is not so easily developed for Alaska Airlines. However, a close examination of the Southeast Alaska network of Alaska Airlines reveals that at least as to that part of its system, the vast majority of the passenger movement between Southeast Alaska communities is strictly intrastate.

With some exceptions, Alaska Airlines did not disclose October, 1969, O & D information for most of its Southeast Alaska bush route system. However, from the information that was provided as well as other information available to this Commission including special O & D information requested by this Commission of Southeast Alaska air taxi subcontractors and other operators, it appears that over 90 percent of the scheduled inter-community passenger movement in Southeast Alaska in October, 1969, was intrastate.

Summer tourist traffic substantially increases the volume of interstate passengers moving between Alaskan points both in the Southeast Alaska system of Alaska Airlines and over the system of Wien Consolidated Airlines. The air tours offered by tour operators and the airlines bring a substantial influx of visitors to the State. The through-intrastate movement of these tourists, however, is generally limited to only the very few points covered in the tours.

It is also true that the summer movement of purely intrastate passengers increases very substantially. It can be seen, for example, in Exhibit ATC-105 that the Third Quarter Air Taxi passenger movement is more than twice that of the Second and Fourth Quarters, and more than three times that of the First Quarter. O & D information submitted by the carriers (to the extent that it can be so broken down) also indicates a much larger intrastate movement in the summer.

Thus the ratio of intrastate to interstate passenger traffic in the summer would probably be not less than 70 percent for the route systems discussed above.

ALL INTRA-ALASKA ROUTES REGULATED BY THE CAB REFLECT A MAJOR CAB-ATC JURISDICTIONAL OVERLAP

In most respects, the responsibilities and objectives of the Alaska Transportation Commission in intrastate air commerce matters are similar to those of the CAB in interstate air commerce matters.

Due to the long-standing and intimate involvement of the CAB in Alaska's air commerce, it would be impossible to draw a fine line between the jurisdiction of the CAB and the jurisdiction of this Commission. This ALASKA SERVICE INVESTIGATION itself epitomizes the jurisdictional overlap in integration of federal and state regulatory practices and policies.

Excluding the Seattle/Portland gateway services, virtually all point to point service and routes being considered in this proceeding are intrastate in nature. With respect to much of this service, interstate commerce is incidental or insignificant compared with intrastate service requirements. It is estimated that carriers regulated primarily by the CAB provide in excess of 95 percent of the scheduled intrastate air service within Alaska. This appears to be a most unusual situation, as well as one of questionable validity, if the CAB jurisdiction is exercised unilaterally.

It follows that in Alaska where air transportation is one of the most important transportation modes and a basic necessity to the entire economy of the State, it is essential that the State exercise major, if not primary, regulatory jurisdiction.

EXCLUSIVE CAB REGULATION OF SPECIFIC INTRASTATE AIR ROUTES AND CARRIERS HAS PROVEN TO BE NON-RESPONSIVE TO THE NEEDS OF LARGE SEGMENTS OF THE STATE

The matter of the exercise of so broad a jurisdiction by the CAB over intrastate routes is not in and of itself the major problem. What is unfortunate, however, is the unresponsiveness of this arrangement to the needs and complaints of the people who are presumably being served. It appears that the remoteness of the CAB from the area of operations of its regulated carriers substantially influences the objectives of the CAB in its regulatory policy as applied to intra-Alaskan services. This remoteness tends to insulate the CAB from operational and service matters (other than those which may be called to its attention by the carriers), the result being that the Board primarily concerns itself about only those problems, such as subsidy payments, which are its direct and exclusive responsibility. It appears that with respect to Alaskan carriers the overriding objective of the CAB is, and has for some time been, the elimination of subsidies with all possible dispatch.

There is little doubt that this primary objective is being achieved. However, it is also quite apparent to anyone familiar with Alaskan air transportation services that this primary objective is being achieved at great sacrifice in public service.

The CAB cannot be totally unaware of the vast deterioration in intra-Alaska air service over the past three or four years. But, it seems certain that the Board does not fully recognize or appreciate the magnitude and implications of these conditions.

THE DOMINANT OBJECTIVE IN THIS PROCEEDING -- REASONABLE ADEQUACY AND PERFORMANCE OF CARRIER SERVICE; THE APPROACH TO ACHIEVING THAT OBJECTIVE -- JOINT INVESTIGATION AND REGULATION

The instigation of the ALASKA SERVICE INVESTIGATION is unquestionably an important and commendable undertaking by the CAB. However, the issues which have been delineated by the Board reflect a continuing and virtually exclusive preoccupation with the subsidy issue and a most unfortunate lack of appreciation for the standards and adequacy of service.

It is the position of this Commission, however, that the adequacy and standards of service dominate as issues and the Board should and must consider them in this proceeding. Assuming the accuracy of this contention, it becomes at once apparent that

there are major deficiencies in the procedures adopted by the CAB in this Service Investigation.

We call the Board's attention to the provisions of the Federal Aviation Act of 1958 (49 USC 1324), titled Cooperation With State Aeronautical Agencies:

> "(b) The Board is empowered to confer with or to hold joint hearings with any State aeronautical agency, or other State agency, in connection with any matter arising under this chapter within its jurisdiction, and to avail itself of the cooperation, services, records, and facilities of such State agencies as fully as may be practicable in the administration and the enforcement of this chapter."

We cannot conceive of a more appropriate occasion for the Board to have implemented the above quoted statute than the instant proceeding. The fact that it did not do so strongly suggests that the Board considered this Service Investigation to be little more than a fairly routine route proceeding. And, perhaps having little more to go on than the carriers' side of the story, the Board could justify that conclusion. However, even if it were routine, the fact that so great a proportion of the routes under investigation are primarily intrastate in nature, should have been sufficient for the Board to have proposed a joint board proceeding. It is elementary that the role of this Commission as simply a party in this proceeding effectively precludes participation by the State in the decisions affecting nearly all scheduled service in intrastate air commerce.

The Commission recognizes that the CAB has not specifically made an issue of the bush route services to those communities listed in Appendix C, but not shown in Appendices A and B, of CAB Order 69-3-68. Nor has the CAB determined to take up the issue of the relative jurisdiction of the CAB and this Commission. However, these issues are necessarily an integral part of this proceeding and, as previously stated, the issue of adequacy and standards of service over the bush route segments of the CAB carriers' authority is one of the dominant issues to be considered. It can be seen that these issues are interrelated. The exclusive regulatory jurisdiction heretofore exercised by the CAB over the Alaska routes has not resulted in reasonably satisfactory or adequate service to most of the communities in the State.

Additionally, the broad assumption of regulatory jurisdiction on an exclusive basis by the CAB seriously subverts effective local regulation. It encourages CAB regulated carriers to avoid state regulation and to look only to the CAB for route changes, tariff changes, etc. (See, for example, Exhibit ATC 104). The State seldom receives timely notice of such requests.

HEARING PROCEDURES ADOPTED BY THE CAB IN THIS INVESTIGATION PRECLUDE AN ADEQUATE EVIDENTIARY RECORD ON DOMINANT ISSUES --- ATC PUBLIC HEARINGS MAY PARTIALLY REMEDY THIS PROBLEM

In a proceeding such as this ALASKA SERVICE INVESTIGATION, where historical carrier performance is a matter of major significance, it is imperative that the consumer public be liberally afforded an opportunity to speak its piece.

Unfortunately, the restriction to a formal hearing process sans less formal public participation effectively thwarts this objective. It is well known that a good cross section of public opinion cannot be obtained in a matter of this sort without holding public, forum-type hearings.

To partially remedy the public participation problem, this Commission belatedly requested and was granted (with concurrence of all other parties) an extension of time in which to conduct open public hearings on its own and outside the CAB record.

During the latter part of February and early March, 1969, the ATC held open, public, forum-type hearings throughout the State and made numerous personal contacts with people throughout the State for the purpose of determining (1) the major concerns and views of the community in regard to air transportation and (2) the manner in which the people of this State may be better served in air commerce.

Hearings were held at the following places: Barrow, Kotzebue, Nome, Unalakleet, Andreafski (St. Mary's), Bethel, Dillingham, King Salmon, Kodiak, Kenai, Cordova, Valdez, Tok, Fort Yukon, Haines, Sitka, Juneau, Petersburg, Wrangell, and Ketchikan. Each of these hearings was conducted by one or more of the three Commissioners. The time, place and nature of these hearings was noticed in advance by public media and individual correspondence although notice was necessarily very short. There were in attendance from a handful to

forty or more people at each hearing. Anyone who desired to speak was permitted to do so. All testimony was recorded and most of these recordings were subsequently reviewed by the Commissioners. Portions thereof were transcribed for further, more detailed review.

People attending these hearings were encouraged to submit their views in writing and a fair representation did so.

Based upon these hearings, letters and numerous other contacts with people throughout the State, the Commission has determined that there are major and inexcusable deficiencies in the service provided by those CAB carriers serving intra-Alaska routes. This is poignantly clear in the so-called bush route areas. Such matters as extreme delays in mail and freight deliveries; inexcusable schedule delays or cancellations; inability to have claims and refunds settled within several months of filing; frequent and unannounced schedule changes; untrained personnel; discriminatory rates and improper charges; commonplace misinformation on flight arrivals and departures; frequent frustration in attempting to make interline connections; substantial failure to meet published departure and arrival times; inability of local people to obtain space on flights to and from tourist centers because all seats booked solid for several days at a time by tour passengers; the frequent unavailability of scheduled flights theoretically being performed by subcontractors, etc., were common complaints throughout the State. Most of these problems are presented in varying forms in Exhibit 300 series statements.

THE ALASKA TRANSPORTATION COMMISSION RECOMMENDS THAT THE ALASKA HEARINGS TO BE CONDUCTED BY THE CAB EXAMINER BE BROADENED IN SCOPE TO INCLUDE A PUBLIC EXPRESSION MISSION

It is the conviction of this Commission that the service conditions previously enumerated do predominate in most areas of the State. However, we do not presume complete agreement by the carriers involved.

Therefore, the ATC strongly urges that the forthcoming hearings to be held by the CAB in Alaska should likewise be of a nature that would allow general public participation and oral testimony.

CARRIER MERGERS AND CONSOLIDATIONS APPEAR TO HAVE LED TO MAJOR DETERIORATION OF INTRASTATE SERVICE THROUGHOUT THE STATE

Within the last three years there have been several mergers and purchases of CAB certificated carriers serving Alaska. In very brief summary, these mergers and consolidations were:

1. Wien Airlines and Northern Consolidated Airlines to form Wien Consolidated Airlines, Inc., April, 1968.

2. Western Airlines purchased Pacific Northern Airlines, July, 1967.

3. Alaska Airlines with Cordova Airlines, and with Alaska Coastal Ellis Airlines, surviving as Alaska Airlines, Inc., February and March, 1968.

There appears to be a direct correlation between the merger of the larger CAB carriers serving Alaska and the deterioration in air service to outlying communities and areas.

Western Airlines, for example, has been systematically ridding itself of what might be properly termed "local service obligations." It has suspended its service to King Salmon, Cordova, and Yakutat. It seeks to rid itself of its route between Anchorage, Kenai, Homer and Kodiak. In essence, it appears that Western's real objective in absorbing Pacific Northern Airlines was to acquire only the high-traffic-density, Seattle/Portland gateway routes to Alaska, and to succeed to the favored position of PNA in its application for Anchorage-Hawaii authority as consolidated in the Trans-Pacific Route Investigation.

Having accomplished these objectives, Western Airlines now shows no interest in the air service needs of the remainder of those communities previously served by PNA.

Alaska Airlines, in its two mergers, has gained access to the Anchorage-Juneau-Sitka-Seattle-Portland market. Ketchikan has not yet been added to this service route by the CAB, but the result of this omission has been the creation of some abnormal and unsatisfactory scheduling and service conditions in the Ketchikan, Juneau, Sitka feeder service from other Southeastern Alaska communities.

In essence, what the CAB has done in Southeast Alaska over the last five years is to substitute in substantial part Alaska Airlines and Wien Consolidated Airlines for Pan American World Airways in the interstate service to Southeast Alaska. This

substitution has never met the approval of the people of this area.

Alaska Airlines inherited by its merger a multiplicity of intra-Southeast Alaska routes. Many of the services previously provided by Alaska Coastal Ellis Airlines have been discontinued by Alaska Airlines entirely. A large number of the remaining point to point routes which Alaska purportedly continues to serve are in fact served by air taxi operators under subcontract with Alaska Airlines (Exhibit ATC-103).

It was anticipated that the merger of Wien Airlines and Northern Consolidated Airlines would provide a materially strengthened carrier which would result in a better service to the public than either carrier was capable of providing individually.

Unfortunately, the emerged carrier, while providing more sophisticated equipment and service to the large competitive markets, has retracted its service to the outlying communities. In markets where Wien Consolidated is not competing with another carrier, its service and performance have deteriorated markedly.

Between 1957 (the first year Northern Consolidated subcontracted out part of its route) and November 1, 1967, Northern Consolidated and Wien Alaska subcontracted a total of 34 points on their routes. Since May 1, 1969, Wien Consolidated has subcontracted thirty additional points (Exhibit ATC-103).

The inverse relationship between mergers and deteriorating service to outlying communities appears to be a very real one. Apparently when a carrier reaches substantial size, gains access to major markets, and places into operation sophisticated jet equipment, it loses its interest and perhaps capability to provide adequate service over marginal routes.

Unfortunately, the bush-level scheduled carriers, which develop from these circumstances, do not inherit any of the better traffic markets because those markets are already occupied by the large carriers.

CAB CARRIER SUBCONTRACTS ARE UNLAWFUL AND CONTRARY TO PUBLIC INTEREST

Wien and Alaska have submitted into the record copies of their agreements with air taxis under which the latter provide

local scheduled service. Exhibit ATC-103 graphically portrays the networks of such service routes. In each case, the subcontractor is a State-certificated air taxi operator. However, only two of the fifteen subcontractors are certificated by the State as scheduled carriers. And, even in those instances where the subcontractor is certificated to provide scheduled service, many of the points listed in his State route authority are different from those he serves under subcontract.

Further investigation also reveals that the subcontractor generally serves the contract points both as a scheduled carrier and as an air taxi operator. In many instances, the volume of traffic carried as an air taxi to such points substantially exceeds the volume carried as the subcontractor. It may be that in many such cases the traffic which the subcontractor is carrying under the contract is limited to multiple coupon, involving travel over more than one service leg.

Air taxi operators are required by State law to charge only those rates which they have filed with this Commission. It is immaterial whether the service is being provided on a trip by trip basis or under a long-term contract.

Thus, for such an operator to comply with the laws of the State of Alaska as to the charges which he may make, he cannot charge the rates and the tariffs of the CAB contracting carrier, unless such rates happen to coincide with those of the air taxi operator which are on file.

Under some of the contracts the operator is paid a flat hourly rate by the mainline carrier irrespective of the number of passengers, volume of freight, etc. The mainline carrier then collects its tariff rates from the sub's passengers and shippers.

Other subcontractors apparently collect and keep as their compensation the published CAB tariff rates of the mainline carrier.

The air taxi operator's tariff normally reflects hourly rates. The cost per passenger would depend on the number of passengers travelling between two given points on the same flight. Thus it would appear that there is only one point in the passenger-time relationship at which the air taxi rate per passenger could be the same as the passenger rate of the scheduled CAB carrier.

This subcontract approach is even further clandestine in that the CAB carrier, rather than this Commission, makes the determination as to which, if any, local Alaska certificated carriers will become scheduled carriers and will be allowed to carry mail for compensation. This leads to an unhealthy control by a major airline of the independent operations of locally-certificated carriers. It also leads to a reduction in competition and service through a mutual arrangement not to compete. Although the CAB regulated carrier remains ultimately responsible for the actions and performance of the subcontractor, they in fact exercise no supervision over the sub, do not know what the sub is doing or not doing, and apparently couldn't care less. With many of the subcontractors, the only scheduled service provided occurs on mail flights (if there is room) and mail is delivered sporadically.

One further point should be made before leaving the matter of subcontracts. There is no assurance that a contract will not be terminated on short notice; or that it will be renewed upon expiration; or that it will not be given to a different local operator; or that the CAB carrier itself will not terminate the contract and initiate the service itself. Thus, the State-certificated operator builds his operation and his capability with no assurance that he may continue to provide that service for any length of time.

The CAB carrier is neither qualified nor authorized to designate local carriers upon which it will bestow operating privileges within this State.

There have been numerous complaints to the effect that some subcontractors of CAB carriers are providing poor, sporadic, inadequate and unsatisfactory service to the people they supposedly serve. These conditions add emphasis to the impropriety of the route subcontracts.

IT APPEARS THAT THE AIR TAXI OPERATORS, PARTICULARLY IN SOUTHEAST ALASKA, NOW PROVIDE THE ONLY DEPENDABLE BUSH ROUTE SERVICE

The Commission has requested confidential O & D information of Southeast Alaska air taxi operators for the months of August and October, 1969. The response to this request was sufficient to indicate that the air taxi operators are now carrying a very

substantial percentage of the passenger traffic between communities presumably being served by Alaska Airlines.

The response to the Commission's request represents about one-third of the total volume of passenger movement by air taxi operators. The information submitted shows a weighted average of approximately 60 percent of the passenger load carried by the responding air taxi operators in the Third Quarter of 1969 as passengers moving between points on Alaska Airlines' scheduled route. It is believed that this average may be somewhat high as a reflection of the total Southeast Alaska air taxi movement. However, even if the percentage was reduced to 44 percent (the lowest of the reporting operators) it would mean that in the Third Quarter of 1969 air taxi operators in Southeast Alaska transported approximately 26,000 passengers between points listed on Alaska Airlines' scheduled route. This matter is well highlighted by the fact that Alaska Airlines in its informational response (IR-AS-1) shows the number of O & D coupon passengers carried by it between Juneau and Hoonah in the month of August, 1969, as 184. However, one air taxi operator alone shows a total of 840 passengers transported between Juneau and Hoonah during the same month.

It is the Commission's belief that these circumstances vividly reflect a virtually-complete abandonment by Alaska Airlines of its responsibilities under its CAB certificate to provide a dependable scheduled service to these outlying communities. In essence, the people of Southeast Alaska must look to the air taxi operator if they are going to receive a modicum of dependable service between the communities of Southeast Alaska.

The extent to which the results of the Commission's survey in Southeastern Alaska can be translated to other areas of the State is not known. However, the Commission has received considerable indication that the ratios may be similar in the Northwest, Southwest, and Interior areas as shown in Exhibit ATC 105.

UNILATERAL DECISION BY THE CAB WOULD BE IMPROPER IN THIS PROCEEDING

As procedural matters now stand, the decision in this Service Investigation is to be made unilaterally by the CAB.

This approach places the Alaska Transportation Commission in a rather unique position (since it is the regulatory body on

the State level). As pointed out earlier in the text of this Paper, the regulatory jurisdiction of the State is at least as substantial as that of the CAB.

Therefore, what the Commission is apparently being asked to do is decide for itself the issues in this proceeding without benefit of the evidentiary record and briefs and thereupon make its recommendations to the CAB as would any other party.

Such an approach, even if it were practical, would serve little purpose. It is essential that the jurisdictional questions be squarely faced and the utmost in cooperative effort be pursued by both the CAB and the ATC. This Commission currently has in its files a substantial number of applications for intrastate scheduled authority. The Commission has deferred consideration of all such applications (upon which hearings have not been held in the past six months) pending the outcome of this ALASKA SERVICE INVESTIGATION. Even where hearings had been held previous to this policy decision, the granting of authority where warranted by the public convenience and necessity has been limited to a one-year period.

It is intended by the Commission to systematically review the scheduled service requirements of limited geographical areas in a series of State area service investigations and to provide for the certificated service so badly needed in many areas of the State.

It would be a complete frustration of regulatory responsibility if the CAB and the ATC failed to integrate their efforts in these matters which so vitally affect the public interest.

DATED at ANCHORAGE, ALASKA, this 14th day of April 1970.

ALASKA TRANSPORTATION COMMISSION

Dennis L. Marvin, Commissioner

George L. Benesch, Commissioner

James J. Johnson, Commissioner

EXHIBIT "C"

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF COMMERCE

ALASKA TRANSPORTATION COMMISSION

750 MACKAY BUILDING
339 DENALI STREET—ANCHORAGE 99501

May 5, 1970

This letter was sent to applicant air carriers representing 13 docketed applications for intrastate scheduled carrier authority.

SUBJECT: Your Application for Scheduled Carrier Authority -- Docket No. _____.

Dear Mr.

The purpose of this letter is to inform you as to the status of your subject Docketed Application for Scheduled Air Carrier authority.

As you may already know the Commission is a party in the ALASKA SERVICE INVESTIGATION of the Civil Aeronautics Board, Docket No. 20826. Upon a close investigation, we believe that the issues in the CAB proceeding touch upon all existing or proposed scheduled service between all points within the State. We have, therefore, taken the position that neither the CAB nor this Commission should act wholly unilaterally in developing an adequate, efficient, feasible and statewide intrastate network of scheduled service.

In keeping with this policy the Commission has for the last several months deferred final consideration of all new applications for scheduled service not previously acted upon unless such deferral would create a serious public hardship in a particular case or the application may otherwise be non-controversial. We intend to continue this policy of deferral over the next few months, at least until the direction the ALASKA SERVICE INVESTIGATION is going to take has been demonstrated.

It is the contention of this Commission that much of the intrastate service such as that for which you have applied is and should be regulated by the State. At the same time, the Commission recognizes that a proliferation of numerous intrastate scheduled carriers could significantly affect the operations of the carriers heretofore regulated exclusively by the CAB. We believe the public interest demands that the regulatory efforts

of the Federal and State governments be substantially coordinated to avoid duplication of effort, conflicting decisions and objectives, adverse effects on the carriers and the public, etc.

This Commission has therefore placed itself in a posture whereby such coordination and joint effort can be accomplished. We are assuming, of course, that the CAB is similarly interested in such cooperation and coordination.

At such time as these applications for scheduled service are again considered (hopefully within the next few months) we propose to initiate local area service investigations for the purpose of developing an adequate, viable, feasible network of local carriers. This program will be preceded by a rule-making proceeding for the purpose of adopting guideline regulations and to give the industry and public an opportunity to be heard on the procedure, problems and objectives.

We appreciate your continued patience and understanding in this matter.

Sincerely yours,

George Benesch

George Benesch
Commissioner

EXHIBIT NO. D

An examination by the staff of the Alaska Transportation Commission as of May 4, 1970, shows that the matters set forth below are pending before the Commission.

There follows hereinafter an analysis of these pending matters. The analysis attempts to group the matters so as to reflect the type of issues and problems involved. It further attempts to explain the general nature of each group and seeks to explain the responsibility of the Commission in deciding these matters so that reasonable time factors can be applied to the determination of each group of matters.

1. Contested Matters: This class of cases involves applications for permanent authority to operate air taxi, scheduled carrier, and contract carrier in air commerce; applications for temporary and emergency temporary authority for operation as an air taxi, scheduled carrier, and contract carrier in air commerce; applications for permanent and temporary authority for what are known as common carriers - freight, common carriers - passenger, and contract carrier - freight, in motor carrier commerce. Other classes of cases involve authority to operate air cushion vehicles and water carrier (ferry) vessels. Each of these cases has been protested by one or more individuals or companys and each application will require public hearing estimated to average from 4 to 5 days.

   Contested cases requiring hearing 87

2. Uncontested Matters: This class of cases involves matters in which there have been no formal protests but in which either an informal or formal hearing will be required by the Commission in order to determine whether it is in the public interest to authorize either air, surface, air cushion, or water (ferry) carriage. This class of cases also includes those matters in which formal oral argument is required by the Commission on either or both contested cases (which have been heard) or uncontested cases.

   Hearings on uncontested cases or cases which require argument and Commission decision 66

3. Other Matters: This class of cases involves matters which require Commission study and perhaps additional hearings (not included above). These cases involve such matters as complaints alleging violations of the transportation law, requests for interpretations of the law, review of policy determinations made by prior Commissions, review of the operation and practices of operating carriers in which the public interest is involved.

Cases involving so-called Other Matters 13

4. Pending Decisions: This class of cases involves matters that have been heard by the Commission and cases which have not required a public hearing but which require the study, examination and exercise of judgment and discretion of the Commission. In all cases formally or informally heard by the Commission under the present law it is necessary for each Commissioner to fully study and analyse the record and all exhibits presented before entering into conference for decision.

Cases involving Pending Decisions 6

5. Special Matters:

(a) The Commission during the past several months has held over 20 hearings throughout the state in connection with the Civil Aeronautics Board's Alaska Service Investigation (Air Route Investigation). These hearings have averaged from 2 to 4 days per hearing (including travel time). Upcoming are six hearings within Alaska and at least two hearings in Washington, D.C. (Please see explanation of the nature and scope of these hearings, supra). These hearings are policy making in nature and hearing officers would not be able to attend to these matters nor exercise the discretion and judgment required.

Estimated time for CAB hearings 30 days
Estimated time for briefing and argument 30 days

(b) The transportation industry of Alaska has changed dramatically during the last few years. The industry is no longer a 'small-time' matter. Regulations of the Transporation Commission as they now exist were based on a much smaller and less complicated industry. The regulations have proven to be grossly inadequate and incomplete to meet the needs of our modern and growing industry. This fact is widely known throughout the industry particularly among attorneys practicing within this field. The regulations must be completely revised. Revision of regulations of the transportation industry is a vast and major task. There is no provision under the law for this task to be accomplished by other than the Commission itself. The revision necessary of regulations

governing air, motor carrier (freight and passenger), air cushion vehicles and water (ferry) carriers will require extensive research and study and may take as long as one year. This work must be performed by the Commission because these regulations involve many involved issues of policy, practice and procedure. Work on this revision of regulations which is very immediately necessary will require time that is now devoted to the hearing of cases.

Estimated time for revision of regulations 1 year

(c) In addition to revision of the transportation regulations there is an urgent need for a reclassification of carriers within each of the groups, i.e., air, surface, air cushion and water. The Commission now has planned at least three reclassification hearings. These hearings will involve the taking of testimony from all interested members of the industry, and the public.

Estimated time for reclassification hearings 30 days

SB569

The Legislature of the State of Alaska
FISCAL NOTE

House Judiciary

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST
___THE HOUSE FINANCE COMMITTEE STAFF
___THE SENATE FINANCE COMMITTEE STAFF
___THE DIVISION OF BUDGET & MANAGEMENT
___RETAIN A COPY FOR YOUR FILES

Subject Judicial Salaries SB SB 569
requested by Senate Judiciary Committee
referred to Senator Miller date of request 4-20-70
completion date requested date received

EXPENDITURE DETAIL	FY 70-71	FY	FY
100 PERSONAL SERVICES	$ 138,200.	$	$
200 TRAVEL			
300 CONTRACTUAL SERVICES			
400 COMMODITIES			
500 EQUIPMENT			
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
TOTAL	$ 138,200.	$	$
FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	138,200.		
Man Months			
Permanent Positions			
Temporary Positions	-0-		

FISCAL ANALYSIS

	SB 569	Alaska Court System 70-71 Budget Req.	Increase	Total Increase
Chief Justice	$32,000	$30,000	$2,000	$ 2,000
Associate Justices (4)	31,000	28,000	3,000	12,000
Superior Court Judges (16) (11 present, 5 proposed)				
Total of 17 includes the Administrative Director	29,000	26,500	2,500	42,500
District Court Judges (16)	24,000	19,000	5,000	80,000
				$136,500
Judges' Benefits-- W/C - 95¢; P.Liab. - 29¢/100 136,500 x $1.24 = $1,692.60				1,693
			Total Salaries and Benefits:	$138,193
			Rounding:	+ 7
			Net:	$138,200

DATE April 20, 1970 SIGNATURE Robert H. Reynolds

NAME & TITLE Robert H. Reynolds, Administrative Director, Alaska Court System

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL—JUNEAU 99801

May 27, 1970

The Honorable Gene Guess
Alaska State Representative
Alaska State Legislature
Juneau, Alaska

Re: Senate Bill 588

Dear Mr. Guess:

In accordance with your request we have reviewed Senate Bill 588 in order to determine its constitutionality. In the opinion of this office there is good reason to believe that SB 588 is inconsistent with one or more of the following sections of Article X of Alaska's Constitution:

> Section 1. PURPOSE OF CONSTRUCTION. The purpose of this article is to provide for maximum local self government with a minimum of local government units, and to prevent duplication of tax levying jurisdiction.
>
> . . .
>
> Section 3. BOROUGHS. . . . The standards [for boroughs] shall include population, geo raphy, economy, transportation, and other factors. Each borough shall embrace an area and population with common interest to the maximum degree possible.
>
> . . .
>
> Section 7. CITIES. . . . shall be a part of the borough in which they are located.
>
> . . .
>
> Section 9. CHARTERS. . . . All charters, or parts or amendments of charters, shall be submitted to the qualified voters of the borough or city, and shall become effective if approved by a majority of those who vote on a specific question.

As noted above, Sec. 3 of Article IX requires establishment of boroughs according to standards which, while set by law, must include those of population, geography, economics, and transportation. From this requirement and others the Constitution obviously requires that the borough be established with a view towards cohesive functioning.

The idea of cohesiveness as the object desired is also reflected in the above quoted portions of Sec. 7 and Sec. 1 of Article X.

In this regard it is also important to note the following pertinent statements by members of Alaska's Constitutional Convention:

> The powers of boroughs shall be provided by law, and we felt that in order to have good local government in Alaska, the whole state should be divided - we would not want to have loose sections here and there, and that in setting up this program the boundaries should be laid out. Alaska Constitutional Convention 2612.
>
> We had thought that the boundaries should be flexible, of course, and should be set up so that we would not want too small a unit, because that is a problem that has been one of the great problems in the state, the very small units, and they get beyond, or they must be combined or extended. Id. at 2621.
>
> It was pointed out here that these boroughs would embrace the economic and other factors as much as would be compatible with the borough, and it was the intent of the Committee that these boroughs would be as large as could possibly be made and embrace all of these things. Id. at 2638.
>
> [W]e visualize the possibilities that as the borough becomes a more definite unit of government over the years, which we hope it will, the scope better defined, that all the functions

> that can best be carried out on the unified basis be transferred over to the borough. Id. at 2654.
>
> I would like to point out here that if that would be the case in our situation, where a city would grow to where its boundaries would be the same as the borough boundary, it would be a matter very simple to either disorganize the city or the borough so you would, under one government instead of having the situation that you would have in some cities in the states where they have grown to take over the whole county. Id. at 2657.

It should also be noted that the effect of Senate Bill 588 would be to make the area excluded from the unified municipality part of the unorganized borough since it would not be subject to any of the ordinances or other decisions of the governing body of the unified municipality. In other words, the result would appear to be a doughnut shaped borough, a concept which does not appear to be authorized by Sec. 7 of Article X.

Finally, there is the problem created by the provisions of Article X, Section 9, which provides

> "The qualified voters of any borough of the first class or city of the first class may adopt, amend, or repeal a home rule charter in a manner provided by law. . . . All charters, or parts or amendments of charters, shall be submitted to the qualified voters of the borough or city, and shall become effective if approved by a majority of those who vote on the specific question."

If one concludes that charter elections for unified local governments 1/ come within the meaning of the first

---

1/ AS 29.85.120; AS 29.85.160.

sentence of this constitutional section, 2/ the provisions of Senate Bill 588 would probably violate the section's last sentence in that one could reasonably conclude that the unification charter would be amended without submission to the qualified voters of the borough whenever a city were to exclude itself under authority of the bill's language.

Sincerely,

G. Kent Edwards
Attorney General

GKE:jt

2/ Although a borough and the cities within it need not be first class to unify under AS 29.85.010 whereas Alaska Const. Art. X, Sec. 9 speaks only of boroughs and cities of the first class, once unification has occurred, unified municipalities have all powers granted to first class cities. AS 29.85.210.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

May 2, 1970

MEMORANDUM

TO: Senator Lewis

FROM: Greg Machyowsky, Legislative Counsel

SUBJECT: Enclosed bills relating to exclusion of a home rule city from unified local government

Either of the two bills enclosed would permit a home rule city to withdraw from a unified government, notwithstanding that a majority of voters in the cities taken together have approved city and borough unification. The shorter bill is a duplicate of a draft prepared at the request of members of the House.

The other bill is for the same purpose, with some suggested revisions to spell out legal implications in more detail and more closely tailor the provisions to the Douglas situation; for example, the 60 per cent vote requirement of subsection (f) is raised to 70 per cent, which was the percentage by which Douglas voted against unification in the recent charter election in the Greater Juneau Borough. Also, subsection (i) alters the approach on filling the seat of a unified governing body member who is a resident of the city excluding itself from the unified government. (I have suggested that some technical revisions be made in the House draft if it is decided to introduce the bill.)

Exclusion of the city under either bill would have to take place before the city is dissolved under terms of the charter for unified government approved by the voters.

While possible arguments could be made on the constitutionality of the bills under the state constitution, in my judgment either bill would meet constitutional requirements.

GM/sm

Greg Machyowsky

Mr. Jackson, Chairman, and Members of the Judiciary Committee:

After hearing all the arguments pro and con on this issue I hope you will be able to sort out fact from fiction.

~~Yesterday~~ the other day, Mr. McLean stated that the community of Douglas was not facing up to its responsibilities in area-wide functions. This is not so. We have participated in and are paying our full share in all area-wide functions - schools, hospital, assessing and collecting of taxes, administrative costs and all the rest that we are obligated to. To infer otherwise is doing an injustice to every taxpayer of Douglas. To assume we would not pay our obligations in the future is also an injustice. Our every intention is to participate fully with whatever functions are deemed area-wide.

All that is being sought here is a small measure of local government - to have a say in the day to day operation of the city, to maintain our streets and utilities (water and sewer) and have a place to be able to take our problems and be heard.

The farther we lean toward a totalitarian government, the less responsive it is to the needs of the people and the less participation people will take in their local affairs.

I urge favorable passage of Senate Bill 588 and this committees favorable report to the full House of Representatives.

Thank you.

James D. Sofoulis

James D. Sofoulis, Councilman

City of Douglas

Mr. Chairman & Members: I am a Douglas Res. since 1933 my wife since 1911

I know too that this session is t longest in history. And I am sure you want to go home rather than have to sit here and listen to people making erroneous statements and tell you their personal record that they have practiced law and been in the Legislature, etc. The second witness, for the opposition another lawyer for the Borough asking that this bill #588 be kept in committee. He, too, is my lawyer, because Douglas is in the Borough. Why should he discriminate against Douglas, it's Douglas' tax dollar that helps pay his salary. He states the bill is unconstitutional, well, there are also lawyers in the Senate that didn't think so. Thirdly, another lawyer telling you that the charter was modified and all the teeth pulled out, it was modified all to the tune of putting Juneau in the middle of District 2 which is Douglas and also giving Juneau one more assemblyman. So one tooth was put back in.(Wisdom) And of course that's only his story. Douglas checked and found that the Dentist overlooked a few. We still have a few copies of what was overlooked. ~~Dropping back to Mr. McLeans testimony, saying that Douglas was not paying to support the airport.~~ On his trip to Anchorage he made the ~~statement there was another airport ready to go in on the Douglas side that would be in District 2 (Douglas)~~ Who would get the ~~profit after this airport is in operation.~~

The Douglas people are giving a lot of help to Juneau. Just a few years ago the Capital move was on the ballot and Douglas put one mill tax levy on all real property on a voluntary basis, everyone paid it. Douglas didn't want our sister city to fade away.

There has been talk of court action, this we want to avoid. It is too costly and we have had to listen to the same lawyer for advice. Here is a clipping out of the local paper. One other item that was mentioned was that Douglas had no housing plan. True, still when the Highway Department needed space in the spring of what year, Douglas gave up their ball park and had the Department moved in before the end of that year. With hard work and planning Douglas has

Area Unification

Feb 24-70

Douglas Residents Seeking Way Out

More than 100 Douglas residents appeared at a city council meeting Monday evening to learn what legal avenues they might pursue in opposing the unification of all governments in the Greater Juneau area.

"No action will be taken by the city council until after the absentee ballots are counted today and the unification election results are certified by the official canvass," Douglas Mayor Robert Savikko said today.

Douglas City Attorney Joe Henri said he told the group "I couldn't see any possibility for a successful court action."

Henri, who is also the city attorney for Juneau, said he told the council they would have to retain another lawyer to prosecute any legal efforts to overthrow last week's election approving unification.

The attorney said that in answer to questions he told the gathering there are two avenues they can follow in seeking to secede from the unified government after July 1.

The city can proceed either under the annexation and exclusion laws of the state, or by an appeal to the Local Boundary Commission, asking to be excluded, he said.

Under state law, an area wishing to be excluded from a municipality follows procedures similar to those for annexation, with a majority vote being required to bring about exclusion.

The courts apparently would have to resolve any conflict between laws allowing unification and those allowing exclusion.

Henry said he is also researching a question of possible "gerrymandering" of election districts on Douglas Island.

The question arose because West Juneau, which separates Douglas and North Douglas, is part of the city of Juneau.

Absentee Ballots To Be Counted Today

Final outcome of last week's election on the revised charter for a unified municipal government will be known late today when the Greater Juneau Borough Assembly is expected to certify the ballot count.

The assembly is due to meet at noon today when it will instruct Borough Clerk Edward S. Hildebrand to count the absentee ballots.

Of 165 absentee ballots sent out for the election, approximately 65 went to voters in the rural area, in which unification carried by the slim margin of 41 votes. In the combined Juneau-Douglas area, the vote was definitely in favor and would not be affected by absentee returns.

Hildebrand said he would begin the absentee count as soon as the assembly adjourned its noon session. The assembly is expected to reconvene at 5 p.m. to certify both last week's ballot returns at the polls and today's absentee ballot count.

now 2 ball diamonds, track, tennis court coming recreation shelters. There is no fence to keep Juneau out.

Maybe it would be quicker and more clear to call a 30 minute recess and take a tour bus and see for yourself, although it's not in the city budget, but I'll pass the hat around and take care of the bill. Douglas had to do it when the town and school burned down in February, 1936. Aid came in from many small communities so we could finish the school term. (None from Juneau) Again by Sept. of the same year a new school was ready and also on a solid foundation. Not like the one at Auke bay on a floating one, but that's big government.

One other item I failed to mention was that the Borough hiled a salesman to the tune of $12,000.00 to fight Douglas and area wide. That too was partly Douglas money. Again I must say if this was so good why did they have to spend so much money for propaganda? It wasn't sold to the people, they were just worn down.

I myself can see that Juneau has problems but who hasn't. Again I would like to say that Juneau has been very fortunate to receive all the money (in wills) for indoor swimming pools, valuable land willed for cemetary purposes, then traded it for a few loads of blacktop. The money the Juneau Douglas School Board received from Douglas ($32,000.00) after school consolidation certainly helped to pay off their old high school which was mortgaged since 1914, this was in 1955, XXXXXXX XXXXXX

on the new unified government, or Other Corrective action other than secession with this ~~subsidiary~~ result.

I propose that the House take no action on a bill 588 allowing secession at this time.

In this event, I believe most objections would be over-come, with the least people un-happy - and this area could go forward with-out inter-city bitterness and passions.

If the House passage declines of the bill, some ~~percent~~ of approximately 400 voters of Douglas may be not entirely sati fied . But the Community will have the knowledge that it fought the battle and in effect won the battle. The Legislature will have solved a problem. Juneau and area with Unification can continue, onward in the march of progress, hopefully to the betterment of our citizens.

Sincerely,

Val Poor

Douglas, Ala ska

548

May 30, 1970

Alaska State Legislature
House of Representatives
Judicial Committee

I am Val Poor, a resident of Douglas, for ~~over 30 years.~~ I ~~have raised a family~~ of five, ~~two of whom are sitting with me today,~~ all graduates of the Unified ~~School System, and most planning to make this their home.~~ ~~I am the Postmaster at Douglas and vitally interested in the affairs of the community,~~ and intend to ~~live in this community for my lifetime.~~ ~~My entire investment for the future lies in this community, as a extensive property owner.~~

who share my views in this matter today

I am here today to testify against action by the House of Representatives to pass legislation similar to a bill passed by the Alaska Senate, allowing Douglas to secede from the Unified government of the City and Borough of Juneau.

I am against the possible action because I can forsee more problems being made for our area and for a long period of time, than if such legislation were not passed.

Douglas was wronged in two instances. The Legislature passed a bill several years ago which resulted in the City of Douglas having been discriminated against, and in which they could vote 100 % against unification and still have it forced upon them. Later the Charter Commission did not give Douglas a full 1 seat on the new representative unified government. I firmly believe/ it is these two wrongs which are the direct cause/ of the defeat of the unification Charter at Douglas proper, and why the Legislature is being asked now to correct the situation by further legislation. In my own case I felt very strongly and financially supported and voted against acceptance of the first Charter presented, partly on the basis of corrections needed, but mainly because of my ~~extreme~~ anger at being dis-enfranchised by my vote in the event Juneaus vote overwhelmed us. By the presentation of the second Charter to the voters, ~~some~~ corrections were made, Douglas was given the chance during Charter hearings to be heard on other desirable changes.

I had taken another look at the area-wide picture and the advantages, and had analysed my own feelings, concluding that I was mainly objecting to the principles of the election - more so at least , th an the principles of unification. SO I voted for Unification and the Charter, ~~on the second time around.~~ In Douglas several years ago we elected to consolidate our School systems into the Juneau Douglas School system . It was a bitter battle and disruptive to the community for quite a few years. I was against unification of our schools. With the passing of years, the graduation of my children and the serving of five years on the School Board, I realize that , altho bitter at the time, the unified School system turned out to be the best for our children It is a closed issue now and Douglas would'nt think of turning back, I'm sure.

I believe that the injustices I mentioned can be remedied, under the existing system, with the help of this judcial committee.

The proponents of a bill to permit secession are my friends and neighbors ~~and patrons.~~ My sympathy goes with them ~~and my heart is surely with them in this matter of injustice.~~ They have worked hard and deligently and ~~with persistence,~~ as I believe, they have won. At this Point The measure has passed the senate. I feel that the House too will feel obligated to correct these injustices towards a proud independent and very old Alaskan comminity. How-ever I also feel that the House of Representatives could , or this Judiciary Committee, could, take action other than passage of secession legislation, to correct the wrongs, ~~and enable our area~~ to continue on with Unification, the progress of the Community, the building of a greater Capital of Alaska, the building of swimming pools and other ~~community benefits for the benefit~~ of all. The proponents will have won and proved that through due legislative action, wrongs can be righted. The Legislature will have playdd a important part in justice to citizens and state and community. And we can still have unification of this area.

I propose that this Judicial body, or other body of the Legislature, direct the new City and Borough of Juneau, that a first order of business on July 1, be to ammend their charter, enabling Douglas to have 1 full Representative, guarantee d

SB 588
House Judiciary

Julie Isaac
5-31, 1970

Mr. Chairman, Mrs. Banfield and Gentlemen:

I believe we've met twice before on other legislation, but for the record, I am Julie Isaac, 410 "D" Street, Douglas, where I've been a resident with my husband and two teen-age youngsters for the past 19 years.

In appearing before you today on SB 588, I speak to you as a resident and concerned citizen about the honesty and integrity of what we call the "democratic process." It has been only during the past year that I've been able to participate actively in our City Government----from the sidelines under the portion headed "audience participation"--having failed to win a council seat in the last election. And I dare say since last October, I've had a better attendance record than many of our councilmen. (Now with this disclosure, Mayor McLean will probably be having some second thoughts about unified government, or maybe he will recommend doing away with audience participation altogether.)

When I heard the Juneau Mayor yesterday attacking SB 588, the far-reaching effect it would have on the entire area, particularly what he said was misuse of the word "unification" rather than ratification, and the inference that we would be excluding ourselves from certain types of area-wide services, such as the hospital and airport, I think he was going a bit too far. Douglas has always paid its way and will continue to do so. Further, he misinterpreted the number of votes he received in Douglas as an endorsement of unification---and the same true out the road in the high vote for Jenny Kline. What did he expect us to do, support the Douglas candidate who ran against him! **Insert

Yesterday's hearing was the first I've attended in regard to this bill, but I understand the charge has been made that Douglas is merely a bedroom city and offers little or no co-operation with Juneau or the entire area. To generalize in this manner, I feel is erroneous. I think there is excellent co-operation between Juneau and Douglas, and Douglas has contributed more than its share of leadership capability in many undertakings that have benefitted the entire area....

For example when there was a need for additional state office space, Douglas gave up its ball park (for a nominal sum) for the Highways Building. When the Mt. Jumbo School became vacant in 1966, Douglas leased it to the University of Alaska, as a support facility for the Institute of Marine Science----for a Dollar year, [redacted] sacrificing a much needed gym for our Douglas teen-agers. I might add that during this time there has been no exterior maintenance to the buildings or grounds----and so far as Douglas profiting from this operation, I wish someone would point it out to me.

Participation in civic and service projects that benefit the area, I cite the leadership that has come from Douglas in such organizations as the Hospital Guild, the Exchange Student program, Savings Bonds Program and the Douglas Island Woman's Club, which is sponsoring the Planned Parenthood of Juneau and Douglas and just now getting organized.

As a matter of fact, we've taken the lead in many community improvements. We were first to get the dial telephone system. Our water is fluoridated. We were first to get the new vapor lights and I could go on. Oh yes, our Woman's Club was the first in the area to have set aside a children's park, which we equipped. We [redacted] also issued the first service directory to welcome newcomers as they moved into the community. It is not as imposing a document as the City Charter and there is no particular pride of authorship since it is filled with printer's errors, but it does give you a bird's eye view of what our town has to offer and I would like for you to have a copy.

Getting back to the integrity and honesty in government, it may seem irrelevant to mention this here, but I have a point to make. I want to thank each of you for your support of House Bill 610, which would give the University non-professional employees equity with State employees---it passed the House without a dissenting vote.

Yesterday morning, in trying to find out from the two different chairmen whose committees will be handling the bill in the Senate---HEW (Lowell Thomas)

State Affairs (Engstrom), I was told by Senator Thomas that he was very cool toward the bill after having talked to Dr. Wood, and he doubted that his committee would be able to get together before adjournment.

When I suggested maybe there was conflict of interest on his part (he has made some pictures for the University) told him I thought he should go ahead and make the effort anyway, he appeared to become irritated and said: "Mrs. Isaac, I am very sorry for you and have nothing but sympathy for you, but you have been deceived by your friends in the House----they knew at the time of passage of this bill it would never get through the Senate at this late date. They just wanted to get if off their back." When I continued to press for calling his committee and offered to help get them together, he finally told me that they would hear my testimony Tuesday morning---five days after receiving the bill.----probably after adjournment. (add: now set for tomorrow.)

Now if the Senator thinks I have been deceived by the House, I wonder if the same charge might not be made against the Senate for having passed this bill out at so late a date.

All of us know there has been deceipt---it first started when we were asked to elect a charter commission---ohm no, we were not voting for unification---we were merely electing a charter commission to conduct a study. Two years, we are told, when we were voting to accept or reject the charter---you are voting to ratify the charter---you voted for unification at the time you elected the charter commission!

Millie, and gentlemen, I beg of you---there has been enough deception already do not deceive us further---if you are not meeting with us in good faith, with an open mind and a willingness to help right a wrong, then pray tell us and let us be about our business.

If there are portions of the bill that are unworkable or detrimental to the government outside of Douglas, please amend it---you have three attorneys on this committee, plus Mr. Peterson and the Attorney General---fix it--make it acceptable to both of us. But I ask you once more to please honor our vote and renew our faith in the democratic process. Thank you

Testimony on SB 588
by Bill Boehl

House Judiciary Committee
June 1, 1970

Mr. Chairman and Members of the Judiciary Committee:

My name is Bill Boehl. I'm a former councilman and Mayor of Douglas.

We have heard arguments for and against unification, but we have heard very little about the unification law itself. It has not been tested in the courts of Alaska, nor have I heard of an Attorney General's formal opinion, attesting to the constitutionality of the original act. If there is one, it has never been tested in court.

This, in itself, poses grave legal problems ahead. I do not know if any action will be taken through the courts at the present time, but this does not preclude some other area or individuals of the State similarly involved in the future from attempting to resolve this question. If it were held unconstitutional a year or so after unification took place, this would pose serious problems indeed.

It seems to me there should be an attempt to get a ruling on the question from our Supreme Court before allowing what, in my opinion, is an illegal annexation. Courts have traditionally held that proper methods of annexation are valid, and this method was open to the area prior to the passage of the Unification Act.

We are a new State and new in government, but in the older 48 states there has been no great rush to dissolve smaller cities by the overwhelming vote of a larger city unless there was <u>mutual agreement</u> and <u>proper annexation</u>.

I would urge you to give SENATE BILL 588 a DO PASS and report it to the House for action.

SB 589

517 Copper Street
U. of A. Campus
College, Alaska 99701
May 5, 1970

SB 589

Barry Jackson
Alaska House of Representatives
Juneau, Alaska

Dear Mr. Jackson:

Governor Miller's scheme for using State funds to build the TAPS road can best be described as "Socialism for the rich." The Governor would never consider allocating so much money to loans for sewer, water, housing or education for low or middle income people.

Politicians frequently brush aside projects aimed at helping non-rich people or minority groups by saying "This is the responsibility of private enterprise". When a wealthy private enterprise gets in a jam, however, the Governor can hardly wait to bail it out with State money.

In actual fact, very few Alaskans will truly benefit from rapid construction of the TAPS road, and we all may suffer terrifically from it (for example, if the pipeline permit is not granted, or if the access road is not built along the pipeline's eventual route.)

The State's responsibility is to its citizens -- ALL of us, not just the oil and construction men. I say, let private enterprise build its own blankety-blank road!

It is up to Legislators of true stature to resist pressure from powerful oil and construction interests in favor of the long-range interests of all Alaskan citizens.

Sincerely,

Constance K. Smith

Constance K. Smith

HB
106

Schwamm

THE ALASKA MERIT SYSTEM

(Review Draft)

Thomas C. Woodruff
Institute of Social, Economic, and Government Research
University of Alaska
College, Alaska 99701

Alaska's State Personnel Act calls for "a system of personnel administration based upon the merit principle and adapted to the requirements of the state to the end that persons best qualified to perform the functions of the state will be employed, and that an effective career service will be encouraged, developed, and maintained." (A.S. 39.25) Alaska's merit system is eight years old and presently employs about 4,200 persons. This article traces the development of the merit principle in public employment and examines some difficulties involved in institutionalizing that principle. Against this background, Alaska's merit system and some of the difficulties it currently faces are described and analyzed.

The effectiveness of any merit system is determined by sufficient pay scales, maximum utilization of the labor market, enlightened application of the merit principle, and adequate financing and staffing of the personnel function itself.

1. Sufficient pay scales: If wages are not high enough to attract and hold high quality personnel, the state incurs long term inefficiencies and fails to develop an effective career service.
2. Enlightened application of the merit principle: Hiring for merit, and merit only, is no simple task. Routines and procedures are designed so that personnel actions are taken for reasons of merit only, but they are never perfect. Faithfully following a routine supposedly based upon the merit principle does not necessarily produce a merit system.
3. Utilizing the existing labor market: Alaska has a peculiar labor market and a substantial unemployment problem. The state's merit system should be aimed at recruiting every individual interested in

competing for a state job and who would be able to successfully assume the responsibilities of that job. Competitive examination among such recruits should set actual employment standards.

Utilizing the Alaskan labor market is especially difficult; screening procedures imported from the continguous 48 states can easily discriminate against some people because of their cultural background, rather than their potential usefulness as state employees.

4. Staffing and financing the personnel function: If the state's personnel agency is not adequately staffed and financed, the difficult judgements which the professionals in that agency must make will tend to become arbitrary because of the necessity of keeping up with the work load imposed by other state agencies.

These four criteria will serve as reference points in describing and analyzing Alaska's system. First, however, is a review of the development of the merit principle.

THE DEVELOPMENT OF THE MERIT PRINCIPLE

The merit principle is a concept of public employment which has evolved throughout the 180 years since the American Revolution. It is now widely recognized that efficient democratic government requires a politically neutral force of capable employees to carry on the public's business. But since a public job is a source of income and of a certain amount of power, control of government employment has always been a valuable political asset.

In colonial days the royal governor made most public appointments. The public service of that time supported an aristocratic class of civil servants who were responsible to the royal governor and who often served inefficiently

and indefinitely. The Revolution was, in part, a reaction against this civil service.

During the nation's first forty years, a democratic aristocracy ruled the country. The rich and educated controlled the political system and the federal civil service consisted of wealthy appointees. Suffrage and education were far from universal. Though government generally was not corrupt, neither was it broadly representative of the majority of the people.

THE RISE OF THE COMMON MAN AND OF THE SPOILS SYSTEM

Andrew Jackson, elected in 1828, was the first president who had not been born to a wealthy family. Historians generally agree that his election signaled the rise of the common man. His administration also marked the formalization of the spoils system in the federal government.

When Jackson took office in 1829, he reformed the civil service by removing all the "unfaithful or incompetent officers" who, he felt had acquired the habit of looking with indifference upon the public interest and who considered their offices "a species of property" and "a means of promoting individual interests." "To the victors belong the spoils" originally meant that common men could aspire to the jobs that formerly went only to the privileged.

The philosophy that government jobs should go to the most qualified applicants seemed an excuse for hiring only the educated and, thus, only the rich. In his first annual message, Jackson said:

> The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I cannot believe that more is lost by the long continuance of men in office than is generally to be gained by their experience.

Politics takes time and money and if political victory could not be made profitable, only the rich could afford to take part in running the democracy.

Jackson formalized the spoils system as a way to make democracy pay for itself. While anti-Jacksonians criticized this as open debasement of public employment, they did not hesitate to use the spoils system when the opportunity arose.

By the end of the Civil War, government at all levels suffered from inefficiency and corruption. Control of government employment enabled individuals to build political machines by trading jobs for money and support. Politicians could finance their political campaigns by systematically taxing public employees for "contributions." An employee's rate of pay often represented his value to the machine rather than the services he performed for the community. It was not unusual for persons having quite similar responsibilities to be paid radically different salaries. Spoils appointees worked for the interests of political allies, friends, and themselves. Since they had somehow paid for their jobs and would lose them for only political reasons, they had little motivation to perform efficiently.

Theodore Roosevelt, one of the first civil service commissioners, once described the spoils system in a magazine article:

> No republic can permanently endure when its politics are corrupt and base; and the spoils system, the application to political life of the degrading doctrine that to the victor belong the spoils, produces corruption and degradation. The man who is in politics for the offices might just as well be in politics for the money he can get for his vote, so far as the general good is concerned...The spoils-monger and the spoils-seeker invariably breed the bribe-taker and the bribe-giver, the embezzler of public funds and the corrupter of voters.

There is another side to the story of the political machines. Before the advent of government welfare program, political machines provided welfare (in the form of jobs and favors) and political identity to the disadvantaged of the cities. For immigrants especially, the machines provided a measure of political and economic security in an otherwise impersonal and bewildering society.

THE REFORM MOVEMENT AND THE PENDLETON ACT

Even before the Civil War, public rumblings about spoils and corruption were heard. But political machines were strong organizations designed to fit existing political institutions. Well-intentioned criticism alone was not enough to dislodge those in power. One organization and one event finally polarized public demand for civil service reform.

The organization was the National Civil Service Reform League, founded by William Curtis in 1881, a union of local civil service reform groups which had been gaining support since the 1860's. Members were well-to-do and educated citizens characterized by professional politicians as "do-gooders" and "intellectuals."

The event was the assassination in 1881, of President James A. Garfield by Charles J. Guiteau, a disappointed office seeker. Garfield's death caused public outrage; the Reform League organized it. In January, 1883, large bipartisan majorities in both houses of Congress passed the Civil Service Act (also known as the Pendleton Act.) The Pendleton Act was based on the British Civil Service. Still on the books, it has served as the model for many state, county, and municipal systems.

The Pendleton Act:

1. Placed the administration of the civil service in the hands of an independent bipartisan commission.
2. Required selection of employees in certain departments by competitive examination.
3. Forbade political solicitation of funds from public employees.

Although the Pendleton Act only affected about 10 per cent of federal employees when it was first passed, it included provisions allowing for

expansion of its coverage by executive order. By the turn of the century, the Pendleton Act covered about 40 per cent of federal jobs, and the Rampack Act of 1940 extended the federal merit system to its present status.

By 1967 thirty-four states had followed the federal government and established their own merit systems. A federal law of 1939, requiring that state employees paid with federal funds to administer the Social Security Act be employed under a merit system, greatly hastened the spread of the merit principle in state governments. The National Municipal League, organized in 1894, promoted merit systems in city governments. The Public Personnel Association, an international association of government agencies and officials, was founded in 1906 to advance enlightened public personnel practices.

ECONOMY AND EFFICIENCIES

Since the turn of the century, public interest in increasing the economy and efficiency of all levels of government has accompanied the drive for civil service reform. In 1917, the state of Illinois commissioned a comprehensive study of their state government which then included more than a hundred agencies and departments. After the study the government structure was completely reorganized. Other states undertook similar studies.

The most important studies of organizational problems in the federal government were undertaken by the two Hoover Commissions (named after President Hoover, their chairman) which reported in 1949 and 1955. Several "Little Hoover Commissions" have since made studies of state governments. Such commissions generally recommend:

1. Increased executive power for governors as executive leaders;

2. Coordination of terms of office of elected administrative officials;

3. Grouping of related functions into a reduced number of departments;

4. Fixing of definite lines of authorized responsibility;

5. Abolition of many independent boards and commissions as administrative agencies.

Personnel administration has changed with this interest in economy and efficiency. The tasks that governments undertake are becoming more and more complicated. Large cities, the states, and the federal government provide public services requiring specialized skills. For these reasons the business of public personnel administration has become much more than simply spoils prevention. In order for government to perform efficiently, it must attract and hold high quality personnel. If Andrew Jackson's belief that any intelligent man could carry on the business of government was true in his day, it is not so today.

THE MERIT PRINCIPLE IN PUBLIC EMPLOYMENT

The civil service reform movement of the nineteenth century produced a concept of public employment called the merit principle. Personnel systems based on the merit principle usually include certain characteristics intended to protect public employment from undue political influence while attracting and holding qualified employees:

1. Competitive appointment and promotion. A government job should go to the applicant who is best qualified to render the services for which he is to be paid. Employees in merit systems generally receive regular performance evaluations from their supervisors. These evaluations can be used to determine salary increases and as evidence of qualification for promotion.

2. Equal pay for equal work and non-equal pay for non-equal work. An employee should be paid for the difficulty encountered and the responsibility assumed in performing his job.

3. Political noninterference in public employment. Merit systems are designed to hire for reasons of merit, not politics. They also include regulations designed to prevent politicians and political parties from soliciting contributions from government employees. Specifically, supervisors are usually not allowed to solicit or accept political contributions of funds or effort from the employees under them.

4. An independent civil service board or commission. Merit systems are usually under the administration of a bipartisan board or commission. The board or commission is responsible for overseeing the impartial operation of the merit system.

5. Separation of the authority to screen and evaluate applicants from the authority to appoint employees. Under merit systems, government agencies appoint their own employees. A separate personnel agency, however, supervises competition among applicants and gives the appointing authority its choice from the best applicants (usually three). This separation of authority exists so that the personnel agency can impose protective checks upon the hiring authority and at the same time provide recruiting and screening services which individual agencies would have difficulty providing for themselves.

INHERENT DIFFICULTIES IN MERIT SYSTEM IMPLEMENTATION

The merit principle is an abstraction which merit systems of personnel administration are designed to implement. There are certain inherent difficulties in designing a merit system.

1. The impossibility of perfectly measuring difficulty and responsibility. The merit principle requires that employees be paid according to the difficulty and responsibility of their duties. Merit systems meet this requirement by assigning each job to a level in the government pay plan. (Presumably, the pay plan itself is set at a level to make the government able to compete in the labor market.) Pay decisions are only as equitable as the measurement of difficulty and responsibility is objective and accurate. An accoutant obviously has a more difficult and responsible job than a bookeeper who works for him. But does he have a more difficult and responsible job than an interviewer in an employment office?

2. The impossibility of perfectly measuring the merit of competing applicants. Motivation, cooperativeness, intelligence, aptitude, knowledge, experience, and formal education are qualities which indicate the relative merit of an employee. Measuring and quantifying all of these characteristics in an objective manner is difficult if not impossible. However, a system which relies too heavily on those factors that are relatively easy to measure, such as experience and formal education, tends to become based upon seniority rather than merit.

3. The possible interference between a merit system and efficient government administration. One assumption of a merit system is that some administrators will abuse their hiring authority if they are

not adequately controlled by external checks. However, these external checks can interfere with conscientious administrators attempting to run efficient agencies. A merit system should be designed to allow administrators to function efficiently without giving them such free rein that they can easily abuse their trust out of motives of self-interest, expediency, or simple carelessness.

THE ALASKAN SYSTEM

The State Personnel Act vests the Personnel Board and the director of the Division of Personnel with responsibility for establishing and operating the Alaska Merit System.

Composed of three members who serve non-concurrent six-year terms, the Personnel Board is appointed by the governor with the legislature's confirmation. Only two members of the board may be of the same political party. A vacancy in an unexpired term is filled by the governor with the consent of the legislature for the remainder of the term. "A member of the board holds office at the pleasure of the governor notwithstanding the member's term." (A.S. 39.25.060)

The Personnel Board approves or rejects amendments to the personnel rules and hears appeals by employees in the classified service. The board has "the power to administer oaths, subpoena witnesses, and compel the production of books and papers pertinent to a hearing authorized by this chapter." (A.S. 39.25.070)

Division of Personnel is within the Department of Administration and the commissioner of administration appoints the personnel director after competitive examination. The director of personnel and his staff

administer the Alaska merit system. The director's responsibilities include:

1. Preparing Personnel Rules "not inconsistent with this chapter, which are required to implement this chapter" (A.S. 39.25.050);
2. Administering the State Personnel Act and the Personnel Rules;
3. Establishing and maintaining a roster of employees;
4. Serving as secretary for the Personnel Board;
5. Ecouraging and exercising leadership in the development of effective personnel administration, employee effectiveness, and morale.

The State of Alaska employs three categories of personnel: the exempt, the partially exempt, and the classified service. Exempt positions, which are exempt from the personnel statutes and rules, include elected officials and policy-making appointed personnel. Also exempt are employees of the University of Alaska, certified teachers in the state school system, employees of the state legislature, and employees on the state ferry system who are covered by collective bargaining agreements. The pay for exempt positions is set by statute or by an agency outside the Division of Personnel.

Partially exempt service includes positions involving principal responsibility for the determination and carrying out of policy or responsibilities and duties of a type not susceptible to the ordinary recruiting and examining procedures. Examples are deputy commissioners and division heads. "Persons holding positions in the partially exempt services are not required to take examinations, qualify, or earn a place on a register, nor are they eligible for a hearing by the personnel board in the case of dismissal, demotion, or suspension." (A.S. 39.25.120) Pay for the partially exempt service is set by the Division of Personnel.

Positions in the classified service are those completely governed by the Personnel Rules and, thus, subject to the requirements and protection of the merit system. These positions are filled by competitive examination. The merit system endeavors to protect persons in these positions from political influences so that they can render efficient and impartial service.

Many agencies of the state government employ an agency personnel officer. This official is under the authority of the agency in which he works rather than the Division of Personnel. Agency personnel officers represent on-line government agencies in dealings with the central personnel office.

As the personnel agent for the state government and as protector of the merit principle, the Division of Personnel's primary activities are: (1) classification and pay, (2) recruitment and examination, (3) certification, and (4) benefits (retirement and Insurance). The division does not hire for the state; each agency hires its own employees. The Alaska merit system separates the hiring authority from the authority that assigns jobs to pay grades and evaluates applicants. The division's primary personnel function is to furnish a choice of the best applicants for a given position and then allow the appointing authority to make the final hiring decision.

THE ACTIVITIES OF THE DIVISION OF PERSONNEL

Classification and Pay

State government functions involve diverse duties and responsibilities. Related tasks are grouped so that one person can be employed to perform

them. A set of related duties to be performed by one employee is called a position. About 5,000 budgeted positions presently exist in the state government. The Division of Personnel groups positions that are substantially the same in duties and responsibilities into job classes and prepares written job specifications for each job class. Job specifications for a class include a description of typical duties and responsibilities and the training and experience required for positions in that class. The experience and education required for an applicant to compete for employment in a job class are called minimum qualifications.

In many instances groups of positions involve the same type of work but in substantially different degrees of difficulty and responsibility. These positions are organized into job classes and job classes are arranged into a job class series -- a hierarchy of jobs which perform different parts of the same operation. An example of a job class series is the Accountant Series. There are five levels of accountant jobs in the state government. Presumably, a career employee could progress through such a series.

Having assigned positions to job classes, the division attempts to assign each job class to the appropriate pay grade. The state pays according to four monthly salary schedules of 28 pay grades with step increases within each grade for meritorious service. The schedules are supposedly designed to compensate for the differing cost of living in various parts of the state. The legislature determines the level of each of the schedules.

Since 1962, the Bureau of Labor Statistics has published regular estimates of the cost of living in four major Alaskan cities. These cost of living indexes are determined by a program of price surveys covering a wide range of typical consumer purchases. They are expressed as percentages of the cost of living in Seattle, Washington.

Table 1 compares the latest BLS cost of living estimates for these four cities with the state's pay rate in the four. For purposes of comparison, Juneau is the base; the pay and cost of living in the other three towns are expressed as percentages of the Juneau rates. The table shows that, while it costs five per cent less to live in Anchorage than in Juneau, employees in Anchorage are paid one per cent more than employees in Juneau. While it costs seven per cent less to live in Ketchikan than in Juneau, Ketchikan based state employees receive the same pay as Juneau based employees. And while it costs four per cent more to live in Fairbanks than in Juneau, Fairbanks employees are paid seven per cent more.

Since the state has a policy of compensating employees according to the cost of living in different parts of the state, it would seem reasonable for the legislature to implement this policy according to the available cost of living data.

Recruitment and Examination

Recruitment is simply a program of advertisement to inform prospective applicants about positions in the classified service that are open to competition. The Division of Personnel issues a recruitment bulletin

TABLE 2

COMPARISON OF STATE PAY DIFFERENTIALS WITH BUREAU OF LABOR STATISTICS COST OF LIVING ESTIMATES

	Pay Rate Expressed as Percentage of of Pay in Juneau, Alaska	Cost of Living Expressed as Percentage of Cost of Living in Juneau, Alaska	Cost of Living Expressed as Percentage of Cost of Living in Seattle, Wash.
Juneau	1.00	1.00	1.27
Ketchikan	1.00	.93	1.18
Anchorage	1.01	.95	1.21
Fairbanks	1.07	1.04	1.32

SOURCE: United States Department of Labor, Bureau of Labor Statistics.

similar to a job specification except that it also includes pay and examination information. These recruitment bulletins are sent to all departments of state government, to newspapers, to radio stations, to members of the legislature, to postmasters throughout Alaska, and to other persons or agencies who might pass information to prospective applicants. In addition, hiring authorities sometimes recruit directly, especially for professional positions. Agencies sometimes recruit in the contiguous 48 states for personnel with specialized training and experience in short supply in Alaska.

The state administers two kinds of examinations, continuous examinations and specific examinations. Continuous examinations are given for job classes for which there are large numbers of positions. Positions in these classes could reasonably be expected to open at any time. Examinations are periodically announced and continuously publicized without a designated closing date for the receipt of applications.

Specific examinations are set up to fill one or more specific positions. Public notice is given at least thirty days before the designated closing date for the receipt of applications.

An applicant must file a separate application for each job class for which he wishes to compete. The Division of Personnel determines, by appraising an application, whether the applicant meets the minimum qualifications. The division may require reasonable substantiation of claims of fact made on the application. Applicants who so qualify are admitted to examination. The purpose of minimum experience and formal

education qualifications should be to prevent obviously unqualified persons from taking the examination. Actual employment standards are, ideally, set by the examination process itself which is supposed to be a complete assessment of an applicants suitability for the job he seeks.

Examination may consist of any combination of written, oral, physical, or performance tests which the Director of Personnel deems appropriate for evaluating applicants. Some job classes require only an examination and grading of the written application. Each examination process is scored on a basis determined by the Division of Personnel. Persons who receive a passing score earn a place on the eligible register.

The eligible register for a job class is a list of persons who have passed the examination for that job class. Applicants are ranked on the register according to their total score in the examination with all residents of Alaska ranked in order of score ahead of non-residents.

The policy of hiring Alaskans ahead of non-Alaskans is, strictly speaking, a compromise of the merit principle since a person's legal residence is not a factor in his merit as a potential employee. Veterans also receive preference in state employment; five points are added to a veteran's examination score (disabled veterans receive ten points.) Veterans preference has been a traditional feature of American public employment based upon recognition of society's debt to these individuals.

A certification is a list of the three applicants at the top of the register who have indicated their availability to fill the position under consideration. This availability is determined by a telegraphed or written inquiry. The Division of Personnel supplies a certification to the hiring authority from which that agency hires its choice.

The final screening after certification is done by the hiring authority on the theory that no system of examination is perfect and that the hiring authority should be able to make the final choice on whatever merit criteria he considers appropriate.

Although the system provides no specific procedure to assure appointing authorities make decisions for merit reasons, the Personnel Rules do require that all personnel actions be based on merit criteria.

> No action affecting the employment status of any employee in the classified service, including appointment, promotion, demotion, suspension, or removal may be taken or withheld for racial, political, national origin, religious, or other non-merit reasons. (Rule 13 06.0)

Compliance with this rule is based upon trust of administrators. It is difficult to imagine procedures which would enforce the rule without making it nearly impossible for administrators to function efficiently. However, the director of personnel does have blanket authority to enforce the rules:

> The Director may take any necessary action such as terminating or correcting the status of an employee, or bringing the employee's salary into conformance with the classification and pay plan to enforce these rules and/or to correct any appointment which is not in accordance with the law or these rules. (Rule 14 08.0)

This authority would allow the director to intervene in cases where he determined an agency was hiring for non-merit reasons.

THE OPEN REGISTER

Some blue collar jobs are filled from an open register. The open register is a list without rank of all applicants meeting the minimum qualifications. These are job classes for which it would be impractical to rank qualified applicants. For example, there are varying degrees of skill among truck drivers, but it is difficult to imagine how the division

could accurately and economically measure this skill in an examination. The appointing authority may choose anyone on the list except when there are three or more Alaskans on the register; one of them must be appointed. The open register is a compromise of the merit principle which the state allows because of the difficulty of determining reasonable and economical ways for applicants to compete. An open register is already "fixed" for the hiring authority who wants to get someone a job as long as that individual meets the minimum qualifications for the class.

It has been suggested the state affirm its commitment to merit employment by abolishing the open register. Proponents of this view say that although it may be impractical to establish examinations for these positions, certification by lot might be more equitable than the present procedure because it would give anonymous applicants some chance of being considered ahead of persons who happen to know the appointing authority. Another approach would be to rank individuals on such registers according to the date of their original certification.

ALTERNATIVE METHODS OF FILLING POSITIONS

If, because of lack of qualified applicants, it is impossible to provide certification of three names, either the position goes unfilled or the merit principle is compromised in one of three ways:

1. Provisional hire. With authorization from the Director of Personnal a hiring authority may appoint someone whom it considers is qualified pending a complete certification and appointment from a register. Without prior approval from the Director of Personnel,

the provisional appointment terminates at the end of the regular probationary period set for the position in question. (The probationary period, which each employee in the classified service must serve, is explained below.)

2. Subfilling is filling a position from the eligible register of a lower class in the same series or from a related class which the Director of Personnel deems appropriate. The Rules state that an employee subfilling in a position of a higher pay level than that of his own class "shall perform the duties of a lower classification." It is difficult to understand how an employee could be hired to assume the responsibilities of a position and yet, somehow, perform the duties of a lower classification. If an employee successfully fills a position which is classified higher than he is being paid, his right to the pay based on responsibility is being denied.

3. The director may make up a complete certification by argumenting from eligible lists of other job classes which he deems appropriate. If these other eligible lists are really appropriate, the position was too narrowly classified. The system should classify so that the maximum number of really qualified individuals will be admitted to compete for each position.

PROBATION

"The probationary period in the classified service shall be regarded as an integral part of the examination process and shall be utilized for closely observing the employee's work, for securing the most effective

adjustment of the employee to his position, and for rejecting any employee whose performance does not meet the required standards." (Rules 6 01.0)

The probationary period is one year of continuous service (six months for jobs in pay range 2 through 13). During this time the employee may be discharged without the right of appeal unless dismissal is for racial, religious, or political reasons. If the employee's performance is satisfactory, his appointment becomes permanent after probation.

DISCIPLINE AND TERMINATION

The following actions cause an employee to cease continuous active employment in his position.

1. Retirement. State retirement age is 65. With permission of the commissioner of administration, employees may continue employment beyond that age. The commissioner may grant this permission if he finds the employee capable of rendering satisfactory service.
2. Resignation. With two weeks written notice, an employee may resign from his position in good standing.
3. Suspension. An employee may be suspended without pay for delinquency or misconduct. Such action requires that the employee be given a written explanation.
4. Layoff. Layoff is the termination of employment for reasons which do not reflect discredit upon the employee's performance of his duties. Seasonality of work, or lack of funds are reasons for layoff.

5. Demotion. An employee may be demoted with just cause. He must be given the reasons in writing.

6. Dismissal. A permanent employee may be dismissed with just cause. He must be given reasons in writing for dismissal. The appointing authority is required to give no formal advance notice of dismissal. Those who think that the Rules should provide for such notice point out that an unforeseen interruption in income can provide particular hardship for employees with family obligations. Since dismissal is primarily intended as a means of removing unsatisfactory personnel rather than as a means of punishment, critics contend that two weeks written notice would be appropriate.

GRIEVANCES

The Personnel Rules specify two grievance procedures, one for general grievances and one for cases involving dismissal, demotion, or suspension for over thirty days. Both of these procedures provide employees a means of protecting their rights as employees; neither is intended as a way for employees to influence agency policy not primarily related to employment.

The general grievance procedure affords an employee an opportunity to air dissatisfaction with working conditions, other employees, or the actions of supervisors. This procedure is designed to facilitate informal resolutions.

An employee with a grievance first presents it in writing to his supervisor. If not satisfied, the employee may than consult the next intermediate supervisor or the department personnel officer. If the employee is not satisfied at this level, he may submit his complaint to the

head of his department or agency. If a decision to the employee's satisfaction is not forthcoming within fifteen days, he may request a hearing from the Commissioner of Administration.

The Commissioner of Administration establishes a grievance committee of three members - one appointed by the Commissioner of Administration or his representativeone by the organization or association of the employee's choice (such as the Alaska State Employee's Association), and one mutually agreeable third party. This committee conducts its hearing as near as practical to the city where the grievance occurred. The employee and his representative receive reasonable time to prepare a case. Hearings are informal; their purpose is merely to ascertain facts. The committee reports its findings to all parties involved. These findings carry only advisory weight.

The agency or the individual against whom the grievance was filed may appeal the committee's recommendations to the Personnel Board which reviews the case and modifies, affirms, or sets aside the findings. They may even reopen hearings.

Those who criticise this general grievance procedure contend that a grievance committee whose findings are only advisory is inadequate. They maintain that the Rules should grant the authority to make and enforce decisions to this carefully selected neutral committee. The question is whether such a committee, given access to the facts, is more likely to judge fairly than is the authority against whom the grievance was filed.

The other grievance procedure is for cases of dismissal, demotion, or suspension for over 30 days. An employee submits an appeal in writing to his division head and to the director of personnel. If the employee is not

satisfied by his division head, he may appeal to his appointing authority, and, finally, to the Personnel Board.

The Personnel Board considers the appeal and conducts hearings if the employee requests. The employee may have an attorney. If the board finds that the action in question was taken for any political, racial, or religious reason, or was in violation of the provisions of the Personnel Act or Rules, the employee is reinstated to his position without loss of pay or leave benefit of the period of his dismissal, demotion or suspension.

Although the rights of applicants for state employment are specified in the Personnel Rules, there is no grievance procedure for applicants who feel that their rights have been violated. The lack of such a procedure is severly criticised by those who maintain that a person's rights may be worth little when he has no reasonable way to enforce them.

PENALTIES FOR VIOLATION OF THE STATE PERSONNEL ACT AND RULES

Violation of the Personnel Act or the Rules is a misdemeanor. The Statutes specify that anyone who is convicted of a violation "immediately forfeits his office or position." (39.25.2.0) That the penalty section of the Personnel Rules is not enforced is common knowledge. An individual considering misusing his power as a supervisory employee of the state has to consider only the risk of having his decision reversed, not the risk of prosecution.

Indictements for criminal offences are initiated by the office of the Attorney General, appointee of the governor, and no law required the Attorney General to take this action. Those who think that unenforced laws are weak laws suggest that there is at least one solution to this problem:

The Legislature could empower and instruct the Personnel Board to initiate criminal proceedings every time they find that the Personnel Act or Rules have been seriously and purposely violated. Giving the Personnel Board such power does not interfere with the administrative efficiency of the government for it involves no additional administrative restrictions or procedures. It only threatens the supervisor who does not have a valid reason for suspending, demoting, or dismissing an employee. If an employee appeals and wins, he receives back pay, but if he looses, he receives nothing for the time it has taken him to appeal. Therefore, an employee is unlikely to appeal unless he believes he has been wronged and he can prove it.

OUTLINES OF AUTHORITY FOR THE ALASKAN SYSTEM

The State Personnel Act delegates specification of the details of the Alaska Merit System to the Personnel Rules. The procedure for making a change in or addition to the Personnel Rules is:

1. The Personnel Director prepares the recommended change and presents it to the Commissioner of Administration.
2. The Commissioner of Administration, if he approves, submits the proposed change to the Personnel Board.
3. The Personnel Board accepts or rejects the change.

This provision is a recognition that the legislature could not foresee all the detailed needs of the merit system and the professional who administers the system is best able to understand these needs as they become apparent.

There has been severe criticism of the present allotment of authority for the Alaska Merit System. Those who make this criticism maintain that the present system is weak because it delegates excessive power over state

personnel functions to the governor and his appointees, and this power is not essential to appropriately strong executive management of the state government. These critics would remove the Division of Personnel from the Department of Administration and place it under the authority of an independent Personnel Board.

Statements of the argument for an independent Personnel Board usually include the following:

1. The personnel director is presently selected by and reports to the commissioner of administration. During his year of probationary employment, the director can be removed by the commissioner without recourse to a hearing before the Personnel Board. Critics of the present system maintain that the merit system's effectiveness depends upon a personnel director who is willing to dissent from the administration whenever he thinks it is in the state's interest. The Personnel Act and Rules vest the personnel director with considerable power but do not require that he take the initiative to use that power. An administration hostile or merely indifferent to a strong merit system could prevent the personnel directorship from being filled by an individual willing to take such initiative. These critics would delegate the appointing authority for the director to the Personnel Board. This, they say, would not make it impossible for an administration to remove an inefficient personnel director, but the administration would have to make its case for removal before the Personnel Board.

2. The commissioner of administration can now block any change in the Personnel Rules by simply failing to submit proposed changes to the Personnel Board. The system's effectiveness requires that these rules be modified whenever the need for modification becomes apparent.

Proponents of the independent Personnel Board would vest the board with exclusive power for determining changes in the Rules. Proposals for changes would be accepted from the personnel director or the administration, and the board would consider the advice of all interested parties in reaching decisions.

3. The administration presently submits the Personnel Division's budget request to the legislature. A hostile or indifferent administration can significantly weaken the whole system by underfinancing it. Critics of the system would have the personnel director submit and justify his own budget requests through the Personnel Board.

4. The governor can now remove members of the Personnel Board at his pleasure. Critics contend this gives the executive inappropriate power and that removal of a board member should require legislative consent.

The major objection to the argument for the independent Personnel Board is that the governor, as the elected chief executive, should be entrusted with control of all the state government's functions.

In answering this objection, proponents of the independent Personnel Board reply that governors are politicians - men trying to control the course of events - and that it is naive to expect them to fight disinterestedly for a strong merit system, when such a merit system would work against their priorities as politicians and as administrators. The proponents of the independent board say that it makes more sense to give a bipartisan group the ultimate authority over matters of public employment. They contend that there is no reason to assume that such an independent board or their Personnel Director would be hostile to the administrative needs of the government.

FINANCING ALASKA'S PERSONAL SERVICES

Efforts to determine what it should cost to sufficiently finance the Division of Personnel are hampered by a lack of meaningful ways to make comparisons with other state systems. In order to make useful comparison, it would first be necessary to determine which other systems were adequately performing their function. To seek the average cost of all state systems would imply that the average state was adequately financed and that those above average were overfinanced. Even if it were possible to determine which states were adequately financed, some way would have to be devised to objectively allow for the higher costs in Alaska. If such allowances could be meaningfully computed, comparison could be made only with systems whose central personnel agencies performed the same parts of the personnel function as does Alaska's and whose labor market offers the same challenges. Indication of the inadequacy of Personnel Division financing comes from those who administer the system and those whom it serves.

Many critics indicate that the Alaska Personnel Division has never been able to assure compliance with the merit principle or provide satisfactory personnel services to the state government because it has never been sufficiently staffed and financed. The present Personnel Director has said that about twice the present budget and staff is required to perform the services delegated. The president of the Alaska State Employees Association estimates that "triple the present budget and staff would be required to administer the system and effectively control it. Currently, the division is merely a housekeeping organization with the capabilities of barely holding things together." Various state officials and employees have indicated that dealing with the Division of Personnel is nearly

impossible because of administrative delays caused by underfinancing.

A personnel service which is not prompt results in inefficiencies that cannot be measured but which are, nevertheless, real. The most desireable and motivated job seekers tend to find suitable employment quickly because they job hunt aggressively. The state undoubtedly looses some of its best prospects because of dealys in the recruiting, examination, and certification process. The more quickly these processes can be completed, the more often the state will be able to beat the competition to the best people.

When agencies of the state government need personnel action taken, they suffer inefficiencies until that need is fulfilled. Such inefficiencies cost even though the costs are not enumerated on financial reports.

The inherently difficult process of measuring duties and responsibilities in order to classify positions requires careful consideration and frequent review. A Personnel Division operating with about half the needed staff and budget does not have the resources to do an adequate classification job. Because the specific duties assumed by individuals within agencies change over time, the classification of a position should be regularly reviewed. At least, review of a positions classification should be made whenever the individual filling it and his supervisor think it has changed substantially. Without such review of past decisions, the pay that employees receive tends to loose its relationship to the duties and responsibilities assumed. Several sources indicate that this deterioration of classification has taken place in many parts of the state government.

The definition and measurement of merit in applicants for employment is difficult at best. But these measurements are important to the welfare of the government and the state. Alaska has a limited labor market and a serious

unemployment problem. Any screening process that eliminates people who could be useful employees tends to aggrevate the unemployment problem and limit the supply of talent available to the state government. Making examinations less and less arbitrary takes time and costs money. An underfinanced Personnel Division cannot be expected to devote sufficient resources to an ongoing program of examination improvement that the particular social and economic characteristics of the Alaskan Labor market makes especially desireable.

A COMPARISON OF ALASKA AND FEDERAL PAY

The existence of more than two federal civilian jobs for every state job in Alaska makes a comparison of state and federal pay an appropriate indicator of the state's competitive position in the labor market.

The federal government pays its Alaskan employees according to the Federal General Service (G.S.) schedule and compensates for the cost of living in Alaska with a 25 per cent cost of living allowance. This 25 per cent is exempt from federal income tax.

Table 2 compares the Alaska state and G.S. monthly salary schedules after federal income tax has been computed and subtracted. This computation of the federal income tax is necessary for meaningful comparison in order to show the real effect of the tax-exempt cost of living allowance. To deny the validity of an after tax comparison is to imply that potential employees are not primarily interested in how much they take home.

The alignment is of pay grades for the same general levels of responsibility. No such alignment would perfectly apply to all jobs. The one shown was determined after consultation with the classification and pay chief of the Division of Personnel and with the executive secretary of the Alaska State Employees Association. This comparison indicates state pay is nowhere near competitive with federal pay at any level.

Table 3 shows the percentage increase that would be needed in gross pay in Alaska's pay grades 5 through 25 to make them about equal to the corresponding federal pay grades after federal income tax were subtracted from both. The calculations assume a federal pay raise of 5 per cent.

TABLE 2

COMPARISON OF STATE AND FEDERAL MONTHLY PAY, AFTER COMPUTATION AND DEDUCTION OF FEDERAL INCOME TAX

State grades:	Southeastern	Southcentral	Central & Northwest	Federal G.S. Level	
7	390	395	416	3	424
8	413	317	439	4	472
9	443	449	473	5	523
10	476	482	507	6	573
11	504	509	536		
12	535	541	568	7	630
13	570	576	607		
14	619	626	658	8	691
15	655	661	695	9	755
16	697	704	739		
17	738	746	783	10	824
18	783	791	829	11	898
19	826	835	875		
20	877	885	925	12	1,051
21	920	929	972		
22	964	973	1,016	13	1,215
23	1,009	1,019	1,064		
24	1,055	1,064	1,110	14	1,392
25	1,101	1,111	1,158	15	1,579

NOTE: Comparison assumes one exemption and standard deduction of 10 per cent or $1,000, whichever is less.

TABLE 3

APPROXIMATE RAISE NEEDED IN GROSS PAY TO MAKE STATE COMPETITIVE WITH FEDERAL GOVERNMENT AFTER FEDERAL INCOME TAX

State Pay Grade	Percent Raise To Make State Competitive
7	15
8	21
9	25
10	25
11	24
12	23
13	21
14	19
15	19
16	19
17	20
18	21
19	22
20	27
21	31
22	31
23	41
24	55
25	75

Information about the actual raise for federal employees in 1969 was not available at the time of the study. The percentages were computed for the pay schedule used in Southeastern Alaska and are presented as a further indication of the state's competitive position.

Since turnover data has not been gathered regularly, it is impossible to know how many employees leave the state government as soon as they find an opening with the federal government. But this comparison makes understandable the contention that Alaska's Classified Service is a training ground for federal employees.

The comparison is presented as an indication of the state's competitive position in the labor market, not as an indication of what state employees "deserve" for their services. If the state cannot afford to compete, taxpayers will incur the subsequent costs in high turnover and in loss of potential talent. The state is not immune to the economic realities of the labor market; politics assuming such immunity are shortsighted.

MINIMUM QUALIFICATIONS

The essential function of minimum qualifications in the recruiting, examining, certifying, and hiring process should be to eliminate obviously unqualified persons. Presumably persons who read the recruitment bulletin and see that they do not meet the minimums do not apply. On the other hand, meeting the minimums is no assurance that an applicant will be hired, only that he will have the opportunity to compete. Minimum qualifications, therefore, save the Division of Personnel the expense of examining obviously unqualified personnel.

This definition of the role of minimum education and experience requirements is, however, not in full agreement with the current policy of the Division of Personnel. The Division appears to use minimum qualifications as a means of setting high standards. The possible consequences of attempting to set high standards of employment with high minimum qualifications should be carefully considered.

There are many characteristics which the Division of Personnel attempts to quantify when evaluating the merit of an applicant. The most readily quantifiable characteristics of a potential employee -- his formal education and years of experience -- are those stated in the minimum qualifications. Motivation and aptitude might be considered the most important traits in employees because individuals with these characteristics take the initiative to remedy their own shortcomings. Unfortunately, these characteristics are least suseptible to measurement.

A personnel officer can appraise many clues, such as school records, test results, and the recommendations of former employers, but none of them are absolute measures of motivation and aptitude.

The tendency to depend on high minimum qualifications, as measurable characteristics, to take precedence in the screening procedure over the less measureable but no less important characteristics can actually have effects opposite those desired.

The supply of potential employees in the labor market at any time is beyond the control of the Personnel Division. The division can only try to recruit the best available talent. Supply and demand tend to apply certain prices to certain kinds and amounts of experience and education. Persons whose comparatively strong experience and education characteristics

actually reflect their merit as employees will usually find employment in positions of correspondingly high pay either in government or in private enterprise. On the other hand, persons with comparatively strong education and experience requirements who are available to compete for employment at relatively low pay will tend to be deficient in the less measurable but often more important characteristics. This is how high minimum qualifications can tend to cause low overall employment standards. This is also why high minimum qualifications in job series tend to protect mediocre civil servants. Ambitious and capable employees are generally drawn to career opportunities where it is possible to progress quickly.

Since lowering the mininum qualifications actually should involve no more than allowing more persons to be examined, the result might be more accurate certification after all characteristics indicative of merit have been measured as accurately and fairly as possible. On the other hand, if the minimum requirements for a job are unnecessarily high, desirable individuals may read the recruitment bulletin and not apply even though they might have been among the best applicants when all characteristics were considered.

The contention that minimum qualifications express precisely the minimum amounts of education and experience necessary for a person to function satisfactorily in a position can lead to invalid conclusions. Strictly applied, this contention implies that, for a job whose minimum qualifications include two years of experience of a certain kind, an applicant with one year and ten months would be unable to function satisfactorily in that position though he might somehow acquire the necessary ability as soon as he had completed the two years.

A merit system could operate with no minimum qualifications at all. The difficulty would be that the personnel agency might find itself swamped with applications from clearly unqualified personnel. One solution is to have recruitment bulletins specify "desired characteristics" rather than minimum qualifications. If none of the applicants possess all of the desired characteristics but some are determined and able to function satisfactorily in the job, the best three available would be certified. In this way, the system would certify the best available talent from the labor market. If the Division of Personnel were adequately financed so it could review and strengthen the examination process, desireable characteristics approach could be developed. The state would hire the best talent available from the existing labor market as determined by the fairest possible examination without accidentially excluding potentially valuable employees.

The Personnel Division's responsibility in determining the minimum qualifications for each job class makes it possible for that agency to expand or limit the portion of the labor market able to compete for any position. The ideal policy would admit the greatest possible number of potentially useful candidates to competition.

Alaska's Personnel Division maintains minimum qualifications in certain job classes which further aggravate the state's already unfavorable competitive relationship with the federal government. Often cited as examples are the accountant and statistition series. Alaskan minimum qualifications are written so accountants and statisticians must wait two years at each level in these series before they are eligible to compete for promotion. In the parallel federal series, employees are eligible to compete for promotion after only one year.

Ideally, the division would always design or adjust minimum qualifications to be slightly less rigorous than the federal government in classes where the two are likely to compete for the same part of the labor market. This is not because the federal government designs better minimum qualifications (any such decision is somewhat arbitrary) but because the state can always afford to be flexible enough to give itself a slightly wider choice from the existing labor supply. Minimum qualifications only admit applicants to examination; those who perform best on the whole examination still are the ones certified. When specified amounts of education and experience will admit an individual to compete for higher wages or faster promotion in the federal service than in the state service, the state is certain to loose many desireable applicants.

Again, since there has been no regularly gathered turnover data, it is impossible to know the cost in turnover of comparatively high mininum qualifications and low pay. But every time a satisfactory employee leaves for a more desireable job, the state assumes the expense of recruiting, examining, certifying, and hiring a replacement, the loss of the old employee's experience on the job, and the disruption of the organization while a new employee is found and trained. These costs may be impossible to calculate exactly, but personnel policy which does not attract and hold good employees clearly detracts from long-range government efficiency.

Recruitment 3 years ago found it cost at least $1,600 to obtain a new employee.

THE COLLECTION OF TURNOVER DATA AND THE DEVELOPMENT OF A MANAGEMENT INFORMATION SYSTEM

Until this year, the Division of Personnel has not regularly collected turnover data. The division now routinely records turnover job class. Figure 1 suggests the type of data that the personnel director and his staff would find particularly helpful in dealing with turnover. The data collected on this form would be systematically stored on computer tape and would enable the director to pinpoint and analyze particular competitive problems.

The personnel director has indicated that he expects the capabilities of digital computers to contribute significantly to improving the speed and efficiency of the service which his agency provides to the state. Every effort should be made to utilize the state government's computer facilities to aid the personnel function.

If a bank of historical information about the state's personnel needs could be developed from which regular reports could be compiled, all agencies involved in education and manpower training in Alaska would be able to make decisions and give advice to clients based upon specific knowledge of at least one important part of the labor market. Such regularly collected and disseminated information could form the basis for later developing a comprehensive labor market information system which would be a useful tool in many facets of the endeavor to deal with unemployment.

FIGURE 1

SUGGESTED TURNOVER DATA COLLECTION FORM

Job Class _____ Position Control Number _____

Date Hired _____ Date Terminated _____

To Terminating State Employees:

The information requested here is for the use of the Division of Personnel and is not to be reviewed by your immediate superiors. Please check all appropriate items.

1. I am leaving Alaska State Employment to take a higher paying position.

2. I am leaving Alaska State Employment to take a position with better opportunities for professional advancement.

3. I am leaving Alaska State Employment to go to school.

4. I am leaving Alaska State Employment because my spouse has been transfered to another location.

5. I have taken another job in Alaska State Government.

6. I have taken a job with the Federal Government.

7. I will continue to reside in my present location.

8. I am moving to another location in Alaska.

9. I am moving outside Alaska.

10. Dissatisfaction with my supervisor(s) or with the organization of my department is a factor in my termination.

The Division of Personnel is interested in knowing why any employee has decided to leave his position. Please use the space provided below (and additional sheets if necessary) to clarify any of the statements you have checked above and to tell us anything else you would like us to know about the circumstances of your decision to terminate.

Thank you.

Personnel should not ask for this information where a person resigned, although it was not always given. There is a place for it on the resignation letter of the PA.

These recommendations are all good.

SUMMARY AND CONCLUSIONS

The purpose of the State Personnel Act is to establish a system of personnel administration based upon the merit principle and adapted to the requirements of the state to the end that persons best qualified to perform the functions of the state will be employed, and that an effective career service will be encouraged, developed, and maintained. With general information about merit employment at hand, it has been possible to describe the Alaska Merit System and to raise pertinent issues concerning its effectiveness.

Underfinancing is impeding development of an effective career service in two ways. First, comparative study indicates that the state does not pay well enough to attract and hold a motivated and capable force of employees. In determining pay, legislators should consider that their decision will directly influence the quality of the classified service in coming years. The state will generally receive what it pays for in the labor market; turnover also will reflect the adequacy of state pay.

Second, adequate financing and staffing is needed to enable the Division of Personnel to contribute to the improved efficiency of the whole state government by meeting the state's personnel needs more promptly. Furthermore, improved staffing would enable the state to strengthen screening procedures and thereby take better advantage of the labor market.

Two possible reforms dealing with the rights of applicants have been discussed. The open register is not in keeping with the merit principle; ways to abolish it without incurring significant administrative costs have been suggested. The lack of a procedure for applicants to seek redress of

violations of their rights to impartial consideration for employment may allow significant abuse. The institution of some applicant grievance procedure would deter such abuse.

Providing for written notice to employees before dismissal, making grievance committee recommendations binding, and granting the personnel board authority and responsibilty for penalizing violations of the Personnel Act and Rules are ways to strengthen the system's protection of individual rights. Administrators may violate employee rights out of self-interest, expediency, or indifference. Even simple personality conflicts may tempt persons with authority to abuse it. A strongly enforced merit principle tends to deter arbitrary actions. The Alaska Merit System will more effectively attract and hold desireable employees if the state becomes known as an employer which hires and promotes for reasons of merit alone and which provides adequate system of safeguards.

The institution of an independent Personnel Board may be an effective way to assure a strong merit system in Alaska. This approach would clearly define and allocate authority and responsibility for the personnel function; it might produce a better combination of executive authority and protective control than presently exists. In many ways, an independent Personnel Board makes sense; its appropriateness for Alaska warrants further study. Such research should draw upon the experience of states having independent Civil Service Commissions. In addition, the judgement of administrators (who would have to live with changes that might be made) should be solicited in order to better foresee the implications of such changes.

It is recommended that the Personnel Division reconsider the function of minimum qualifications in the screening process. Minimum qualifications

in the screening process. Minimum qualifications should be statements of the absolute minimum of training and experience which, combined with adequate motivation and aptitude, would enable an applicant to become a satisfactory employee. The policy of attempting to set employment standards by specifying high minimum qualifications is self-defeating. Specifying "desirable characteristics" in places of minimum qualifications in some or all job classes may be an appropriate way to take better advantage of the Alaskan labor market.

Finally, the desireability of collecting regular comprehensive turnover and employment data has been pointed out. Such data would be a useful management tool for the Division of Personnel and would also provide information of use to other government agencies.

A considerable time lag will separate financial and institutional improvements in the Alaska Merit System from the benefits which these improvements will bring. Since Alaska's government is young and relatively small, the state has an opportunity to profit from its own experience and the experience of older states. However, growth will make bureaucratic improvement more difficult. Thus, Alaska should move now to develop career service fully capable of meeting the demands which will accompany the state's growth.

(BOXED)

THE ALASKA STATE EMPLOYEES ASSOCIATION

The Alaska State Employees Association was chartered by the state as a non-profit corporation in 1959. Presently the association has about 2,100 members contributing $2 each per month in dues. The ASEA employs a full time executive secretary and a clerical secretary. The organization sees its major functions as:

1. To lobby in the legislature for better pay and improved retirement programs. The ASEA considers the pay bills of 1965 and 1967 and the Retirement and Health Insurance bills of 1968 significant legislative victories.

2. To lobby in the Department of Administration for rules changes which they consider appropriate. Presently the ASEA is attempting to obtain what they consider an adequate policy for overtime compensation.

3. To disseminate information of interest to state employees, especially through their monthly newspaper, the State Employee Reporter.

4. To serve as employee consul in the systems two grievance procedures.

Since public employees traditionally have not had recourse to strike and since the ASEA does not officially represent state employees in collective bargaining (the legislature determines pay),

(BOXED)

the association depends upon straightforward lobbying backed by a potential ability to influence a significant number of votes to achieve its goals.

Although only twenty-one hundred state employees pay dues, all employees receive the association's newspaper and most of them vote in state elections. In addition, the votes of husbands and wives contribute to their potential influence in elections. Furthermore, any state employee, if sufficiently motivated, might well influence the votes of his friends. In a small state where elections are often close, the existence of such unity behind one set of interests might be a decisive factor.

The ASEA attempts to influence legislators and the administration by convincing them that this potential unity is a reality -- that the association will make employees aware of who represents their interests and that state employees will act accordingly.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

April 4, 1969

The Honorable Barry W. Jackson
Alaska State House of Representatives
Pouch "V" State Capital Building
Juneau, Alaska 99801

Dear Mr. Jackson:

Attached please find a copy of a self-explanatory petition for your consideration. The original signed copy has been forwarded to the President of the Senate and copies have been sent to the Chairman of the Finance Committee and Chairman of State Affairs Committee.

Thank you in advance for your consideration.

Sincerely,

Howard Watt
Chairman, Fairbanks Chapter
A.S.E.A.

PETITION

We, the undersigned employees of the State of Alaska, and residents of the Fairbanks North Star Borough, petition the Legislature and the Governor of the State of Alaska to enact in this session of the Legislature HOUSE BILL 174, with its equivalent SENATE BILL 132, relating to State employees' salaries and providing for an effective date; and HOUSE BILL 106, eltitled "An act Amending the State Personnel Act; and creating the Alaska Civil Service Commission".

The desirability of having an independent merit system not influenced by political motivations or by changes in administration, but devoted solely to the creation of a fair, impartial and efficient working staff for our State is only too well established. Such a system, together with fair compensation for services rendered, constitutes the only way to attract and keep in State employment qualified career personnel. Failure to act on these bills will perpetuate a system which has received much well-earned criticism and has cost this State and its people the high cost of constant turnover of personnel, continuous recruitment, and the concomitant training, with reduced efficiency and production.

We therefore urge our representatives, senators, and Governor to enact these bills promptly by such majority of votes as to demonstrate to the people of Alaska their desire for the quality of government and administration this great State of Alaska deserves.

Robin Cameron	311 State St. Fairbanks
[illegible]	[illegible]
[illegible]	1760 Jack St. Fairbanks
Warren W. Hanson	660 FAIRBANKS ST.
[illegible]	[illegible]
[illegible]	[illegible]
Van Robnett	1811 Cora St. Fairbanks
[illegible]	[illegible]
David E Bagby	672 21st Fairbanks
[illegible]	[illegible]

Rush

111

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Fred Hupprich	1661 Aspen
Kirk [illegible]	[illegible]
C McCutcheon	[illegible]
Bert Hupprich	522 Lakeview Terr, FBKS
Donald Kirk	[illegible]
[illegible]	[illegible]
Howard W. Collins	1405 Jamison St, Fairbanks
Thomas W. Jenson	Alaska Steel Supply, Fairbanks
Walter E. Woodside	[illegible]
Roland A. Hoyt	611 Front St Nenana - FBKS

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[illegible]	230 Haiswell Ave. Fairbanks
[illegible]	1603 Lemon Apt #8 FBX
[illegible]	5-165 College Alaska
[illegible]	PO Box 917 Fairbanks Alaska
[illegible]	1½ mi. Goldstream Trail, Fairbanks
[illegible]	Mack Rd College Alaska
[illegible]	Box 5253 College Alaska 99701
[illegible]	"
[illegible]	Box 930 North Pole Alaska

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George O'Rourke	1601 Cottage, Fbks.
William L. Nannie	College Alaska
Kim McLeod	2751 Davis Rd Fairbanks
Warren L. Wilson	Box 5709 College Alaska
Edward Leigh-Kendall	1532 Tenth Ave. Fairbanks Alaska - 99701
[illegible]	[illegible]
[illegible]	[illegible]
William S. Ebersman	1301 Turner St. Fairbanks
Lee Snyder	306 4TH ST W. NORTH POLE ALASKA
[illegible]	[illegible]

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Patrick B Harris	Eaton Clerk
Ted Harwood	703 Fulton Fbks
Alvin J Reed	1319 Cushman
Ruth Reed	1319 Cushman
Ronald C Stevenson	1317 Central Ave. Fbks.
Gilbert J. Andrews	2019 Cass, Fbks.
Lowell Taylor	824 17th Ave
Lee C. Rutgers	907 - 21st Ave — Fbks, Ak
Evelyn M Scatchard	P.O. Box 902 Nenana Alaska
Mike Foster	Arctic Co, Fairbanks

PETITION

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Ernest E Presley	Passenger Drive, Fairbanks
(Stephen W McCann)	345 Chena St
[illegible]	Box 456, Fairbanks
[illegible]	Super Cond. Fairbanks
[illegible]	328 Barnette Fbks
[illegible]	2 mi Chena Hot Springs Rd.
Clyde V Niemi	1825 Bridgeway
[illegible]	834 [illegible]
[illegible]	[illegible]
Arthur L Jacquot	1606 Marie Road

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[illegible]	Ramey Pkwy 321 3rd St Central, Fairbanks
[illegible] Brown	Cliff Bowers Box 5-525 College
Dan Bates	601 Polaris Bldg. Fairbanks
[illegible]	616 Building Ave Fairbanks
[illegible] Johnson	Box 601 Fairbanks Alaska
Herbert N Johnson	218 Bldg St Fairbanks
W F Donovan	1805 Central Fairbanks AK
Don Pierce	1805 Central FBX
[illegible]	[illegible]

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[illegible]	[illegible]
[illegible]	
[illegible]	1616 Cushman - Fbks.
[illegible]	1616 Cushman St. Fbks
Robert E Lee	1616 CUSHMAN ST., FBKS
[illegible]	1617 Baidarka Drive
[illegible]	215 College Rd.
[illegible]	
[illegible]	
[illegible]	1616 Cushman Street, Fbks

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Marion L. Hinton	219 Slater Drive - Fairbanks
[illegible]	[illegible]
Peter C. Livingston	1813 Central Ave. - Fairbanks
Bud Yarbrough	320 Glacier Ridge Road
M. P. Lovell	1211 Farmer Loop Rd

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Evelyn Cunningham	
Jessie Nashoanak	
Arthur Leon	
Lou Conway	
Esther Alone	
Louis Tapatillo	
Nancy Joseph	
Richard Dyment	
Martha Wood	

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Carol Strnick	
Patricia Burton	
Linda Bentley	
Janice Gerber	
Fern Wilkins	
Orlyn K. Bergsaas	

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[illegible]	1101-6th #7, Fairbanks
[illegible]	[illegible]
[illegible]	531 Northward Bldg. Fairbanks
[illegible]	Box 1757 Fairbanks, Alaska
[illegible]	359 Slater Fairbanks
[illegible]	[illegible]
[illegible]	Box 581 Fairbanks (318 Slater St)
[illegible]	Box 2137 FBKS ALASKA

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James H. Savage	759-8th ave. Fairbanks
Marjorie L. Mullin	P.O. Box 2111 Fairbanks
Valda M. Aitken	Box 4104-1 8th Ave. FBKS. Alaska
Barbara H. Parker	PO Box 1004 FBKS. Alaska.
Sylvia M. Guest	1584 Hilton Avenue. FBKS. Alaska
Gemma Barth	Nixon Apt 1-B-4, Fairbanks
Elinor A Blum	1801 Central Fairbanks
Irene F. Pace	Po. Box 976 North Pole Alaska

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Phyllis A Wolfe	
Margaret Potts	
Dorothy Bettisman	
[illegible]	
[illegible]	

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[illegible]	415-5th Ave. FBKS.
[illegible]	1411 Mary Ann FBKS.
[illegible]	232 Slater Drive Fairbanks.
[illegible]	[illegible]
[illegible]	College Alaska.
[illegible]	Box 269 College Alaska
[illegible]	2030 Eagle St
[illegible]	415 Lakeview T.C.
[illegible]	647 Birch Dr. Fairbanks
[illegible]	12 MILES CHENA RIDGE ROAD

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[signature]	1012 Silvern
Leonie McCasing	1733 Tamarack Dr

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[illegible]	1616 Cushman [illegible]
[illegible]	1616 Cushman [illegible]
[illegible]	1616 Cushman, Fbks
[illegible]	1616 Cushman St. Fairbanks
[illegible]	1616 Cushman Street Fbks
[illegible]	1616 Cushman Street Fbks
[illegible]	1616 Cushman Street, Fairbanks
[illegible]	1616 Cushman Street FBX.
[illegible]	[illegible] Cushman [illegible]
[illegible]	1616 Cushman St. FBKS

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[illegible]	1303 O'Connor, Pl
[illegible]	15 Mile Richardson Highway
[illegible]	[illegible]
[illegible]	901 A.P.T.E. Wilson
[illegible]	230 Jewell
[illegible]	2360 W. Sta
[illegible]	321 Barnett Tr Ct.

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Bonnie H. Cox	F.B.K.S.
Eugene A. Rogstad	Fish + Game - Fairbanks
Henry Carstensen	Fish + Game - Fairbanks
Bonnie H. Cox	F.B.K.S.
Kenneth T. Galt	Fish & G. F.B.K.S.
Glenn L. Hollis	Fish & Game F.B.K.S.
Peter C. Windlow	Fish + Game FBKS.
[illegible]	Fish + Game - FBKS.
Diane R. Peltier	[illegible] Manual, FBKS.
Peter M. Bennis	Fish & Game, FBKS
William H. Copeland	Division of Lands, FBKS

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Charles Mansfield	1-D-7 Lisa Cir. Fbks
Karla Gail	418 Barnett Fbks
Lucy Tinker	#5 CRAIG AV Fairbanks
Darlene Fasken	209 Birch St. Fairbanks
Norma L Cate	3611 Beech Circle 99705
Nora C Funk	5 Mile Chena Hot Springs Road Fbks
Ellen Wiebelt	C-4 BTC, Eielson AFB
Peggy Covey	2101 - Central - Fbks.
[illegible]	P.O. Box 53 N. Pole, Alaska
Fred Marshall	BI 2053 Fairbanks, Alaska

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Judy Gronholt	206 Kodiak Dr. Fbks, Alaska
Andrew M. Fullerton	102 Fairbanks Fbks. Alaska
Margaret Schaupeter	1033 Eighth Ave Fbks Alaska
Eugene C. Henderson	1 Mi. N. Geneva Rd. Fbks Alaska FBKS ALASKA
Mary M. Brennan	Box 1716 FAIRBANKS, AAA
Ralph H. Rowley	713 Bentley Dr. Fbks AAA
Virgil L. Hagerty	1139 Cowart St. Fairbanks
[illegible]	[illegible]
[illegible]	[illegible]
L O. Schwenck	1416 Noble Street

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Thomas McWilliams	175 Alaska Way Fairbanks
John Dreckman	3½ Mile Old Steese Rd. Fairbanks
[illegible]	43 [illegible] Fairbanks
[illegible]	12 Mile Minnie Rd - Box 6 - Fairbanks
[illegible]	215 Kodiak Circle - Fairbanks
Vincent J. Riley	1011 Seville Street Fairbanks
Lowell D. Hamilton	303 Dalton St. Fairbanks
[illegible]	Box 1914 Fairbanks
Gertrude Faraday	Unit 214 Northwood Bldg. Fairbanks
Don Billings	1-D-2 Fairview Manor Fairbanks

PETITION

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The desirability of having an independent merit system not influenced by political motivations or by changes in administration, but devoted solely to the creation of a fair, impartial and efficient working staff for our State is only too well established. Such a system, together with fair compensation for services rendered, constitutes the only way to attract and keep in State employment qualified career personnel. Failure to act on these bills will perpetuate a system which has received much well-earned criticism and has cost this State and its people the high cost of constant turnover of personnel, continuous recruitment, and the concomitant training, with reduced efficiency and production.

We therefore urge our representatives, senators, and Governor to enact these bills promptly by such majority of votes as to demonstrate to the people of Alaska their desire for the quality of government and administration this great State of Alaska deserves.

[illegible]	[illegible] Fairbanks, Alaska 99701
Bruce E. Roberts	1325 Rewak Dr. Apt 6 Fbx. 99701
[illegible]	Box 5-114 College, Alaska 99701
[illegible]	[illegible]
Donald E. Kelly	328 Illinois Fairbanks 99701
[illegible]	1433 Cowles Dr, Fairbanks

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Miles Steed	Box 5544 College Alaska
Evelyn Melville	156 Keller Road Fairbanks
Carolyn Collins	108 Ira St Fairbanks
[illegible]	655 University, Apt 4-C
[illegible]	Box 5-275 College
[illegible]	Box 1837 Fairbanks
[illegible]	732 [illegible]
[illegible]	Box 130 College Alaska
[illegible]	2 Mile Badger Rd Fairbanks
[illegible]	BOX 472 FAIRBANKS. ALASKA

PETITION

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John C Kelley	328 Illinois St.
Marvin L. [illegible]	328 Illinois St
Odell D Johnson	328 Illinois St
Jerrie L Martin	113 Lenig St.
Donna Stoch	507 Illinois
Sheila M. Riley	1907 Central
[illegible]	328 Illinois St.
[illegible]	225 College Rd
Lenny E. Kinney	Box 82-129, College, Alaska
D Kolman	328 Dell

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

HB

188

HB 188

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

JUNEAU
ALASKA 99801

MEMORANDUM

March 1, 1969

TO: Barry Jackson, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson
Revisor of Statutes

SUBJECT: PSC-related bills presently before the legislature

HOUSE

HB 188, by Guess & Bradner -- full PSC chapter -- same as SB 54

HB 202, by Fink -- virtually full PSC chapter -- same as SB 128 but deletes exemption for municipally owned and operated utilities re rates

SENATE

SB 54, by Josephson, Rader & Begich -- full PSC chapter

SB 128, by request of the governor -- virtually full PSC chapter

SB 214, by Rader -- mainly deals with the definition of "public utility" and the exemptions from the application of the PSC chapter

SB 215, by Rader -- deals with the pay and removal of PSC members

Fed. Com. AB188
Dept Public Service Commission

CITY OF FAIRBANKS

MUNICIPAL UTILITIES SYSTEM

Operated By The Public Utilities Board

645 FIFTH AVENUE

FAIRBANKS, ALASKA

P.O. BOX 2215 – 99701

CHAIRMAN

WILBUR WALKER

SECRETARY

DON C. CHANDLER

MEMBERS

RAY KOHLER

M.B. SCHIERHORN

RON NERLAND

January 23, 1970

Senator Paul Haggland, Chairman
and Commerce Committee Members

Gentlemen:

During April 1969, testimony was presented to the Commerce Committee by Fairbanks representative, A. J. Movius. The position of the City was, at that time, and is, that the benefits to be gained in protecting the public's interest are outweighed by the burden imposed on the rate payers who will pay for the regulation.

The City of Fairbanks Public Utilities Board and Fairbanks City Council have previously gone on record as being opposed to regulation that will interfere with the regulation of local utilities on a local basis. An arbitration provision is the only forseeable genuine benefit that could accrue to the rate payer.

If a bill is to be passed, and if this is to do any good, it must contain a provision to solve the service area problems existing between contiguous utility organizations. If the legislature sincerely intends to protect the public by passage of a bill to strengthen the Public Service Commission, definite guide lines for settling border disputes will be contained in the legislation.

Finally, one practical point - it is apparent to everyone that the Public Service Commission has been overwhelmed by the RCA certificate situation and this should point out that if the Commission is to be effective in protecting the rate payer, it must first get organized.

Very truly yours,

Ray Kohler

Ray Kohler
Vice Chairman
Public Utilities Board

cc: Committee Members
Fairbanks Area Legislators
Public Utilities Board Members
City Council Members

CITY OF KETCHIKAN

KETCHIKAN PUBLIC UTILITIES

Senate Bills Nos. 54 and 128 and House Bill No. 188 have been introduced in the State Legislature. If passed, these bills would put control of municipal utilities under an appointed State Public Service Commission.

The City of Ketchikan Public Utilities have been regulated by the City Council for approximately 34 years and have provided its consumers a reasonable level of service at the lowest rates in Alaska, and at rates below the national average for residential service.

Control by a State Public Service Commission, in addition to violating the charter provisions of home rule cities, would constitute an unnecessary interference in the management of city affairs, and could, by creating additional operating expense in the operation of its utilities, result in higher rates for service to be paid by the consumer.

Wednesday, March 5, 1969, at 7:00 P.M., a hearing will be held by the Senate Commerce Committee on Senate Bill No. 128. If you feel this type of legislation would be against your best interests we would strongly urge that you send a letter or telegram expressing your opposition to Senator Paul Haggland, Chairman, Senate Commerce Committee, State Capitol Building, Juneau, Alaska.

KETCHIKAN, ALASKA, 3 MARCH, 1969
DEAR SENATOR HAGGLAND
IF I WERE A MEMBER OF THE LEGISLATURE, I WOULD VOTE "NO" ON EITHER OR BOTH OF THE ABOVE MENTIONED BILLS. IT IS MY PERSONAL OPINION THAT THE ALASKA PUBLIC SERVICE COMMISSION ALREADY HAS TOO MUCH REGULATORY POWER OVER INDUSTRIES ABOUT WHICH THE INDIVIDUAL MEMBERS OF THE COMMISSION HAVE VERY LIMITED KNOWLEDGE.
RESPECTFULLY

Paul J. Wingren

PAUL J. WINGREN, PRES.
WINGREN FOOD STORES, INC.

HB 188

KEITH H. MILLER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

Jackson
working copy

February 7, 1969

The Honorable Jay S. Hammond
Chairman, Senate Rules Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Mr. Chairman:

Pursuant to State law and the Uniform Rules of the Legislature, I am transmitting herewith a bill entitled "An Act relating to the regulation of public utilities, defining the composition, powers and duties of the Public Service Commission; and providing for an effective date."

The attached bill would effect a number of important changes in the existing Public Service Commission Act.

It will substantially strengthen the regulatory authority of the Commission in certain respects. It will broaden the Commission's base of jurisdiction; it provides a reasonable and workable means of engendering compliance and enforcement; and it gives the Commission the ability to effectively regulate within its sphere of jurisdiction.

The bill does not repeal and re-enact the entire existing PSC Act. The first several sections of Chapter 42.05 are retained or simply revised. This has the effect of leaving the composition of the Commission as it is. Revisions are included, however, which would provide means for removing a commissioner from office: either by the same procedure in which he is appointed or for cause. These removal methods are designed to provide continuity of policy of the Commission. At the same time it affords an essential ability for change in event of incompetence, etc.

Due to the rapidly increasing workload of the commissioners and the need to retain well qualified and competent men on the Commission, the bill proposes an annual salary of $5,000.

The bill does repeal and re-enact all sections beyond AS 42.05.060 of the current chapter. In many instances, however, the new provisions are the same or similar to the present ones. Re-enactment of this large block of sections was employed primarily to provide continuity and uniformity and avoid the confusion of large scale amendments, additions and deletions.

Why not amend existing service? (amend?)

The other areas of important change which this bill would affect can be summarized as follows:

Sections 42.05.141 - 171 clarify the regulatory authority of the Commission. It is divided into general and administrative authority. The latter specifies that the Commission is to provide by regulation, for its own rules of practice and procedure in its adjudicatory proceedings. The procedures of the APA (AS 44.62) were never designed, intended nor are they appropriate to the usual utility regulatory agency investigation and hearing. The authority given to the PSC to prescribe its own procedural rules is similar to such authority granted the Alaska Transportation Commission in 1966 (139 SLA 1966).

The new statutes make it clear that the Commission may employ its own hearing officers. They also clarify the Commission's authority to hear a case itself without using a hearing officer. This authority has been implied in the past but the conflicting hearing processes provided for by the APA and the current PSC statutes rendered the implication at least questionable. The new provisions also expressly state that a commissioner may act as hearing officer.

The proposed bill expands the authority of the Commission in respect to certification of utilities. It prescribes (PROSCRIBES) unauthorized discontinuance or abandonment of certificated service and gives the Commission the power to modify, suspend, or revoke a certificate under certain conditions.

The new provisions concerning utility service have been strengthened in the requirement that service be reasonable, safe, adequate and sufficient.

In the area of rate regulation, the new bill makes it clear that the Commission may make, fix, alter and amend rates. It also expressly provides for suspension of rate changes for a maximum period of seven months. The seven-month period corresponds to the rather standard statutory suspension period for Commission regulating motor carriers, etc., but is less than the ten-month period commonly provided in regulation of electric, telephone, etc., utilities.

The Commission is also given the authoritv to apportion joint rates where the participating utilities cannot agree on apportionment or an apportionment is prejudicial to one of them.

The bill provides for reparations where the Commission finds that a utility has charged unreasonable, excessive or discriminatory rates.

In valuation of utility property for rate making purposes, the Commission is required to determine fair value primarily as a function of original cost less accrued depreciation. This, in effect, codifies the approach taken by the Commission in actual practice.

For the sake of uniformity and usefulness of information, the Commission is given the authority to prescribe the accounting systems to be used.

Article 8 of the bill provides both criminal and civil penalties for violation. Adequate penalty provisions are essential to regulation. They are designed and normally act as a compliance tool; and compliance rather than levy of fines or penalities is the objective.

The general provisions of the bill include assessment of regulatory fees, a public records section and a section to the effect that the 1968 amendment to Section AS 42.05.640(2) did not abrogate any rights vested in a public utility prior to its enactment. It is also called to your attention that the 1968 amendment is repealed. The provision therein which defined public utility in terms of $25,000 minimum gross annual revenue was completely unworkable — Query and raised numerous corolary questions concerning Commission jurisdiction. — NAMELY?

The definition of public utility is broadened and like its predecessor confines itself to definition. Exemptions are incorporated in a separate section.

Municipally owned and operated utilities are exempted from regulation only in certain respects. These are specified in subsections AS 42.05.631(b)-(d). In brief, a municipal utility would be exempt from rate regulation for services provided within the city boundaries. Services which it provides outside the municipal boundaries would not be exempt. Municipal utilities would also be exempt en toto from Sections AS 42.05.491 - 511 concerning financial and management regulation, and from Section AS 42.05.641 concerning regulatory fees.

The only other exemption from regulation is the person who furnishes water, gas or petroleum products by tank, wagon, etc. However, this exemption is limited where such supplier is providing the service to a public utility in which he has an affiliated interest.

Sincerely yours,

Keith H. Miller

Keith H. Miller
Governor

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

for accident insurance policy as to whether insured had had any "physical defect or infirmity" or "any local or constitutional disease." Ocean Accident & Guaranty Corporation v. Rubin, C.C.A.Cal., 73 F.2d 157, 96 A.L.R. 412.

PHYSICAL DEPRECIATION

"Physical depreciation" of property is the result of deterioration due to age and wear. It results from use, decay and the action of the elements. "Physical depreciation" is a constant factor, and it begins as soon as the structure is exposed to the action of the elements or is put into use. Central R. Co. of New Jersey v. Martin, D.C.N.J., 30 F.Supp. 41, 60.

"Physical depreciation" is reduction in value of structure due to actual wear and tear or physical deterioration. Property consisting of paper mill, bag factory, storehouses, yard equipment, etc., used by going concern, should be assessed for taxation at valuation fixed by reconstruction cost less depreciation, in absence of market value or evidence thereof. People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y.S.2d 290, 295, 166 Misc. 237.

PHYSICAL DETERIORATION

Company formed by merger of title companies was not entitled to deduction from income for "obsolescence" in amount of alleged decrease in value of title insurance plant which company failed to keep up to date after the merger, since loss of usefulness was not because of changing economic conditions or circumstances over which company lacked control, but was result rather of "physical deterioration." Revenue Act 1928, § 23(k), 26 U.S.C.A. (I.R.C. 1939) § 23. United States v. Real Estate-Land Title & Trust Co., C.C.A.Pa., 102 F.2d 582, 586.

PHYSICAL DIAGNOSIS

Faulty diagnosis of itself and apart from treatment does not give rise to action for malpractice, since diagnosis may rightly be changed from time to time. "Diagnosis" is defined as the art or act of recognizing the presence of disease from its symptoms, and deciding as to its character, also the decision reached, for determination of type or condition through case or specimen study or conclusion arrived at through critical perception or scrutiny. A "clinical diagnosis" is one made from a study of the symptoms only, and a "physical diagnosis" is one made by means of physical measure, such as palpation and inspection. "Malpractice" is the treatment of a case by surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; and hence any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional duties or of mistreatment of a disease or injury through ignorance and carelessness. Williams v. Lucas, 1 N.W.2d 121, 124, 140 Neb. 656.

PHYSICAL DISABILITY

Cross References

Crippling

A voter who claimed the assistance of an election officer in preparing his ballot on the ground, not that he was blind or could not read or write, but that he left his eyeglasses at home was not under "physical disability," within Rev.St. art. [illegible], as amended by Acts 36th Leg., 1919 [illegible], Vernon's Ann.Civ.St. art. 3010, Vernon's Ann.P.C. arts. 224, 225, where he made no effort to get his glasses, the law applying only to permanent disability. Hillert v. Schweppe, Tex., 254 S.W. 152, 154.

Questions in life policy application regarding deformity, amputation, and physical disability, and whether insured had disease of genito-urinary system, did not suggest to insured operation for removal of testicle so as to warrant cancellation of policy, where application did not disclose such operation; operation being neither "deformity," "amputation," nor necessarily "physical disability." American Life Ins. Co. v. Bunyan, 145 So. 617, 620, 227 Ala. 32.

The provision of charter of city of Sacramento for benefits for "physical disability" of city employees as result of injury received in performance of duty, and for reduction of such benefits by amount of any workmen's compensation award against city, does not cover death of an employee during performance of duty, and hence does not authorize pension payment to widow of employee within city retirement system to be reduced by

state-wide importance and concern and have been enacted in aid of the health, safety, and welfare of the people of this State.

LEGISLATIVE HISTORY

Enacted 1951. Based on Stats 1915 ch 91 § 43 subd (d) p 137, as amended by Stats 1917 ch 209 § 1 p 320, Stats 1927 ch 704 § 1 p 1216, State 1933 ch 855 § 1 p 2227, without substantial change.

COLLATERAL REFERENCES

Cal Jur 2d Eminent Domain § 186, Railroads § 21.

Law Review Articles:

30 SCLR 191 (public utilities regulation and community interest).

§ 1220. Legislative declaration of purpose for enactment of §§ 1206 to 1218. The Legislature declares that Sections 1206 to 1218, inclusive, are enacted as a germane and cognate part of and as an aid to the jurisdiction of the commission in the supervision and regulation of railroad and street railroad corporations.

LEGISLATIVE HISTORY

Enacted 1951. Based on Stats 1915 ch 91 § 43 subd (e)8 p 137, as amended by Stats 1917 ch 209 § 1 p 320, Stats 1927 ch 704 § 1 p 1216, Stats 1933 ch 855 § 1 p 2227, without substantial change.

COLLATERAL REFERENCES

Cal Jur 2d Eminent Domain § 186, Railroads § 21.

Law Review Articles:

30 SCLR 191 (public utilities regulation and community interest).

NOTES OF DECISIONS

Under Const Art XI, §§ 22 and 23, legislature has plenary and unlimited authority insofar as such conferred powers are germane to subject of regulation of public utilities. East Bay Municipal Util. Dist. v Railroad Com. (1924) 194 C 603, 229 P 949.

CHAPTER 7

Valuation of Public Utility Properties

§ 1351. Authority to value and revalue property of public utilities.
§ 1352. Hearings to ascertain values: Notice: Preliminary examination: Utilities entitled to hearing: Reduction of evidence to writing.
§ 1353. Making and filing of findings: Review of findings: Findings as admissible in evidence: Findings as conclusive evidence: Manner of controverting facts found.
§ 1354. Additional hearings for revaluations, etc.: Procedure for hearings: Findings.

CROSS REFERENCES

"Commission" and "commissioner": § 20.

§ 1351. Authority to value and revalue property of public utilities. The commission may ascertain for each purpose specified in

this part, the value of the property of every public utility in this State and every fact and element of value which in its judgment may or does have any bearing on such value. The commission may make revaluations from time to time and ascertain the value of all additions, betterments, extensions, and new construction to the property of every public utility.

LEGISLATIVE HISTORY

Enacted 1951. Based on:

(a) Stats 1915 ch 91 § 47 subd (a) p 139, as amended by Stats 1917 ch 170 § 1 p 261, without substantial change.

(b) Stats 1st Ex Sess 1911 ch 14 § 47 subd (a) p 42, as amended by Stats 1913 ch 339 § 1 p 684.

(c) Stats 1911 ch 20 § 20 p 22.

COLLATERAL REFERENCES

Cal Jur 2d Eminent Domain § 353, Public Utilities and Services §§ 53, 55.

McKinney's Cal Dig Public Utilities and Services § 52.

Am Jur Public Utilities and Services §§ 105 et seq.

Law Review Articles:

2 CLR 3 (just and scientific basis for establishment of public utility rates, with particular attention to land values).

3 CLR 500 (valuation of public service companies for rate-making purposes: going concern value).

5 CLR 1 (estimating depreciation in valuation of public utilities for rate-making purposes).

12 CLR 283 (theory of prudent investment as a rate basis).

15 CLR 445 (investigations on the commission's own motion).

32 CLR 398 (rate making of public utilities discussed).

23 St BJ 165 (lawyer's view of valuation of public utility property).

Annotations:

20 ALR 560 (effect of additions constructed at war and postwar prices on valuation for rate-making purposes).

49 ALR 1477 (valuation of street easement for street railway rates).

63 ALR 1096 (telephone company's rights in, and remedies available to protect, telephone directory and advertising material therein).

72 ALR 1232 (capitalizing or funding bond discount).

64 ALR2d 866 (liability of public utility to abutting owner for destruction or injury of trees in or near highway or street).

64 ALR 1199 (railroad company's liability for injury or death of pedestrian due to condition of surface of crossing).

64 ALR2d 1296 (admissibility of evidence of repairs, change of conditions, or precautions taken after accident).

66 ALR2d 634 (liability of municipality for torts in connection with airport).

67 ALR2d 1364 (liability of railroad for injury or damage resulting from motor vehicle striking bridge or underpass because of insufficient vertical clearance).

68 ALR2d 392 (compensation or damages for condemning public utility plant).

NOTES OF DECISIONS

I. Court Decisions.

II. Public Utilities Commission Decisions.

CALIFORNIA

In proceeding involving transfer and recapitalization of public utility properties it is not necessary that commission determine present value of lands involved. Santa Cruz County Util., In re (1928) 31 CRC 32.

Income theory as measure of value is unstable. San Francisco, In re (1929) 33 CRC 202.

Actual application of income theory is by means of a purely mathematical formula which determines the answer without the exercise of judgment. San Francisco, In re (1929) 33 CRC 202.

Just compensation cannot be found on basis of income earned from property, investments in which a utility estimates it might make in the future. It is commission's duty to fix just compensation on basis of property owned and to be taken on the day of taking. San Francisco, In re (1929) 33 CRC 202.

5. —— PROPERTY INCLUDED IN VALUATION

Unused property.—In making valuation of water utility property for rate-fixing purposes, water owned by utility entirely separated from its water system and not used or useful in service of water to its consumers, will not be included as property on the value of which a return is allowed. Watsonville Water & Light Co., In re (1919) 17 CRC 126.

Intercorporate relationship.—Worth of subsidiary electric railway to parent railroad as collector and distributor of parent company's passenger and freight traffic is factor to be considered in determining reasonable rate of return to be allowed subsidiary. Chamber of Commerce v Pacific Elec. R. Co. (1928) 31 CRC 454.

Nonoperative property.—Cost of diversion dam rendered nonoperative and no longer necessary in rendering service should be excluded from operative capital. Monterey County Waterworks, In re (1928) 31 CRC 852.

Lands.—When market value of land is found there is nothing to be added to further indicate value of land except it be that intangible value which attaches to composite property in use. San Francisco, In re (1929) 33 CRC 202.

Nonutility Property.—Water company rendering private service and utility service which contends that private properties acquired from predecessor have never been dedicated to public use has no legal right to have such properties fully valued for utility-rate fixing purposes merely because utility arm of company may be accorded by the other a revocable permissive right to use that part of the property considered private. This does not mean that were the utility to show that it has a definite legal right to the use of private property for utility purposes it would not be entitled to have a fair value accorded to such a right. Thomas v Monterey County Water Works (1937) 40 CRC 683.

6. —— COST AND INVESTMENT

Reproduction cost based upon estimate of what price of material and labor will be two years hence is speculative and of very little assistance in determining rate base. Watsonville Water & Light Co., In re (1919) 17 CRC 126.

Historical cost and present value.—Where applicant claims that rates should be established on estimated present value of property and not on historical cost new, consideration must be given the fact that it is electric utility serving under regulation in territory free from general competition and has other and different obligations imposed upon it than those to which nonpublic utility is subjected, for it may be required to meet the demands of territory whether costs are

CALIFORNIA

[II, 7]

high or low and develop plants when necessary to provide for needs of public during periods of high prices as well as of low prices, and amount invested in public utility properties, if known, or if not known, the historical cost of property, should be regarded as principal element in arriving at rate base and applicant is therefore entitled to fair return upon its reasonable historical cost rather than upon "present value." Southern Sierras Power Co. & Holton Power Co., In re (1920) 18 CRC 818.

Allowance for historical investment should not be blindly followed in case utility has unreasonably delayed in its obligation to public by failing to develop plants at time when they should have been developed and later constructing them under conditions of high cost of money and material, in such case, fairness to consumers must dictate lesser compensation to utility. Southern Sierras Power Co. & Holton Power Co., In re (1920) 18 CRC 818.

Allowance for development cost.—Commission refuses to allow as development costs, either in capital or to be amortized at this time, early losses incurred by utility prior to its purchase by present owners, as former owners would not benefit thereby and it would be equivalent to requiring consumers now to pay power bills which should have been paid at the time, were they reasonable. Southern Sierras Power Co. & Holton Power Co., In re (1920) 18 CRC 818.

Actual cost cannot be sole measure of value, admitting that expenditures for special equipment, labor and management is the best measure of value since substitution partakes of the element of speculation, yet abnormally high or abnormally low costs or costs incurred during a time long since past or for things no longer efficient cannot be the true measure of actual present-day worth of the properties for which just compensation must be fixed. Redding, In re (1921) 19 CRC 267.

The best evidence of development costs consists of showing what the costs actually amounted to during a reasonable development period and should be applied in all cases where it is possible to determine the nature and extent of actual losses, if any, during such development period. Redding, In re (1921) 19 CRC 267, 293.

Investment in advance of present needs.—In rate proceeding cost of canal enlarged beyond present needs may be appraised upon the basis of the cost of that portion of canal reasonably necessary for service to present consumers. Foothill Ditch Co., In re (1928) 32 CRC 44.

Work in progress.—Construction work in progress as of date of valuation should be included in reproduction cost new and reflected thereby in the figure of just compensation. San Francisco, In re (1929) 33 CRC 202.

Preliminary organization.—Within reasonable bounds preliminary organization expense is proper item to be included in reproduction cost new. San Francisco, In re (1929) 33 CRC 202.

Cost of acquisition of land disallowed in determination of just compensation where such amount as may be claimed is amply covered by liberal allowance for organization expense and other general overheads. San Francisco, In re (1929) 33 CRC 202.

7. —— —— CONSUMERS' ADVANCES

Consumers' advances in aid of construction being available to utility without payment of interest will be treated as proper deduction in determining rate base. Southern Calif. Gas Co., In re (1928) 32 CRC 379.

8. —— AMOUNT AND VALUE OF SECURITIES

It is not the practice to use as rate base the amount of securities outstanding, nor figures carried in fixed capital accounts in a utility's books unless, in the commission's opinion, such figures, at time of rate fixing, represent rea-

sion, 203 A.2d 515, 204 Pa.Super. 102, 1964.

52. —— Findings of commission, hearing and determination

Public Utility Commission was presumed to have considered effect of suspension of tariff supplement in fixing final gas rates, and was not required to make a specific monetary allowance for a calculated loss allegedly due to suspension. City of Pittsburgh v. Pennsylvania Public Utility Commission, 222 A.2d 395, 208 Pa.Super. 260, 1966.

Where Public Utility Commission had sufficient evidence before it in approving rate increase for steam heating company, even though defective in certain respects, to reach conclusion that proposed rates were just and reasonable and that fair value of utility's property would support proposed increase in rates, no specific finding of fair value or fair rate of return was necessary. Penn Sheraton Hotel v. Pennsylvania Public Utility Commission, 184 A.2d 324, 198 Pa.Super. 618, 1962.

54. —— Presumption and burden of proof

Shippers who attacked intrastate freight rate had burden of proof in showing that rates were unreasonable. Deitch Co. v. Pennsylvania Public Utility Commission, 203 A.2d 515, 204 Pa.Super. 102, 1964.

Burden is upon utility company seeking rate increase to establish all basic facts necessary for consideration by the Public Utility Commission. Sayre Land Co. v. Pennsylvania Public Utility Commission, 175 A.2d 307, 195 Pa.Super. 417, 1961, affirmed 185 A.2d 325, 409 Pa. 556.

62. Review

Where complainants in rate proceeding did not raise any question concerning original cost of gas utility's property before Public Utility Commission or in their appeal petitions, they ordinarily could not raise such question on appeal. City of Pittsburgh v. Pennsylvania Public Utility Commission, 222 A.2d 395, 208 Pa.Super. 260, 1966.

§ 1151. Valuation of property of a public utility

The commission may, after reasonable notice and hearing, ascertain and fix the fair value of the whole or any part of the property of any public utility, in so far as the same is material to the exercise of the jurisdiction of the commission, and may make revaluations from time to time and ascertain the fair value of all new construction, extensions, and additions to the property of any public utility. When any public utility furnishes more than one of the different types of utility service enumerated in paragraph seventeen of section two of this act,[1] the commission shall segregate the property used and useful in furnishing each type of such service, and shall not consider the property of such public utility as a unit in determining the value of the property of such public utility for the purpose of fixing rates. In fixing any rate of a public utility engaged exclusively in common carriage by motor vehicles, the commission may, in lieu of other standards established by law, fix the fair return by relating the fair and reasonable operating expenses, depreciation, taxes and other costs of furnishing service to carrier operating revenues. As amended 1963, Aug. 1, P.L. 449, § 1; 1965, Dec. 22, P.L. 1165, § 1, effective in 90 days.

[1] Section 1102 of this title.

Section 2 of act 1965, Dec. 22, P.L. 1165, provided that the act should take effect in ninety days.

Section 2 of the act of 1963 provided that the act should take effect in ninety days.

3. Valuation—In general

Public Utility Commission acted within its power in rate proceeding in refusing to reduce gas utility's trended original cost measures of value to extent of investment tax credit as too speculative. City of Pittsburgh v. Pennsylvania Public Utility Commission, 222 A.2d 395, 208 Pa.Super. 260, 1966.

Public Utility Commission's treatment in rate proceeding of investment tax credit as a reduction in cost of gas utility's property and deduction of unamortized portion thereof from original and trended cost measures on value was not an abuse of discretion. Id.

In determining fair value of physical plant of steam heating company, one measure of value, against which depreciation is accrued, is original cost of construction, that is, cost when first devoted to public service, which does not include future costs of removal. Penn Sheraton Hotel v. Pennsylvania Public Utility Commission, 184 A.2d 324, 198 Pa.Super. 618, 1962.

Negative salvage actually incurred by steam heating company, either upon actual retirement of property without replacement or upon replacement of item of property, is entitled to consideration in rate proceeding. Id.

6. —— Fair value, valuation

The Public Utility Commission is not bound to any specific formula to determine fair value, but it cannot take only one factor as the formula; it need not give equal weight to all measures of fair value, but neither can it weigh fair value only by one consideration. Scranton Steam Heat Co. v. Pennsylvania Public Utility Commission, 167 A.2d 693, 194 Pa.Super. 143, 1961, modified on other grounds, 176 A.2d 86, 405 Pa. 397.

24. Reproduction cost—In general

Reproduction cost of utility's facilities is factor which must be considered and weighed by public utility commission in arriving at fair value for rate-making purposes, and only reason for according little or no weight to such cost is when facilities have become so obsolete as to make highly improbable and unlikely the facilities' reproduction. Scranton Steam Heat Co. v. Pennsylvania Public Utility Commission, 176 A.2d 86, 405 Pa. 397, 1962.

The Public Utility Commission should have considered original cost of construction and cost of reproduction and

COMPARISON OF STATE REGULATORY BODIES
TREATMENT OF RATE BASE VALUATION

	Original Cost States		Fair Value States	No State Commis.
1.	Alaska	1.	Alabama	1. Iowa
2.	Arkansas	2.	Arizona	2. Nebraska
3.	California	3.	Delaware	3. South Dakota
4.	Colorado	4.	Illinois	
5.	Connecticut	5.	Indiana	
6.	District of Columbia	6.	Kentucky	
7.	Florida 2/	7.	Minnesota	
8.	Georgia	8.	Missouri	
9.	Hawaii	9.	Montana	
10.	Idaho 3/	10.	New Jersey	
11.	Kansas	11.	New Mexico	
12.	Louisiana 4/	12.	New York	
13.	Maine	13.	North Carolina	
14.	Maryland	14.	Ohio	
15.	Massachusetts	15.	Pennsylvania	
16.	Michigan 5/	16.	Texas	
17.	Mississippi			
18.	Nevada			
19.	New Hampshire			
1/ 20.	New York			
21.	North Dakota			
22.	Oklahoma			
23.	Oregon			
24.	Puerto Rico			
25.	Rhode Island			
26.	South Carolina			
27.	Tennessee			
28.	Utah			
29.	Vermont			
30.	Virginia			
31.	Washington			

32. West Virginia

33. Wisconsin

34. Wyoming

NOTES

1/ All utilities except telephone.

2/ Does not regulate electric and gas utilities.

3/ Uses inflation allowance only.

4/ Uses inflation allowance for telephone.

5/ Does not regulate electric utilities.

NOTE: Only one State, Ohio, prescribes a fixed RCND percentage by statute.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

HB166

Alaska State Legislature

SENATOR
JOE P. JOSEPHSON
DISTRICT E
326 H. STREET
ANCHORAGE, ALASKA 99501

WHILE IN JUNEAU
POUCH V
JUNEAU, ALASKA 99801

Senate

COMMITTEES
HEALTH, WELFARE, AND EDUCATION
LABOR AND MANAGEMENT

March 15, 1969

Honorable Barry Jackson,
Chairman,
House Judiciary Committee,
House of Representatives,
Juneau, Alaska

Dear Barry:

A constituent of mine, Mr. John Mlaker, recommends an express provision in proposed PSC legislation to curb discriminatory rate practices.

I am taking the liberty of enclosing Mr. Mlaker's letter to me of March 7, and his suggested statutory language, for consideration by your committee.

Sincerely,

Joe

Joe P. Josephson
State Senator

146188

March 7, 1969

Mr. Joe Josephson
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

Dear Joe:

Several Public Service Commission bills have been or perhaps will be introduced in both Alaska Legislative Houses. It appears that one of these bills in original or amended form will pass during this session.

In the past several years many of Alaska's public utilities have been guilty of a variety of discriminatory rate practices involving kick-backs, "special rates", give-aways, differential subsidies, etc. The practices take many forms but collectively they amount to taking a little bit extra from the vast majority of consumers in order to subsidize and attract potential new customers.

Attached is a section lifted from the Public Service Commission portion of the North Carolina Code. If this language is contained in any new Alaskan P.S.C. Bill, then the situations I have outlined could be prevented in the future. The North Carolina Code has been widely cited for its forthrightness and for its defense of the public interest. It could well be adopted in Alaska.

Those of us in Anchorage who have struggled with this situation for many months are very hopeful that you will work toward making these provisions a part of a new P.S.C. Bill.

Respectfully yours,

John Mlakar
Denali Fuel Company
Anchorage, Alaska

Attachment

NORTH CAROLINA CODE

Sec. 62-140

(a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service. The Commission may determine any questions of fact arising under this section.

(b) The Commission shall make reasonable and just rules and regulations.

(1) To prevent discrimination in the rates or services of public utilities.

(2) To prevent the giving, paying or receiving of any rebate or bonus, directly or indirectly, or misleading or deceiving the public in any manner as to rates charged for the services of public utilities.

(c) No public utility shall offer or pay any compensation or consideration or furnish any equipment to secure the installation or adoption of the use of such utility service except upon filing of a schedule of such compensation or consideration or equipment to be furnished and approval thereof by the Commission, and offering such compensation, consideration or equipment to all persons within the same classification using or applying for such public utility service; provided, in considering the reasonableness of any such schedule filed by a public utility the Commission shall consider, among other things, evidence of consideration or compensation paid by any competitor, regulated or non-regulated, of the public utility to secure the installation or adoption of the use of such competitors service.

Sec. 42.05.171(b). FINAL ORDERS OF THE COMMISSION. No final order of the commission compelling affirmative action, denying a right or privilege, or granting a right or privilege over protest of an interested party may be entered by the commission without giving opportunity to be heard, including, if requested by the public utility or any interested party, a public oral hearing.

Sec. 42.05.171(c). DECISIONS. The commission shall make reports in writing on all proceedings under this chapter in which hearings are held. Each report shall state the commission's findings, the basis for the findings, and conclusions together with its decision and order. All reports shall be entered of record and copies shall be furnished to all the parties to the proceedings.

Sec. 42.05.431(c). AUDIT OF ACCOUNTS. An audit made by a certified public accountant, or by a person approved by the commission, shall be accepted by the commission as prima facie correct. (§ 17 ch 199 SLA 1959)

Excerpts from U. S. Supreme Court Statements on Rate Making Value, 1909–1942

AB168

1909

Willcox v Consolidated Gas Co. 212 US 19:

There must be a fair return upon the reasonable value of the property at the time it is being used for the public. . . . And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase.

1913

Minnesota Rate Cases, 230 US 352, 33 S Ct 729:

The making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law.

1918

Denver v Denver Union Water Co. 246 US 178, PUR1918C 640:

What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures.

1923

Bluefield Water Works & Improv. Co. v West Virginia Pub. Service Commission, 262 US 679, PUR1923D 11:

The record clearly shows that the commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, at 1920 prices, appears to have been wholly disregarded. This was erroneous.

Missouri ex rel. Southwestern Bell Teleph. Co. v Missouri Pub. Service Commission, 262 US 276, PUR1923C 193:

It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for tomorrow ignore prices of today.

1926

McCardle v Indianapolis Water Co. 272 US 400, PUR1927A 15:

But in determining present value, consideration must be given to prices and wages prevailing at the time of the investigation; and, in the light of all the circumstances, there must be an honest and intelligent forecast as to probable price and wage levels during a reasonable period in the immediate future. In every confiscation case, the future as well as the present must be regarded. It must be determined whether the rates complained of are yielding and will yield, over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future.

1929

St. Louis & O'Fallon R. Co. v United States, 279 US 461, PUR1929C 161:

The question on which the [Interstate Commerce] Commission divided is this: When seeking to ascertain the value of railroad property for recapture purposes, must it give consideration to current, or reproduction, costs? The weight to be accorded thereto is not the matter before us. No doubt there are some, perhaps many, railroads the ultimate value of which should be placed far below the sum necessary for reproduction. But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts; and this mandate must be obeyed.

1930

United R. & Electric Co. v West, 280 US 234, PUR1930A 225:

The allowance for annual depreciation made by the commission was based upon cost. The court of appeals held that this was erroneous and

that it should have been based upon present value. The court's view of the matter was plainly right. OVERRULED BY HOPE CASE 1944.

1933

Los Angeles Gas & E. Co. v California R. Commission, 289 US 287, PUR1933C 229:

We approach the decision of the particular questions thus presented in the light of the general principles this court has frequently declared. We have emphasized the distinctive function of the court. We do not sit as a board of revision, but to enforce constitutional rights. . . . The legislative discretion implied in the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory.

1935

West v Chesapeake & P. Teleph. Co. 295 US 662, 8 PUR NS 433:

When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value. To an extent value must be a matter of sound judgment, involving fact data. To substitute for such factors as historical cost and cost of reproduction, a "translator" of dollar value obtained by the use of price trend indices, serves only to confuse the problem and to increase its difficulty, and may well lead to results anything but accurate and fair. . . .

We agree, therefore, with the view of the district court, that the method was inapt and improper, is not calculated to obtain a fair or accurate result, and should not be employed in the valuation of utility plants for rate-making purposes.

1942

Federal Power Commission v Natural Gas Pipeline Co. of America, 315 US 575, 42 PUR NS 129:

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made, and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

raised whether the conventional case-by-case approach of conventional utility rate making based on production cost was a practical or equitable approach. He criticized the "end use" theory of the majority opinion (which stressed results rather than formula used to attain it) as a form of reasoning based on the end justifying the means. He said that the prudent investment theory of the rate-making approach in the majority opinion, while meritorious in usual utility rate cases, "has no rational application when there is no such relationship between investment and capacity to serve." He viewed gas as a commodity, similar to coal, a wasting asset available at a market price. Many of the difficulties foreseen by Justice Jackson in attempting to apply utility rate case methods to gas production proved prophetic in the subsequent experience of the Federal Power Commission, as witnessed in the Phillips Petroleum Company decision, post p. 562.

Present Status of Fair Value Rule

Some economic authorities looked upon the Hope decision as signalling the end of the "fair return on fair value rule" followed since Smyth v Ames. Thus, Professor James Bonbright said, in 1948, that the rule had ceased to be the "law of the land," although conceding that it might still be followed by those states wishing to do so (38 *American Economic Review*, Supplement 455).

Nearly a decade later, Joslin and Miller were noting that the "weary old formula" was still "the dominant concept in rate regulation" ("Public Utility Rate Regulation: A Reexamination," G. Stanley Joslin and Arthur S. Miller (1957) 43 *Virginia Law Review* 1027, 1049).

Two decades later, the death knell forecasts for the "fair return on fair value" rule still seemed very much premature, notwithstanding attempts of several commissions to follow a "revenue requirements" approach rather than a direct return on a physical rate base. See "Utility Regulatory Climate in Florida," Lewis W. Petteway, 54 Public Utilities Fortnightly 563 (October 28, 1954).

Cost of capital and comparable earnings techniques as means for determining rate of return on equity have been discussed by several leading economists in the field: "*Principles of Public Utility Rates*" (Chapter XV) by James C. Bonbright (1961) Columbia University Press; "*Economics of Regulation*" (Chapter IX) Charles F. Phillips, Jr. (1965), Irwin Press, Homewood, Illinois; "*Public Utility Economics*"

(Chapter IX) by Paul J. Garfield and Wallace F. Lovejoy (1964) Prentice-Hall, Inc. According to Harold Leventhal (since made judge of the U. S. circuit court of appeals, District of Columbia) "The role of rate of return was elevated from that of a featured player to that of star." Quoted in "Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy" 75 *Yale Law Journal* 989, 990 (1965).

As of mid-1967, thirty-four state commissions followed either the original cost formula or the closely allied net investment or so-called "Prudent investment" method of determining rate valuation. These include Alabama, Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

Sixteen states, including several of the largest, still make use of valuation factors; such as, reproduction cost, "current replacement," and other concepts associated with present fair value. But some of these combine the present fair value determination with original cost, getting a compromise or judgment figure for the rate base. In fact, only in Ohio is reproduction cost a sole consideration. Other states in this category include: Arizona, Delaware, Illinois, Indiana, Kentucky, Maryland, Minnesota (jurisdiction limited), Missouri (which also uses original cost as an alternative check), Montana, Nebraska, New Mexico, North Carolina, Pennsylvania, and Texas (regulation by municipalities). In New York, two different statutes require different treatment of telephone and transit utilities (present fair value) as compared with gas and electric utilities (original cost). In Iowa, a recently created regulatory commission had not yet become committed, although previously "present fair value" was used by court decree.

RATE OF RETURN CONSIDERATIONS GENERALLY

In the recent proceeding on an increased wholesale rate of Pan Handle Eastern Pipe Line Company:

> The commission said that many variables should be taken into account in setting the proper rate of return, and that its responsibility to fix just and reasonable rates could not be fulfilled so far as rate of return is concerned simply by applying ready-made formulae. It pointed out that no two pipelines are alike in their operations, and capital structure, but these things have a bearing on the rate of return that should be allowed. Similarly, it said return allowance is influenced by an assessment of general financial business and economic conditions, and an appraisal of the relative risks with which investors view the pipeline industry. Finally, the financial needs of the company and its investors must be weighed in the light of the commission's responsibility under the Natural Gas Act to assure consumers a continuing supply of gas at the lowest reasonable rates. Consequently, the commission rejected the idea that a return allowance can be fixed simply by an arithmetical calculation. It said that it is nevertheless helpful to consider separately debt, preferred stock, and common equity, prior to consideration of the overall return.

The indented quotation is from "Public Utilities Fortnightly," December 19, 1968.

Even today, however, the so-called "fair-value" rule of rate making has not yet suffered its oft-anticipated complete demise. Indeed, in several jurisdictions it has been restored to some measure of its earlier vigor by the action of a commission, a court, or a legislature. But one would be naive in assuming that the partial restoration has been based on any conversion of influential political interests to a reproduction-cost or present-value theory of rate making as distinct from an actual-cost theory. Almost certainly, the revival of the fair-value doctrine has been based on another consideration: namely, on the failure of the actual-cost standard, in its traditional version, to make any direct allowance for the serious, continuing price inflation. Rightly or wrongly, many fair-minded people have regarded this failure as grossly unfair to public utility stockholders, on the ground that it measures the stockholder investment in terms of dollars that have lost their former significance.

Adoption of a fair-value measure of the rate base has been seen as the most expedient way by which to make amends for this failure. For this purpose "fair value" is not identified with a reproduction-cost rate base, since such a rate base would often confer upon the common stockholders enhancements in the dollar values of their equity securities far in excess of any increases in general price levels or in current "costs of living." But in line with traditions followed at times (though rejected at other times) by the Supreme Court, "fair value" has been interpreted to mean a rate base which, while derived in large measure from actual costs, gives some "equitable consideration" to estimates of depreciated replacement cost. And in this way, what goes under the name of the "fair-value" rule can really be turned into a liberalized version of the actual-cost rule, the liberalization taking the form of some equitable upward adjustment in the rate base as an offset to price inflation.

(The above quotation is from "Principles of Public Utility Rates" - James C. Bonbright, Chapter XII "The Rate Base: Actual Cost", pages 190, 191)

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

RATE CASES RELATED TO FAIR VALUE

ILLINOIS Re Northern Ill. Water Corp. (1959) 26 PUR 3d 497

The commission, in arriving at a fair value rate base, must use reasonable judgment in determining the weight to be given reproduction cost, original cost, depreciation, book cost, work in progress, materials and supplies and cash working capital.

Re General Telephone Co. of Illinois (1959) 29 PUR 3d 369

Fair value is not original cost depreciated, nor is it reproduction cost depreciated, nor is it a matter of formulas, but it is rather a matter of reasonable judgment based upon the consideration of all relevant facts.

(1964) 56 PUR 3d 66

DELAWARE Re Wilmington Suburban Water Corp. (1962) 47 PUR 3d 175

In determining a fair value rate base, the commission must give weight to original cost depreciated and reproduction cost depreciated.

MONTANA Re Little Chicago Water Co. (1962) 46 PUR 3d 300

In fixing a fair value rate base, the commission should consider reproduction new less depreciation, assessment values, original cost, prudent investment, and certain public records.

NEW MEXICO Re Moyston (Hobbs Gas Co.) (1963) 48 PUR 3d 459

A fair value rate base for a gas utility was computed on the basis of the average of original cost and reproduction cost.

OHIO Re Cleveland Electric Illum. Co. (1963) 47 PUR 3d 44

A fair rate of return is a figure which must be determined under Ohio law on the reproduction cost new less depreciation rate base.

TEXAS Re Houston Nat. Gas Corp. (1963) 52 PUR 3d 244

The commission, in fixing rates, must determine a reasonable balance between original cost less book depreciation and replacement cost new less an adjustment for present age and condition, and in doing so it must use its own judgment and discretion.

PENNSYLVANIA Re Penn. Pub. Utility Commission v. Columbia Gas of Penn., Inc. (1965) 60 PUR 3d 385

Trended original cost figures were accepted for rate base purposes where a comparison of the 5-year average trended original cost study with actual construction experience of 10.1 per cent of the total footage of mains pointed up the reasonableness of the 5-year estimates.

ILLINOIS Commerce Commission v. Peoples Gas, Light & Coke Co. (1953) 99 PUR NS 361

The Commission, in determining present fair value for rate making, is required to consider current economic conditions, price levels, reproduction cost, and original cost as well as the cost of improvements and the probable earning capacity of the property under prescribed rates.

NORTH CAROLINA Re Piedmont Nat. Gas Co. (1961) 40 PUR 3d 62

Upon evidence of average net original cost of a gas company's properties of $17 million, net property value at the end of the period of $19,600,000, and trended original cost of $31,500,000, and considering that no evidence of reconstruction new cost or present-day values by visual appraisal was offered, the commission fixed a fair value rate base of $20,300,000.

Re Nantahala Power & Light Co. (1963) 51 PUR 3d 96

The commission, in establishing a fair value rate base, considered all the evidence offered relating thereto, including, but not limited to, trended cost, reproduction cost new, original cost, average net investment, allocated cost, actual investment, normal depreciated value, and accelerated depreciation value.

ALABAMA Re Southern Bell Teleph. & Telegr. Co. (1963) 47 PUR 3d 77

A reasonable value rate base was determined for a telephone company by giving one-third weight to original cost depreciated, one-third weight to reproduction cost depreciated, and one-third weight to invested capital.

INDIANA Re Indiana Bell Teleph. Co. (1950) 85 PUR NS 129

The commission, indetermining the fair value of utility property, must give consideration to all bases of valuation which may be presented and to the reasonable cost of bringing the property to its present state of efficiency.

MISSOURI Missouri ex rel. Dyer v. Missouri P.S.C. (1960) 37 PUR 3d 507

The commission did not act arbitrarily or unreasonably in fixing a rate base calculated upon the fair value of utility properties (an amount between net original cost and net reproduction cost).

RED:hf 2-18-69

HB188

Public Utilities FORTNIGHTLY

Regulators Have Problems

A plethora of controversial issues continues to confront public utilities: safety and reliability, promotional practices, profit incentives, rate base and rate of return, a high money market. These, of course, are merely illustrative, not a comprehensive list. If the utilities are concerned, so too are their regulators. A leading state commissioner here gives his views on these and other problems with which both management and regulation must deal.

By The Honorable JAMES W. KARBER
PRESIDENT, NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

REGULATION of rates of utilities of all kinds—gas, electric, telephone, water, sewer, and transportation—has long been a matter of major concern both to the utilities affected and their customers, and to the general public. While there are many who quarrel with specific regulatory actions, I think it is safe to say that there are few who believe the utilities, their customers, and the public would be better off without regulation of any kind.

Any regulatory agency, be it federal or state, must at all times keep in mind that it has a responsibility not only to the general public and to the customers of utilities, but — because of these — to the utilities as well. If utilities are required by regulatory agencies to maintain rates that are not fully compensatory or that do not provide a fair rate of return, in my opinion, the agency or commission is doing the general public and the utility customers a disservice as great, in fact, as it would if it permitted the utility to maintain rates that provided a higher rate of return than could reasonably be justified.

IN other words, a regulatory agency must maintain a balance. The ideal rate should be one that would deliver the best possible gas, electricity, telephone, water, sewer, or transportation services to the general public at the lowest possible cost and still yield a rate of return to the utility high enough to enable the utility to obtain additional capital at reasonable costs. For this is mandatory if the utility is to provide modern equipment, improve its methods of production, and provide its investors with a reasonable return on their investment. When the commission permits an adequate return, it provides to the utility the wherewithal for research and development and for capital expenditures. The utility, in turn, obtains the means of achieving more efficient and less costly production with the end result that it will provide the most efficient service at the lowest rate to its customers.

Much of any commission's work is done continuously through intimate knowledge and surveillance of the utilities it regulates with informal action through negotiation much more frequently than formal action through rate cases. But the same

ground rules apply and these are most easily stated in terms of the formal rate case.

Rate Determination

How should regulatory agencies proceed to determine what rates are the best for the utilities, their customers, and the general public? It would be ideal if all of the agencies, state and federal, could follow the same guidelines in any rate case and have the same rules and regulations. Although during the passing of years there has been an increasing uniformity in the treatment of utility rates among regulatory agencies, there still, of course, is not complete uniformity.

However, in considering the propriety of earnings levels, the first requisite, I believe, is that the various regulatory agencies give appropriate consideration to the effects of past and currently renewing inflation either in the rate base or rate of return. In Illinois, for example, we are required to do so by developing a fair value rate base. This involves many questions like the following:

What is the original cost of the property?

What is the original cost depreciated?

What is the reproduction cost new and depreciated and how was it determined? What is the per cent condition that should be applied?

What is the weight that should be given to original cost depreciated and to reproduction cost new depreciated in determining fair value?

What consideration should be given to property under construction but not put into the working plant accounts on the books of the company?

What consideration should be given to property used and useful in the operations of the company and to contributions in aid of construction?

All of these factors enter into the determination of the fair value on which a rate of return must be based.

Fixing the Rate Base

Original cost of the property of any utility that keeps its books in accordance with the accounting rules and regulations of a commission should be easily determined as should be the depreciation accrued thereon. Reproduction cost new, however, cannot be determined with absolute finality. The method of trending prices has often been used to determine reproduction cost new. This is a theoretical method that employs appropriate tables. A more accurate but expensive and time-consuming method, the "unit cost" method, prices an inventory of plant units of the various types at current costs.

Both methods, however, run into difficulty when it comes to determining the reproduction cost new of property that is no longer manufactured. There is, of course, really no point in determining the reproduction cost new of property that cannot be replaced. Consequently, under these circumstances it seems proper either to determine the present-day cost of some given equipment that would be an adequate replacement, or to accept a trended value of the original cost.

Determination of the useful condition of the various plant units is also a difficult problem. This is a question of judging the degree of obsolescence of any given property; i.e., its per cent operating condition. In my opinion, the per cent condition can be adequately determined only through the physical inspection of the property by qualified engineers.

It is also necessary in any computation of either original cost or reproduction cost new of a utility's property to separate the property that is used and useful in the operations of the company from property that is not useful or that has no use in the immediate future.

Having determined the basic factors that comprise fair value, it is necessary for the regulatory agency to decide the weights to be given to



The Honorable James W. Karber is chairman of the Illinois Commerce Commission. Chairman Karber is a graduate of the University of Illinois, AB ('34) and LLB ('36). He was appointed to the commission in 1961 and in that same year moved up to the position of chairman. He is also currently serving as the president of the National Association of Regulatory Utility Commissioners.

original cost depreciated and reproduction cost new depreciated. No fixed formula has been found that can be applied for such a weighting. It thus becomes a judgment factor for any commission to consider the relative age of the property, the per cent increase to original cost of reproduction cost new, the per cent condition of the property, the degree of obsolescence, the condition of the economy, and the probable future trend of costs of materials and labor. There are no set percentages that can be assigned in the weighting of original cost depreciated and reproduction cost new depreciated. Rather, this must be determined on its own merits in each particular proceeding.

Fair value of the plant accounts, of course, does not comprise the entire rate base. To determine the full rate base there must be added to fair value, working capital, including a sufficient amount of cash to meet the needs of the utility (after considering the cash made available through unpaid taxes), materials and supplies, property under construction (to the extent that "interest during construction" is short of a full return), and contributions in aid of construction. Although there has been much discussion pro and con, I think there should be deducted from the base all contributions in aid of construction made by other than the utility or its stockholders that the utility is not obligated to refund.

Considering Expenses

In any rate proceedings, after determining a rate base, it is necessary to determine the per cent of return a given utility is earning on its rate base under the rates in effect at the time of any proposed change in rates. For this purpose a determination must be made of the current income and expenses resulting from the so-called "above the line" operations of the utility. An analysis of income for any given so-called "test year" presents no great problem, for it is relatively simple to determine the income derived from property devoted to utility operation and to eliminate nonoperating income.

In considering allowable expenses, however, questions arise as to the proper treatment of the deferred federal income taxes resulting from accelerated depreciation; that is, whether the "flow through" method or the "normalization" method should be used. Also, the unamortized portion of the investment credit is of concern, and so is the question of charitable contributions — should they be allowed as deductions?

The Federal Power Commission and the state commissions themselves have differed in the handling of taxes. At the present time, the Federal Power Commission seems to have adopted the so-called "flow through" method. In the state of Illinois, however, we have considered it reasonable to normalize these tax items and to allow reasonable contributions to charity, but we deduct from the rate base the unamortized investment credit.

Rates are made for the future and, accordingly, operating expenses, in my opinion, must be adjusted to reflect as much as possible all known changes that have occurred during any so-called test year. They must also be adjusted for any changes that it is *known* will occur in the immediate future, such as wages or tax increases, changes in expense from putting new equipment into operation, and changes in the cost of fuel or materials used for maintenance. In some instances, we have adjusted for increases both in operating revenues because of a natural increasing trend in the sale of the utility's product and in expenses because of a period of inflation. These latter two decisions, however, are made only after deep study and serious consideration.

In some instances, utilities have prepared their operating expenses on the basis of forecasts; e.g., an "estimated year." In allowing for an increase in revenue or an increase in expenses because of natural growth, we have in a way used an estimated year. However, the adjustment of actual past operating results for known changes is quite different from forecasting future results. I believe a regulatory agency is not justified in adjusting either operating income or operating expenses, except for known changes that have occurred or that it is known, with a degree of certainty, will occur.



Needless to say, operating revenues of a utility should be adjusted to annualize all rate changes that have occurred during the test year or that are *known* will occur thereafter. Wage and tax changes which have occurred during the year or are known to be impending are other items which it is appropriate to annualize.

Rate of Return

THUS far, fair value, a rate base, and an adjusted income account of a utility for a test year have been determined and we must now apply a rate of return. The current rate of return of a utility is simply a matter of division. How then does a regulatory agency determine the reasonableness of such a rate of return? How does it evaluate the present-day cost of capital, the capital structure of the utility, the impact of the rate of return of companies in other fields, and the rate of return necessary to permit the utility to compete for capital successfully with other industries?

In order to conclude what rate of return a given utility should be allowed to earn, regulators of utilities must constantly reappraise their policies in view of currently changing economic conditions. What might have been a reasonable and fair rate of return yesterday obviously may not be a fair rate of return today. Nor is a rate of return susceptible to precise determination. The Supreme Court of the United States said in the Bluefield case, "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time in the same general parts of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties . . ."[1] It is no mean problem, however, to determine just what businesses do have corresponding risks and uncertainties.

The actual capitalization of the utility is a factor in determining a rate of return. I can find no ideal capitalization ratios. Reasonable capitalization figures may well vary with the industry and company under review and there is no set combination of debt, preferred stock, and common equity which is universally appropriate. In a number of instances, in attempting to justify a rate of return, utilities have used a so-called ideal capitalization rather than their current capitalization. I do not think, however, that a utility is entitled in determining a rate of return to do other than use its capitalization as it exists or as it may be in the foreseeable future.

[1] Bluefield Water Works & Improv. Co. v West Virginia Pub. Service Commission, 262 US 679, PUR1923D 11, 20.

Cost of Money

THE cost of capital is an important factor in determining a rate of return and it is important that this phase be carefully developed. But the regulator's problem goes much further. In addition to determining the cost of capital, he must

Appraise the rate of return earned by comparable industries, with due regard for differences in risk.

Make a judgment as to what rate of return is required to bring the most service to utility users at the lowest rates.

Make allowance for a reasonable profit above the confiscatory level in the rate of return.

Keep at least one eye fixed on the competitive sources of energy, gas, and communications.

Above all, the rate of return must be sufficient to permit the utility to earn the money it needs to continue to research and provide new and better technologies with a resultant decrease in the costs of operation and a greater service to the utility's users — sufficient, in short, to stimulate management through profit incentives for better performance to the consumer benefit.

The Rate Case

IT is the duty of the utility in any rate proceeding to present competent and qualified witnesses and complete and thorough testimony and evidence. The burden of proof is upon the utility and no utility should appear before a regulatory agency in a rate proceeding without first having prepared all of its exhibits as to original cost and reproduction cost (both gross and depreciated), income and expense, rate of return, and all of the other factors that go into the making of a rate case.

On the other hand, it is the duty of the commission to provide a full and fair hearing; to require any interveners in the case to supply full and complete evidence to sustain their positions; and to provide a staff that is experienced, capable, and competent so that it may properly analyze all of the testimony and evidence submitted in the case and in turn introduce competent witnesses, testimony, and evidence upon all of which the commission may base its decision.

Commissioners cannot be expected to have the



time or, in some instances, the specialized knowledge to analyze thoroughly all of the important problems that arise in a rate case. That is why it is so important that every commission have at its disposal personnel that can supply the expertise necessary to supply the commission with facts and accurate data upon which it may base its conclusions.

Beyond the immediate case, commission regulation must be capable of formulating policies and plans which are applicable to present as well as future situations. There must be a constant review of all relevant factors and an overall policy for all utilities, with allowance for particular situations. Regulatory agencies must gear their thinking to the present space age and give up what now may be nonapplicable traditional thinking. The utility must have a rate of return that reflects the present buying power of money; that will permit financially sound and economic operations; that will stimulate management to maintain operational efficiency and introduce new and improved service; and that will give the most adequate and satisfactory service at the most reasonable rates—the primary goal of all regulatory agencies.

It should be remembered, however, that regulatory commissions cannot fix rates so as to guarantee a specific rate of return. Their function is to fix rates which will permit the utility to earn a reasonable rate of return by its own efforts under the economic conditions existing at the time the rates are set.

Promotional Practices and Allowances

ALTHOUGH the establishment of fair and reasonable rates and the issues that arise in connection therewith are major regulatory problems, there are other problems that contribute to the regulator's headache and for which solutions must be found. One of these is the use of promotional practices and allowances.

Until recently, cases concerning the legality and propriety of promotional practices and allowances usually involved complaints of the oil industry against local gas distributors and dealt with limited and specific promotional practices. Now, increasing competition between electric and gas companies has caused the issue to spread to many states throughout the country and to the federal government.

I believe that the Illinois Commerce Commission was the first to begin a general investigation of promotional practices. That investigation is continuing and we hope we can issue a final order before the end of this year. Now, general investigations are being made by other states and by agencies of the federal government.

PROMOTIONAL practices themselves are a matter of definition and the first problem of any regulatory agency is to define and determine just what it considers promotional practices to be. I would define promotional practices to include, but not necessarily to be limited to

1. Any payment by a public utility, its subsidiaries, or its agent (in cash, merchandise, or labor) donation, gift, subsidy, conveyance, transfer, or other consideration to any person, corporation, association, or group for the purpose or evident design of inducing the recipient to

a) Purchase or use the utility's service or to use additional service;
b) Purchase or install equipment, facilities, or appliances designed to use such utility service;
c) Specify the purchase or installation of equipment, facilities, or appliances designed to use such utility service.

2. Free (or less than cost) installation, operation, or maintenance of equipment, facilities, or appliances.
3. Free or less than cost service.
4. Free or less than cost nonutility professional service.
5. Payment of cash or other consideration to architects, builders, subdividers, developers, or others in the same category for work done on property not owned by the utility for the purpose of inducing the recipient to purchase or use the utility service or to use additional service.
6. Financing equipment, facilities, or appliances at less than cost.
7. Guaranties as to the maximum level of bills.
8. Financing assistance—the extension of credit, making of a loan or an investment, directly or indirectly to any person or corporation by any means whatsoever for the purpose or evident design of inducing said person or corporation to select or use the service (or additional service) of such public utility or to select or purchase equipment, facilities, or appliances designed to use such utility service, including, without limitation, loans, advances, guaranties, investments, leases, sale, and repurchase or sale and leaseback agreements, sales on open account, and conditional or instalment sales contracts.
9. Special discounts.
10. Trade-in allowances at greater than value.
11. Discounts or allowances for the purchase or service of air-conditioning or heating equipment, stoves, refrigerators, washing machines, dryers, or other appliances.
12. Installation of free wiring or piping.
13. Advertising or contributing to advertising on account of a customer or a potential user of the utility's service.
14. Replacement allowances for equipment, facilities, or appliances.
15. Free certificates or premiums offered for or with the purchase of equipment, facilities, or appliances.
16. Sales bonuses and allowances to dealers for the sale of equipment, facilities, or appliances.
17. Free heat correction programs.
18. Special rates for the installation of equipment facilities or appliances.

THERE are those who believe that promotional practices should be entirely a matter for control by the utilities themselves and I would agree that ideally this would occur. But the fact of the matter is that too frequently competing utilities have tried to outrival each other in promotional offers to the detriment of those users who are not in position to share the favors. Under these circumstances, it is the duty of the regulator to see that promotional practices are beneficial both to the utility and the customer, are uniformly applied, and comply with federal and state laws.

During the early course of the investigation in Illinois, the commission concluded that certain promotional practices and allowances should be prohibited. Consequently, on July 12, 1967, the commission issued an interim order [2] prohibiting electric and gas utilities from

1. Making any loans, guarantee of loans or grants to any corporation, group, or individual for building construction; or engaging, in any way, in the investment in or financing of any nonutility property;
2. Making any promotional allowance to any corporation, group, or individual for any promotional, advertising, or publicity purpose of any of said corporation, group, or individual;
3. Making any payment, or extending any other consideration, to architects, engineers, builders, subdividers, or others for work done on property not owned by said electric or gas utility and/or its subsidiary or affiliated companies;
4. Purchasing or acquiring for the purpose of leasing or renting to others, or making loans to others for the purchase of, any electric or gas equipment, appliances, or facilities, the cost of which exceeds $1,000 for each specific location without first having obtained the approval of this commission.

[2] Re Promotional Practices of Electric and Gas Utilities (Ill 1967) 69 PUR3d 317.

The commission also ordered that promotional practices and allowances should be available on a uniform basis and should not be unlawfully discriminatory.

THE final decision and order of the Illinois commission in any individual case will be determined by the answers to the following questions:

1. Are the promotional practices and allowances economically feasible?
2. Are they to the best interest of the utility, its customers, and the public?
3. Are they uniformly granted?
4. Do they violate any federal or state anti-trust laws?
5. Are they unlawfully discriminatory?

The Issue of Safety

BECAUSE of the current emphasis placed on pipeline safety by the Congress of the United States, safety has been pushed to the forefront in Illinois, as well as other states as an important regulatory problem. Last February 27th, I testified before a House Committee on Interstate and Foreign Commerce with respect to the National Association of Regulatory Utility Commissioners' position on pending gas safety legislation. Under SB 1166, the Department of Transportation will be given authority to establish minimum safety standards for the construction, operation, and maintenance of all gas systems in the United States. The Senate bill, as passed by that body, will permit the states to continue supervision of pipeline safety, provided the state agencies will enter into an agreement with the Department of Transportation to carry out the minimum safety requirements of the federal law. Final control, however, will rest with the Department of Transportation.

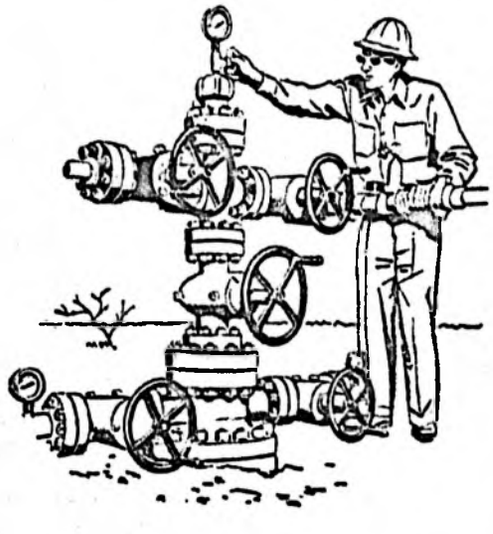
If you were to listen to the proponents of the federal safety bills you might draw the conclusion that regulation of safety was something new. This is not the case, however, because when many of the public utility laws across the land were first passed, such laws provided for general supervision of safety. In our own case, the Illinois Commerce Commission or its predecessors have had jurisdiction of safety since at least 1914. The Illinois commission has carried out its responsibility of assuring public safety in a number of ways. First, before a public utility can expand its service into a new area, the utility must obtain a certificate of public convenience and necessity from the commission. A part of the evidence deemed necessary in such certificate cases is the construction, operation, and maintenance specifications for the mains. Secondly, the commission's investigation of accidents, review of accident reports, inspection of pipelines, investigation of complaints, analyses of depreciation, and analyses of per cent of new physical condition during rate proceedings, keeps the commission and its staff advised as to the degree of maintenance and safety of the gas utility system operating in Illinois.

THIRDLY, the commission used the ASA (now referred to as USASI) B31.8 Code for Pressure Piping as its guide in construction and safety matters long before the commission officially adopted a mandatory version of this code as our General Order 192. We adopted General Order 192 last year to indicate to Congress that Illinois was supervising safety.

In carrying out our supervision of safety, only once in the last ten years have we found it necessary to suggest to a utility that a certain line was dangerous and should be removed from service. On a few occasions the staff has found that a degree of inspection on construction jobs to be too lax and the systems were not being installed in as good a condition as they could have been. But, these things are all history.

With respect to the future, the commission's action will be determined by what Congress decides with respect to safety legislation. If the vote by the Senate is an indication of what may happen, we will have some form of federal regulation.

In anticipation of the future, the NARUC Com-



ing price levels and is unrealistic and erroneous. Current cost accruals do not represent amounts expended for the rendition of service and should not be included in rates. Such depreciation would necessitate conjectural variations in the annual accrual. It would compel an involuntary contribution of capital by the ratepayers and require them to pay a return on capital contributed by them, resulting in an unwarranted profit to the utility. Ratepayers would sustain alone the impact of inflation.

In any event, said the commission, current cost depreciation is based upon a fiction since property taken out of service is not replaced in kind but by other and different property (34 PUR3d 257).

On appeal of this decision to the Kansas supreme court, the commission argued that the depreciation expense allowance is not intended to provide a surplus for replacing the original assets upon their retirement. The company argued that it sought only to recover through depreciation the value of its plant as it is consumed in the furnishing of service, in order that the integrity of the plant may be preserved. It said it could not do this by basing depreciation expense on plant investment made at preinflation price levels.

The purpose of annual depreciation, said the court, is to return to the investors the amount of their investment in the original plant. It is not intended to return the cost of reproducing a new plant when the old one is worn out. If the construction of a new plant requires additional capital, a fair rate of return will be allowed on the additional cost (51 PUR3d 113).

Present Customers Not to Be Burdened for Future Costs

The Wyoming commission allowed depreciation expense based on original cost of plant and denied any additional allowance to reflect current price levels. The company contended that when the original investment is returned through depreciation charges measured in current dollars, the stockholders are not recovering the full amount thereof. It asked for an additional allowance, to be set up as a capital reserve, prorated between debt and equity capital. It claimed a return on the portion allocated to common equity.

Any such additional allowance, said the commission, quoting from a Michigan commission decision (22 PUR3d 369), would involve an involuntary contribution of capital by the customers. Present customers who pay the legitimate costs of present service cannot be expected to pay additional sums which may be needed to provide plant to serve future customers. This is the responsibility of the investors. Moreover, the commission declared, to allow the company to create the proposed capital reserve and earn a return on it would require the customers to pay a return on capital contributed by them (23 PUR3d 68).

The Hawaii commission refused to authorize earnings at such a level as to accrue a depreciation fund to meet an anticipated higher equipment replacement cost than the actual cost of the equipment. Only the return of actual dollars in existing equipment is allowed. To grant an additional allowance, said the commission, would call for higher rates today for a future service and, in effect, would seek a return on capital paid in through these very rates in the future. Even if such a present-day extra burden in expenses were justified, the commission pointed out, it would be limited to the present worth of the future incremental higher replacement cost (40 PUR3d 140).

The District of Columbia commission observed that original cost is the conventional depreciation base approved by the weight of authority. Depreciation in theory, it pointed out, is unrelated to replacement because depreciation

occurs whether or not the property is replaced. It would be unfair to the company to deny any depreciation expense simply because the company did not propose to replace the depreciating property. If a replacement cost basis were used and prices were rising, consumers would become involuntary investors though with no right to a return on their investment. What is even worse, they would thereafter be required to provide a fair return and depreciation allowance on capital which they themselves had contributed. Original cost, the commission held, is just and equitable for both investors and consumers (38 PUR3d 19).

The Virginia commission indicated that depreciation expense should be based on original cost and not on reproduction cost, because it would be unjust to make present consumers pay for new plant to be consumed by a future generation of consumers (19 PUR3d 1).

Rate of Return Provides for Inflation

A company before the Alaska commission argued for depreciation expense based on fair value. The commission found that this would be inequitable. Fair value, it explained, may be more or less than original cost. If fair value is set at less than cost, the investor is penalized by depreciation expense based on that value because he would not recover his cost. This would amount to confiscation. On the other hand, if fair value is set at more than cost and depreciation is based on that figure, the investor would recover more than his cost under the guise of depreciation expense, with a consequent understatement of the rate of return. The commission indicated that the rate of return is the proper place to make adjustments for inflation or attrition if any are required (62 PUR3d 113).

Cost Basis Recognized but Extra Accrual Suggested

The cost of an asset of a public utility is a prepaid operating expense to be apportioned as depreciation over the years of its life by some more or less systematic procedure, the Ohio supreme court declared. It is cost, not a higher or lower value, that is to be so apportioned whether value for rate-making purposes is determined on a reproduction cost new basis or otherwise. Thus, the court saw no occasion for any "hypothetical depreciation" allowance, as suggested by the company here concerned.

The court recognized, on the other hand, that where costs have risen, the depreciation charged on a cost basis will not be sufficient to replace an asset when it is used up. Theoretically, such depreciation should at that time have provided an amount sufficient to replace the used-up asset. The court indicated that where reproduction cost new less depreciation is higher than the book depreciated cost of an asset, some amount for annual depreciation probably should be allowed in addition to the annual depreciation expense. Probably for this reason, it was noted, an Ohio statute provides for "making reservations from the income for surplus, depreciation, and contingencies." In the instant case, however, it appeared that dividend requirements on the company's common stock were only 5 per cent while 7 per cent was allowed on the common equity. It was intimated that the extra 2 per cent might provide for any additional depreciation requirement (45 PUR3d 1).

Right to Restoration of Capital Recognized

The Iowa supreme court said the allowance for depreciation expense should be based on present value rather than original cost. Logic, the court pointed out, requires that the valuation for depreciation be consistent with the rate

base, which was fair value in this case. It would do the utility company no good to set rates on a fair present value base if that base is then to be ignored and its value annually eroded away by the denial of an adequate depreciation expense allowance. The company's right properly considered, the court declared, should be the right to restoration of its invested capital (20 PUR3d 159). The court followed this decision in a 1964 case in which it indicated that it would be inequitable to refuse to permit a company to recover fair value over the remaining service life of its property (54 PUR3d 464).

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

HB/CB

Jackson

CITY OF NOME STATEMENT IN OPPOSITION TO THE PASSAGE OF ANY PUBLIC SERVICE COMMISSION LEGISLATION THAT WOULD REGULATE OUR PUBLIC UTILITY SYSTEM.

Senate Commerce Committee
Mr. Chairman, Legislators:

We do not feel that there is any need for any legislation to regulate our utilities for the following reasons:

1. We are from a remote area where communication is difficult and expensive.

2. We do not have any utility problems that we cannot resolve on our own. Our utilities are protected by city ordinance against competition from within the city or outside of our city.

In 1954 the City of Nome purchased a privately owned power system paying two prices for it. At that time power was sold at a consumer cost of 15¢ per KWH down to 10¢ per KWH. Since that time we have built a new system, increased the voltage, increased load capacity capability, consequently resulting in improved service. Consumption has steadily increased, costs have steadily increased. Yet our rate has decreased to 10¢ and 7¢ per KWH over this 15-year period.

Democracy works best where we have strong local home rule governments, be it a village, a city, a county, or a borough.

The Public Service Commission legislation infringes on our local home rule government prerogatives and responsibilities. This would weaken local government.

In areas where problems do exist that cannot be resolved between factions, i.e. Chugach Electric and the City of Anchorage, we suggest legislation be prepared and enacted to resolve the problem, that specific problem.

While we are doing well with our utility we absolutely cannot afford the luxury of additional costs that we would obviously be confronted with as a result of Public Service Commission regulation. We have been told that PSC regulation will not cost us any money. Maybe it will not -- initially. But once PSC gets us in their grasp it is inevitable that costs will arise. You cannot prove otherwise. We have had ample experience with state government administering our affairs by remote control. When we need help we'll let you

know about it. In the meantime we are doing fine with our utility.

Respectfully submitted on behalf of the City of Nome, Alaska,

Stanley L. Sobocienski
Secretary
Nome Light & Power Utilities

Attested to:

Elmer C. Straub
Member
Nome Light & Power Utilities

Robert H. Renshaw
Member
Nome Common Council

HB186

CITY OF KETCHIKAN STATEMENT IN OPPOSITION TO THE PASSAGE OF SENATE BILL NUMBER 128

SENATE COMMERCE COMMITTEE

Submitted by Elmer B. Titus, Utilities Manager, on behalf of the City of Ketchikan, March 5, 1969

Mr. Chairman, Members of the Committee:

For the record, I am Elmer Titus, Manager of Ketchikan Public Utilities, City of Ketchikan, Alaska, representing the views of the City Council and the Advisory Board for Ketchikan Public Utilities.

The City of Ketchikan is opposed to the passage of Senate Bill 128, an act granting the Alaska Public Service Commission regulatory authority and jurisdiction over municipally-owned utilities.

Historically, public service commissions were created to provide for the regulation of utilities to protect the interest of the consumer-public from gouging and poor service from private utilities. The need for this type of protection for the public against privately-owned utilities is still apparent; however, since the consumer-public served by municipally-owned utilities is adequately protected by the regulation and control of locally elected government bodies, the need for such further regulation has not been demonstrated. Such regulation by the State of Alaska as proposed in SB 128, would, in our opinion, constitute an unnecessary interference in the management of cities affairs and create great additional expense in the operation of its utilities which could only result in higher rates for service to be paid by the consumer.

Article 10 of the State Constitution, Section 1, entitled "Purpose and Construction", was designed to allow local charter cities the maximum local control. Section Number 1 reads as follows:

> "The purpose of this article is to provide for maximum local self government with a minimum of local government units, and to prevent duplication of tax levying jurisdictions. A liberal construction shall be given to the powers of local government units."

The City Council of Ketchikan has been able to regulate and operate the municipally-owned utilities for a period of approximately 34 years and to provide to its people a good level of service at the lowest rates in Alaska, and at rates below the national average for residential electrical services. No private utility presently under the jurisdiction of the Public Service Commission in Alaska can match this performance.

It would appear that the present duties now imposed on the commissioners will

require as much time as the commissioners could reasonably be expected to give to their duties in view of the fact that the members will be paid $5,000 plus per diem and travel expenses. If the commission is further burdened with the duties set forth in S.B. 128 and are required to regulate power and light, telephone, telegraph, gas, oil, water and sewer throughout the state, such members will have to be placed on a full-time salary basis.

The proposed bill makes no provision for resolving conflicts which may occur between commission orders on the form of accounts and other records with requirements of federal agencies where licensing by such federal agency for hydro-electric projects carry with it certain record keeping and reporting requirements.

To regulate all the public utilities in Alaska, both private and municipally-owned, as required by this bill would be very costly. Thousands of dollars in additional expense would have to be borne by the consumers and tax payers of the State. In the absence of need for such regulation, particularly in the case of municipally-owned utilities, such expense cannot be justified at a time when the cities require every available dollar for their development and growth. Certainly the utilities of the City of Ketchikan cannot afford any additional expense to which it may be subjected if this bill is passed. In fact, with increased labor and material costs it has been a most difficult task in recent years to maintain a reasonable standard of service and carry debt service requirements without a general rate increase. Any additional expense brought about by regulation of its utilities by the State could very well require the City of Ketchikan to increase its rates for this purpose.

In order to operate, the bill requires all public utilities to obtain a certificate of public convenience and necessity. It is almost unthinkable that after 34 years of ownership and operation of the power and light, telephone and water utilities by the City of Ketchikan that its continued operation of these utilities would become dependent upon a certificate of convenience and necessity to be issued at the pleasure of an appointed commission. This right of franchise, which in effect this provides for, is in conflict with the City's Charter adopted under the Constitution and laws of the State of Alaska. The operation of the city-owned utilities is provided for in this Charter and, in fact, any sale of its utilities can be made only upon the affirmative vote of the majority of the qualified voters of the City.

Relating to rates and changes in rates, the Bill is in conflict with the Charter of the City of Ketchikan, wherein the power to fix rates and charges for public utility services is vested in the Council. Such Charter provision also prescribes the procedure. private utilities?

In conclusion it would appear that any act passed by the Legislature which would impose regulation by the Alaska Public Service Commission on municipally-owned utilities of charter cities would raise very serious legal questions. More important than the legal aspect is the fact that the need for regulating municipally-owned utilities does not exist, such regulation would be an expensive undertaking for both the State and the cities, and in the end would serve no useful purpose because municipal utilities are already regulated by city councils who are probably more conscientious and responsive to the requirements of its utility customers than any state commission.

We feel this bill is a continuing effort to legislate for a problem that has existed elsewhere that can and should be resolved by local communities.

I wish to express the appreciation of the City Council and the Ketchikan Public Utilities Advisory Board for the opportunity to be represented before the Committee, and to those appreciations I wish to add my own personal thanks for the Committee's courtesy.

Elmer B. Titus, Manager
Ketchikan Public Utilities

EBT:jh

April 9, 1969

HOUSE JUDICIARY COMMITTEE

SECTIONAL ANALYSIS OF CSHB 202

The original HB 202 is identical to SB 128 (introduced by request of the governor), except for the exemption section (proposed AS 42.05.691). In the preparation of its committee substitute, the House Judiciary Committee considered the comments and suggestions numerous individuals presented at hearings and meetings held on the PSC bills, particularly the detailed written analyses of Don Hall, executive director of the Alaska Public Service Commission, and Karl Walter, Anchorage City Attorney. (It should also be noted that HB 188 and SB 54 are identical to each other. SB 54 is based on, and is very similar to, 1965 CSHB 138, as is 1967 HB 164.)

AS 42.05.010. This section implements the recommendation of Don Hall consistent with the practice in many other states where the state name precedes the commission name.

AS 42.05.020. This section is amended in the original bill to provide that the governor shall designate the chairman of the commission. The committee substitute amends the original bill by specifying that his term is four years rather than two years. The reason for this change is that two years seems like too short a term and by lengthening it the chairman is less subject to the pressures of politics.

AS 42.05.030. This section of the original bill is primarily concerned with providing for vacancies in the office of commissioner and specifies that they shall be filled by appointment by the governor and confirmed by the legislature. The committee substitute deletes some unnecessary language regarding the confirmation by the legislature (but confirmation will still be required).

AS 42.05.035. This section provides two methods of removal of commissioners. One is with the consent of a majority of the legislature and the other is for cause, such as incompetence or misconduct. The committee substitute does not change the original bill in this regard.

AS 42.05.040 is not amended by either the original HB 202 or the committee substitute. It ~~provides for a~~ states the professional qualifications required of commissioners.

AS 42.05.071. This section begins the entirely revised portion of the PSC chapter. The old sections 70 - 650 are repealed. Section 71 provides that two members of the commission constitute a quorum. Present law is silent on this point.

AS 42.05.081. This section requires the commissioner and, under the committee substitute, the executive director to take the oath of office required of principle officers of the state. The language in the original bill said each commissioner and "each person appointed to a civil executive office", which language is not appropriate to Alaska law.

AS 42.05.091 provides for compensation of the members. It gives them per diem and travel expenses and an annual salary of $6,000 (it was $5,000 in the original bill). The chairman of the commission however, is to serve fulltime and is entitled to the salary of a superior court judge.

AS 42.05.101. This section simply provides for a principal office and branch offices and requires the commission to have an official seal. The committee substitute does not change this section. ST RC 02

AS 42.05.111. This section specifies that the attorney general is legal counsel for the commission. The section is not amended by the committee substitute.

AS 42.05.121. This provides that the commission may employ an executive director, requires him to be an experienced administrator and the committee substitute adds the provision that he may be one of the commission members. The committee substitute deletes the authority to hire hearing officers. It also deletes some unnecessary language regarding appointment of personnel. Both the original bill and the substitute provide for contracting for the services of consultants. The following language should be added after the period on line 5 page 4 of CSHB 202: "The salary of the executive director may not exceed that of a superior court judge." this would prevent him from being paid the full salary for both the director

Attorney General's position: Tim - I've discussed this with the Chairman and the Chairman's position: Tim - I've discussed this with the Chairman and the Chairman's position: Tim - I've discussed this with the Chairman and the

AS 42.05.131 is a section added by the committee substitute in order to protect against conflicts of interests of commissioners and employees. This provision is a slightly broadened version of [illegible] sec. 45 in HB 188.

AS 42.05.141 specifies the general powers and duties of the commission. The committee substitute makes some minor language changes in this section. One change is the deletion of the word "supervise" so that the commission will regulate utilities but not supervise them. (This section is a combination of AS 42.10.070 and California Public Utilities Code, sec. 701.)

AS 42.05.151 gives the commission authority to adopt regulations, requires the adoption of certain types of procedural regulations, and gives the commission and employees certain administrative authority. The committee substitute expands slightly upon the type of regulations the commission is required to promulgate, specifically mentioning the handling of procedural motions by a single commissioner. The committee substitute also allows for representation by out-of-state attorneys in accordance with Civil Rule 81. The committee substitute further provides for each commissioner acting alone to issue orders on procedural motions; this should expedite much of the commission's proceedings. ~~(the original version is a combination of AS 42.10.070 and California Public Utilities Code, sec. 701)~~ (Part of this section is based on AS 42.07.150(b).)

AS 42.05.161. This section specifies that the Administrative Procedure Act applies to regulations adopted by the commission but does not apply to adjudicatory proceedings of the commission. It is felt that the provisions of the APA regarding accusations, ~~and~~ statements of issues and hearing officers are not appropriate to proceedings of the PSC, such as rate hearings, ~~etc.~~ The committee substitute deletes some of the original bill's exceptions for the types of regulations required to be filed under the APA. (The deleted portion of (b) was based on the federal APA – 5 USC, § 553.)

AS 42.05.171. This deals with investigations and hearings. The committee substitute makes a distinction between formal investigations and hearings and informal ones, requiring that for formal proceedings two or more commissioners must be present. It also requires a commissioner to hear or read the record before participating ~~or~~ in making a decision of the commission. (The original section was adapted from the Calif. Public Utility Code, sec. 310. of Pa. Stat., Title 66, sec. 458.) The committee substitute deletes a section (derived from Pa. Stat., Title 66, sec. 458) which is AS 42.05.181 in the original bill, dealing with hearing officers and agents. The intent is to do away with the position of hearing officer and require hearings to be held by the commissioners themselves. ~~(Part of this section is based on AS 42.07.150(b).)~~

AS 42.05.181. This requires, providing an opportunity to be heard before a final order of the commission may issue.

AS 42.05.191. This requires the commission to make reports on all proceedings held under this chapter.

AS 42.05.201 requires reports, orders, etc., to be in writing and requires that they be published and be given proper distribution.

AS 42.05.211 simply requires the publication of annual reports by the commission. (IT is the same as AS 42.07.140.)

AS 42.05.221 requires a public utility to get a certificate of convenience and nedessity before operating as a utility. It also provides for the commission to eliminate the duplication of facilities. The committee substitute adds a subsection which grants grandfather rights to public utilities not presently required to have a certificate of convenience and necessity. ST RC.03 Subsection (c) should be amended by adding the following language after the period in line 16 on page 8 of CSHB 202: "Such a certificate is subject to modification where there are areas of conflict with other utilities."

(Subsection (a) is similar to present AS 42.05.193, and subsection (b) was taken from proposed AS 42.05.245 in 1967HB 164.)

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AS 42.05.231. This section provides for the filing of applications in the form and with the information required by the commission. The committee substitute deletes the requirement that the application be "verified", believing that this is unnecessary.

AS 42.05.241. This section requires that the utility be able to provide the utility services applied for and allows the commission to specify conditions for the issuance of a certificate. (It is adapted from proposed AS 42.05.265 in 1967 HB 164.)

AS 42.05.251. This section, which is added by the committee substitute, provides that public utilities have the right to use public streets, etc., upon the payment of a reasonable fee and upon reasonable conditions which the city or borough requires. Disputes as to reasonableness are to be decided by the commission.

AS 42.05.261. This section allows for the discontinuance of a service only when the commission finds that the continued service is no longer required by public convenience and necessity. It also allows the commission to require the reinstatement of service previously discontinued, again if the public convenience and necessity require it.

AS 42.05.271. This section sets out the basis for ~~a~~ the commission's ordering the modification, suspension, or revocation of a certificate. The committee substitute adds a requirement that failure to comply with the provisions of the chapter or failure to comply with conditions of the certificate must be a wilful failure.

AS 42.05.281 prohibits the transfer of a certificate ~~but not~~ without prior approval of the commission.

AS 42.05.291. This section requires public utilities to furnish and maintain adequate, efficient, safe and reasonable service and facilities, and allows the commission to set standards for this. The

(Cf. present AS 42.05.190, and 42.05.460 and Pa. Stat., Title 66, sec. 1171.)

committee substitute adds the requirement that the commission's standards shall conform to standard practices of the industry. Under this section, the commission also has the authority to require certain services or facilities or certain repairs, extensions, etc., which are reasonably necessary for the public.

AS 42.05.301 prohibits discrimination in service but allows the establishment of reasonable classifications of service. (This was adapted from Pa. Stat., Title 66, sec. 1172. Cf. present AS 42.05.460.)

AS 42.05.311 requires a public utility having certain distribution or transmission facilities such as conduits, poles, pipelines, etc., to allow the joint use and interconnection of these facilities upon being paid a reasonable compensation, when the public necessity and convenience requires. This section also requires that the tariff of a public utility include rules setting out the terms by which its customers may hook up with certain facilities. The committee substitute deletes, as being unnecessary to state, the provision in the original bill that dealt with the contents of these rules, with regard to the customers aiding in construction of certain facilities. (This section is a revised version of present AS 42.05.360.)

AS 42.05.321 provides for the commission's resolution of conflicts when there is a failure to agree upon joint use or interconnection. (This section is a revised version of present AS 42.05.370.)

AS 42.05.331 gives the commission authority to set standards for the measurement of utility services. SLA 03 (Presently AS 42.05.410.)

AS 42.05.341 requires the commission to provide for periodotic testing and certification of meter standards. (Presently AS 42.05.420.)

AS 42.05.351 requires the commission to provide for the examination and testing of measuring appliances used by a utility's customer. The committee substitute changes this section by making it identical to chapter 4, SLA 1969, (amending present AS 42.05.430) which will be repealed if the Public Service Commission bill passes.

AS 42.05.361 requires each public utility to file its complete tariff with the commission and requires that these tariffs be kept available for public inspection. (Cf. present AS 42.05.470.) The committee substitute changes this latter requirement so that the tariffs need be kept only at the principle office in each community served. The committee substitute also classifies special arrangement contracts which affect rates and charges as special tariffs. This classification is a suggestion of Karl Walter, as is the slightly expanded basis for the commission's rejection of the filing of a ~~the~~ tariff (in (c) of this section).

AS 42.05.371 prohibits deviation from a filed tariff. (Cf. present AS42.05.510.)

AS 42.05.381 requires rates to be just and reasonable. (Cf. present AS42.05.190.) The committee substitute adds a subsection which specifies that a municipality is entitled to a fair and reasonable rate of return in establishing the rates of a municipally owned and operated utility. In order to put municipal utilities on a par with other utilities, a municipality may include a reasonable street permit fee in determining the utility revenue requirements. (This new provision is also a suggestion of Karl Walter.)

AS 42.05.391 prohibits discrimination in rates. However, it provides that the rate charged by a municipality for a utility service furnished beyond the corporate limits is not necessarily unjustly discriminatory solely because it is ~~might be~~ different from the rate charged for service within the corporate ~~for~~ limits. The committee substitute deletes the provision amplifying sp. on the discrimination prohibition, the feeling being that the point was adequately covered by subsection (a). The substitute also adds a provision prohibiting other types of discrimination, such as by the payment of ~~rebates~~ or bonuses or by furnishing special facilities or services. The furnishing of equipment must conform to a tariff approved by the commission. (Cf. present AS 42.05.190; Calif. Public Utility Code, sec. 461; Pa. Stat., Title 66, sec. 1141.)

AS 42.05.401. This gives the commission authority to settle disputes as to the apportionment of joint rates. The committee substitute deletes the provision which allows the commission to employ consultants and require utilities to pay the fees and expenses of consultants, believing that this authority is already covered in other sections of the bill.

AS 42.05.411 requires commission approval for filing of new tariffs and changes in old ones. (Cf. present AS 42.05.490.)

AS 42.05.421 allows for commission investigation of a tariff change. (Cf. ~~present AS 42.05.490.~~ 46 USC § 845 and proposed AS 42.05.345 in 1967 HB 164.) The committee substitute changes the seven-month period for which the commission may suspend the operation of a tariff change to five months. ~~The~~ commission may require a utility to place in escrow all amounts received by reason of an increased rate. The committee substitute deletes the provision that required the utility to pay interest on amounts collected which have been found to be unreasonable or unlawful and which are required to be returned to the consumer.

AS 42.05.431. This section simply gives the commission power to determine just and reasonable rates, classifications, regulation, practices, etc. (Cf. present AS 42.05.520.) The committee substitute adds a provision allowing the municipalities to covenant with bond holders with regard to rates of municipally owned utilities. This additional provision was picked up from sec. 335 of HB 188. ~~(which bill is identical to SB 54).~~

The committee substitute deletes two sections in the original House Bill 202 which provided for reparations and the recovery of reparation payments. (They were taken from Calif. Public Utility Code, secs. 734 and 735.)

AS 42.05.441 provides for the commission's ~~determination of the~~ valuation of property of ~~the~~ a public utility. The original bill required the commission to be guided primarily by the elements of original cost, less accrued depreciation. The committee substitute changes this by requiring the commission to be guided primarily by the average of original cost, less accrued depreciation, and reproduction cost, less physical deprication. (There is a typographical error on page 19, line 19 of the committee substitute; there should be a comma after the word depreciation in that line.)

AS 42.05.451. The original bill required public utilities to use an accounting system prescribed by the commission and the committee substitute allows the utility to use a generally recognized system of public utility accounting; if the utility does not do this then the commission will prescribe for the accounting system. (Cf. present AS 42.05.290 & 310.) This section also requires each utility to submit an annual report to the commission. The original bill required this to be done within 75 days after the close of the utility's annual accounting period; the committee substitute changes this to 90 days and allows additional time to be granted upon a showing of good cause. (The committee substitute provision regarding the accounting system was picked up from HB 188, sec. 435.)

AS 42.05.461. This section allows the commission to require a utility to maintain a continuing inventory of all units of tangible property, showing the current location of the property, the original cost of the property, etc.

AS 42.05.471 requires utilities to keep depreciation accounts. The commission is to determine and allow depreciation expense in fixing rates, etc. (cf. present AS 42.05.340.) The committee substitute adds a provision which allows a new utility to amortize operating losses, if any, which it has incurred in developing its market and system.

AS 42.05.481 requires utilities to keep accounts of subsidiaries separate and prohibits consideration of the property, expense and revenue of a subsidiary in the determination of rates and charges. (cf. present AS 42.05.300.)

AS 42.05.491 simply requires that records and accounts be kept in ~~this state~~ Alaska. (cf. Pa. Stat., Title 66, sec. 1214.)

AS 42.05.501 gives the commission access at all reasonable times to the books of a utility and, in the committee substitute, the affiliated interests of a utility. (cf. present AS 42.05.540.)

AS 42.05.511 gives the commission authority to investigate management of a public utility to determine whether unreasonable practices are found to exist which adversely affect the cost or quality of service of the public utility. SR RUCS

AS 42.05.521 gives the commission authority to direct a utility to cease paying dividends on its common stock when the capital of the utility is impaired, or, under the committee substitute, when it might become impaired by a continuation of current practices. (This new language was suggested by Karl Walter. Cf. proposed AS 42.05.535 in 1967 HB 164.)

AS 42.05.531 requires surplus and profits to be distributed in accordance with bylaws and governing ordinances. (Cf. present AS 42.05.200.) The committee substitute deletes the reference to operating margins, the committee believing that to be an inappropriate term here. The substitute also deletes two sentences allowing the commission to govern the distribution of surplus and profits through regulation. This deletion implements a suggestion of Karl Walter, and it is believed that once the utility has made a profit the distribution of that profit is not a proper concern of the commission.

AS 42.05.541 simply gives regulations and orders adopted under this chapter the effect of law.

AS 42.05.551 allows for judicial review in accordance with the specified sections of the Administrative Procedure Act and provides for superior-court enforcement of this chapter. (Cf. proposed AS 42.05.555 in 1967 HB 164.)

AS 42.05.561 makes violation of a provision of this chapter or a regulation or order issued under it a misdemeanor. The committee substitute simply cleans up the language of the section deleting unnecessary words.

AS 42.05.571 - 591 establish a system of civil penalties for violations of this chapter or orders or regulations issued under it. These sections are adopted primarily from the California Public Utility Code.

Sections 5312 - 5317, with some modifications reflecting Washington Public Utility Code, section 80.04.405. They allow the commission to impose a ~~simple~~ civil penalty as a means of enforcement. The committee substitute makes these provisions applicable only to a public utility and not to individuals.

AS 42.05.601 requires the attorney general to bring actions to recover penalties for imposed fines under this chapter and specifies that they shall be paid to the commission and deposited by it in the general fund.

AS 42.05.611 provides that penalties imposed under this chapter are cumulative. The committee substitute clarifies this language and specifies that a criminal prosecution is not a bar to an action of a recovery of a civil penalty.

AS 42.05.621 allows for the joining of actions ~~of~~ for recovery ~~from a~~ of penalty ~~and~~ joining of applications for enforcement of commission orders and joining of appeals from orders of the commission. (Cf. proposed AS 42.05.575 in 1967 HB 164.)

AS 42.05.631 gives public utilities the power of eminent domain for public utility purposes. (Taken from proposed AS 42.05.585 in 1967 HB 164.)

AS 42.05.641. Subsection (a) of this section in the original bill was a carry over from existing section 620. The committee substitute deletes that subsection in the belief that it is no longer necessary to provide for pre-1959 grants or franchises. The language that remains in the committee substitute provides that orders, decisions, etc., of the commission prevail over charters, franchises, ordinances, etc., of a local government when there is a conflict. (Cf. proposed AS 42.05.587 in 1967 HB 164.)

AS 42.05.651. This section simply provides for the allocation among the parties, including the commission, of the cost of a ~~public~~ hearing. This allocation itself is subject to a hearing at the request of any party. (Cf. present AS 42.05.610.)

AS 42.05.661. In the original bill this section required the payment of regulatory fees by all utilities. The committee substitute deletes the provision for regulatory fees, and retains only the provision for the submission of an application fee which will be paid to the commission and deposited into the general fund.

AS 42.05.671. To make the intent of this section clearer the committee substitute picks up a provision from existing section 180 of the PSC chapter providing that information in the possession of the commission is public. The language, from the original bill (which was taken from AS 02.05.240), then provides for a person making a written objection to public disclosure of certain information.

AS 42.05.681. This section, which is unchanged in the committee substitute, protects the certificates already issued to public utilities grossing less than $25,000, which utilities were exempted from regulation by section 2, chapter 188 SLA 1968.

AS 42.05.691 is designed to fit the general plan of greater jurisdiction and authority of the commission. By allowing classification of utilities the commission can provide regulatory requirements that will fit the circumstances of utility variations.

AS 42.05.701. In this section the definition of "public utility" includes municipally owned utilities and, to a limited extent in the committee substitute, pipelines carrying products for sale or resale to a fully regulated public utility. (This latter language was proposed by Paul Robison.) Both the original bill and the committee substitute

contain definitions of "public" and "affiliated interests", which terms are not defined in existing law. The definition of "affiliated interests" is taken from Washington Statute 80.16.010. Upon the recommendation of Don Hall the committee substitute also includes a definition of the word "tariff". In the definition of "public utility" the reference to steam in sub-paragraph (2)(C) to "steam" refers to steam heat, as it does in (2)(E). (The present definition section is AS 42.05.640.)

AS 42.05.711. In its comparable section, SB 128 provided for the exemption of municipally owned and operated utilities from the provisions regarding the regulation of rates, financial management regulations, and the requirement of a regulatory fees. (Cf. present AS 42.05.645 and Pa. Stat., Title 66, sec. 1141.) The original HB 202 deleted the exemption regarding rates. The committee substitute deletes the regulatory-fee exemption because the provision for regulatory fees itself has been deleted. The committee substitute also deletes the exemption from the financial ~~advantage~~ management regulations since it is considered appropriate that a municipally owned and operated utilities ~~is to~~ be subject to PSC jurisdiction in this regard. ¶ Section 7 of the committee substitute (which was section ~~five~~ 5 of the original HB 202) provides for the continuation of ~~the~~ presently pending proceedings and for the continuation of current certificates, orders, etc. The committee substitute adds a sentence continuing the existing rates, charges, etc., of municipally owned and operated utilities unless otherwise ordered by the commission under this act.

Sections 8 and 9 of the committee substitute have no counterpart in the original bill. They provide that the limitations in Title 29, relating to the granting of franchises and regulation of public utilities, apply to home rule boroughs and cities, respectively. ¶ Section 10 of the committee substitute limits the jurisdiction of cities over public utilities regulated under AS 42.05, the Public Service Commission Act. It also makes clear that utilities have the right to use the streets upon the

payment of a reasonable permit fee and on reasonable terms and with reasonable exceptions the city council requires. These provisions with regard to cities also apply to boroughs, under AS 07.

Sections 11 and 12 of the committee substitute make existing language consistent with the limitations established in section 10.

Section 13 of the committee substitute sets July 1, 1969 as the effective date of the act. The original bill contained an immediate effective date clause.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

Jackson

Sectional Analysis of SB 128 and HB 202 ~~(Insofar as the House Bill corresponds with the Senate Bill)~~ By George Bernard Assist. Attorney General

The following brief sectional analysis of SB 128 covers primarily those sections which make substantial changes in the existing law or language. This bill was drafted on the premise that

(1) the public interest requires that the commission's jurisdiction should encompass all public utilities whether publicly owned or otherwise, and whether large or small;

(2) regulation should be directed to the benefit of the public; ~~and~~ the creation of utility monopolies and other benefits accruing to the utilities are the results of good regulation, but not the purpose;

(3) good regulation in the public interest can only be accomplished where the regulatory body has ~~the~~ SUFFICIENT jurisdiction and authority to do whatever is necessary to accomplish it;

(4) special exemptions from the commission's jurisdiction create regulatory problems which go far beyond the usual intended objective of the exemption and substantially disrupt the regulatory processes; more orderly, uniform and fair regulation will result if the question of ~~regulatory need~~ the extent of regulation is left to the discretion of the commission;

(5) the commissioners appointed to the commission will be competent in that capacity;

(6) the commissioners will exercise good judgment in regulating; and

(7) the commission will have an adequate and competent staff.

By Phil ~~The Attorney~~ General office,

In drafting this bill, the changes in existing law and the additions were researched against the laws of other states, primarily California and Pennsylvania. In two instances, federal laws were reviewed for appropriate language. In no case was a statute of another

state used without analysis as to its effect and application

Reference was also made to HB 164 which was introduced in the Alaska legislature in 1967.

The Alaska Public Service Commission members and executive director were consulted on most of the proposed changes and their suggestions were incorporated to the extent deemed appropriate.

The draftsman of the has considerable background in utility operations and regulation having been employed in Alaska as a professional electrical engineer in electric power development for 11 years, a licensed electrical contractor in Alaska for several years and as an Assistant Attorney General for 3 1/2 years in work with both federal and state regulatory agencies.

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* Sec. 42.05.035. REMOVAL OF COMMISSIONERS.

The present law (AS 42.05.030) and the amended sec. 30 included in this bill both provide for tenure of six years for commission appointees. The commissioners do not serve at the pleasure of the governor. Since the commission acts in a quasi judicial capacity this tenure provides an essential freedom from possible sudden and sweeping changes in commission make-up and policies.

At the same time it is necessary to provide means of removal which will assure that commission members are capable of doing and actually do their assigned jobs.

Sec. 35 provides two means of removal; one is removal for cause; the second is removal in a manner similar to that in which installed. The first means is fairly standard in most state PSC Acts where tenure is provided. The second is not generally found in other states. It is included here for the purpose of assuring that the commission will be accountable to some degree for its policies. This bill grants the commission a very broad sweep of authority and jurisdiction. Theoretically the commission could adopt a particular policy which would be unreasonably burdensome to a segment of the industry or a segment of the public but which nevertheless would not be reversible in court or constitute a technical "cause" for removal.

Admittedly this second removal method can be subject to political abuse but only in the case where an administration and a majority of the legislature act in consort. Some additional safety factor could be provided if the simple majority of the legislature was changed to a 2/3 majority.

* Sec. 42.05.071. QUORUM.

The present PSC law is silent as to the number of commissioners necessary to constitute a quorum.

* Sec. 42.05.091. COMPENSATION OF MEMBERS OF COMMISSION.

There is little doubt that the public would be better served by a full-time commission. But this is not to say that a part-time commission cannot do an adequate job at the present time if it is composed of competent and concientious members. Furthermore, the workload of the commission is not so substantial at present as to require a full-time commission. However the commissioners should be paid for their time. This is not presently the case. An annual salary of $5,000 as provided in this bill is the very minimum which should be considered.

* Sec. 42.05.121. EMPLOYMENT AND COMPENSATION OF COMMISSION PERSONNEL.

The commission presently employs an executive director who is not a member of the commission itself. This feature is carried over into this bill.

The separation between the functions of the commissioners and the functions of the commission's staff is an important one. Without such separation the staff is substantially precluded from representing the public interest in a proceeding before the commission. Fundamentally this is a separation of the decisional process from the investigation and prosecution process.

In formal proceedings before public service commissions of other states and before federal regulatory commissions such as the F.T.C. and the F.M.C. the commission staff acts substantially in the capacity of an independent party, developing and putting on its own case before the commission. It occasionally happens that the staff will even appeal a decision of the commission. Such participation by the staff is subject to the same rules of procedure as are all other parties including the matter of ex-parte communications with the commission. The courts have been quick to strike down commission decisions where it has been shown that substantive ex-parte communications have occurred between the commission and its staff.

This section also gives the commission the authority to employ

its own hearing officers. Tne existing statute, AS 42.05.160, does likewise; however since the commissions adjudicatory procedures are presently prescribed by the A.P.A. (See AS 42.05.150) and since the A.P.A. requires hearing officers to be appointed by the governor, there is serious question whether the commission does, in fact, have such authority.

Sec. 42.05.161(a) of this bill removes the commission's adjudicatory procedures from the A.P.A. except those sections pertaining to judicial review.

* Sec. 42.05.121(b).

This section makes it clear that the commission may employ consultants etc. Such authority is essential. The commission cannot reasonably hire a staff of full-time employees that will have all of the expertise necessary for a complex rate case, etc. The use of consulting firms which specialize in such matters is a vital necessity.

* Sec. 42.05.131. ANNUAL REPORT.

This section is adopted from AS 42.07.140 and replaces AS 42.-05.140.

* Sec. 42.05.151. GENERAL POWERS AND DUTIES OF THE COMMISSION.

This section is designed to establish in one place the general regulatory powers and duties of the commission and to set them out in clear, concise language. Under the present chapter AS 42.05 some of these powers are merely inferential and others are found scattered through the provisions relating to regulation of rates, services, etc.

This section was put together in part from the California Public Utilities Code, sec. 701, and in part from AS 42.10.070. In both instances the referred statutes were modified to fit the needs of this bill.

* Sec. 42.05.151. ADMINISTRATIVE AUTHORITY OF COMMISSION.

This section covers the commissions authority in procedural and

administrative functions. Again, it has no specific counterpart in the present P.S.C. law.

It has been adopted in part from AS 42.07.150(b). The last sentence of subsec. (b) of this section 42.05.151 provides that "technical rules of evidence need not apply to investigations, hearings. . . ." This relaxed evidentiary provision is the guideline of nearly all state public service commissions as well as federal regulatory agencies.

The present law requires the commission to comply with the adjudicatory procedures provided in the A.P.A. However, as now constituted these procedures are neither appropriate nor adaptable to the procedures which should be followed by a utility regulatory agency. It is the common practice to give the agency the authority to prescribe its own procedural rules. The problem was recognized and its solution was provided with respect to the Alaska Transportation Commission when that commission was established in 1966.

* Sec. 42.05.161. APPLICATION OF ADMINISTRATIVE PROCEDURE ACT.

Subsection (a) removes the commission's adjudicatory procedures from the coverage of the A.P.A. except for judicial review.

Subsection (b) is adapted from the federal APA 5 U.S.C. 553.

* Sec. 42.05.171. INVESTIGATIONS AND HEARINGS -- ACTIONS DEEMED THOSE OF THE COMMISSION.

No section similar to this one is found in the current PSC law. It is adapted from the California Public Utility Code, sec. 310. Similar provisions are also found in several other state utility codes (e.g. Penna. Statutes, Title 66 Sec. 458). Under the present workload it is anticipated that the commission itself will be able to hear most of the cases. The commission should have the authority to do so without also requiring the services of a hearing officer. In other words a commissioner should be able to act in the capacity of a hearing officer (See proposed section 42.05.181(c)).

At the same time it is not realistic to conclude that the full commission shall be able to hear all cases. Therefore to cover as many eventualities as possible it is provided that any one or more of the

commissioner may hear a case.

The idea of requiring at least two commissioners to be present when the commission hears a case was rejected as unnecessary since a majority confirmation is required of any decision or opinion. Such a requirement would also preclude concurrent hearings by the commission on different cases and would cause considerable delay or disruption or necessitate starting over again if one of the commissioners had to withdraw from a hearing for any reason.

* Sec. 42.05.181. HEARING OFFICERS AND AGENTS.

This section has no counterpart in our existing PSC law. Subsec. (a) is a substantially modified version of the Pennsylvania Code, Title 66, sec. 458.

One main objective of this section is to give the commission the authority to hear a proceeding without the need for a separate hearing officer. At the same time it provides guidelines and authority for using hearing officers when desired.

Although this bill does not necessarily ~~complete~~ contemplate the need to regularly use hearing offices at this time, it will probably be necessary within the near future. Occassion may also arise at present when the use of a hearing office would be highly beneficial. Therefore this bill gives the commission to the authority to employ hearing officers and delineates the authority of such employees.

* Sec. 42.05.191. CERTIFICATE REQUIRED.

Subsection (a) of this section is similar to AS 42.05.193 of the current PSC law which is here modified to reflect suggestions of the commission.

Subsection (b) is taken from proposed sec. 42.05.245 of House Bill No. 164 (1967).

The language in subsec. (c) was settled upon in discussions with the executive director of the commission. It is considered advisable to permit the commission to exercise considerable discretion in attempting to resolve the overlapping service area problems. Therefore the language does not attempt to pin down any specific remedy. It is sufficiently broad to even allow the commission to act as an arbitrator or order arbitration if that appears to be the best approach.

The question of grandfather rights was considered. However no such provision was included. Constitutional due process of law requires the commission to recognize and provide for the rights of prior operating utilities and any provision requiring such certification will only tend to compound the service area delineation problems where overlapping facilities are found.

* Sec. 42.05.211 CONDITIONS OF ISSUANCE.

This section is adapted from House Bill No. 164, sec. 265 (1967) and modified.

* Sec. 42.05.221. DISCONTINUANCE OR ABANDONMENT ---

The present PSC law does not proscribe abandonment or discontinuance of service by a utility.

This proposed section restricts abandonment or discontinuance unless approved by the commission after public hearing.

* Sec. 42.05.231. MODIFICATION, SUSPENSION OR REVOCATION OF CERTIFICATES.

The commission can presently issue certificates but can do nothing about them thereafter. The authority provided in this section is necessary to resolve problems of overlapping service areas, as an enforcement

tool, and to assure adequate and reasonable service.

* Sec. 42.05.251. STANDARDS OF SERVICE AND FACILITIES.

This section brings together in revised form the service standards currently prescribed in AS 42.05.190 and 460. Subsecs. (a) and (b) of this section reflect similar provisions of Pennsylvania statutes, Title 66, sec. 1171. Subsecs. (c) and (d) are modified versions of AS 42.-05.460.

* Sec. 42.05.261. DISCRIMINATION IN SERVICE.

This section separates the discrimination provisions relating to service, from "standards". It is adapted from Pennsylvania statutes Title 66, sec. 1172.

A service discrimination proscription is currently found in AS 42.05.460.

* Sec. 42.05.271. JOINT USE AND INTERCONNECTION OF FACILITIES.

This section is a modified version of AS 42.05.360. The revisions are those suggested by the commission.

* Sec. 42.05.281. FAILURE TO AGREE UPON JOINT USE OR INTERCONNECTION.

This section is a revised form of AS 42.05.370.

* Sec. 42.05.291. STANDARDS FOR MEASUREMENT.

Currently AS 42.05.410.

* Sec. 42.05.301. TESTING OF METER STANDARDS.

Currently AS 42.05.420.

* Sec. 42.05.311. TESTING OF APPLICANCES.

Currently AS 42.05.430. One change should be made in this section as written. The third sentence, providing for use of testing appliance by the consumer, is improper. The revision recommended by Don Hall in his comments of March 4, 1969 would be appropriate.

* Sec. 42.05.321. TARIFFS, FILING AND INSPECTION.

The provisions of subsec. (a) of this section are found to some extent in AS 42.05.470.

Subsecs. (b) and (c) are new and self-explanatory.

* Sec. 42.05.331. ADHERENCE TO TARIFFS.

This section is similar in its provisions to AS 42.05.510.

* Sec. 42.05.341. RATES TO BE JUST AND REASONABLE.

The provisions of this section are pulled out of AS 42.05.190 and modified.

* Sec. 42.05.351. DISCRIMINATION IN RATES.

Subsec. (a) is a revised version of provisions found in AS 42.05.-190.

Subsec. (b) is similar to the provisions of California Public Utility Code, sec. 461.

Subsec. (c) is a revision of Pennsylvania Statute, Title 66, sec. 1141.

* Sec. 42.05.361. APPORTIONMENT OF JOINT RATES.

No similar provision is contained in the present PSC law. Its principal application would arise in connection with telephone toll separation charges.

* Sec. 42.05.371. Tariff Changes.

Basically subsection (a) of this section is contained in AS 42.05.491.

Subsections (b) and (c) are new and self explanatory.

* Sec. 42.05.381. Suspension of Tariff Filing or Contract.

The Commission does not presently have suspension authority.

Subsections (a) and (b) are similar to provisions found in 46 U.S.C. 845. The remaining subsections are modified versions of section 345 in H.B. 164 (1967).

* Sec. 42.05.391. Power of Commission to Fix Rates.

Provisions of this section are presently found in AS 42.05.520.

* Sec. 42.05.401 and 411. Concerning Reparations.

These two sections are taken from California Public Utilities Code, Secs. 734 and 735.

* Sec. 42.05.421. Valuation of Property of a Public Utility.

Although taken from AS 42.05.250, the provisions in this proposed section bear little resemblance to its predecessor. The Executive Director of the P.S.C. suggested much of the language employed here.

Subsection (b) relating to "fair value" codifies the rate-base policy adopted by the Commission in recent rate proceedings. The RCND (Reconstruction cost new depreciated) philosophy was specifically rejected as being inappropriate to Alaska at this time. The State's current law permits the Commission to consider RCND.

* Sec. 42.05.431. System of Accounts and Reports.

The principal changes from existing law (AS 42.05.290 and 310) are (a) the requirement that a utility adopt a system of accounting prescribed by the Commission instead of "a generally recognized system; and (b) the requirement that a utility keep its accounts on a calendar year basis.

Both of these changes were suggested by the Commission.

The uniformity which would result will materially assist the Commission in evaluating and analyzing utility operations and drawing comparisons with the norm of other similar utilities. These provisions are standard in most states.

* Sec. 441. Continuing Property Records.

This section has no counterpart in current Alaska law. Its objectives are similar to those of requiring uniform accounting and reporting.

The ability to make continuing evaluations, analyses and comparisons is of significant assistance to the Commission in determining the reasonableness of rates.

* Sec. 42.05.451. Depreciation Rates and Accounts.

Subpart (a) of this section is a modified version of AS 42.05.340.

Subpart (b) is new and its need is fairly obvious.

* Sec. 42.05.461. Subsidiary Business Accounts.

The counterpart of this section in existing law is AS 42.05.300. Changes are minor.

* Sec. 42.05.471. REcords and Accounts to Be Kept in State.

This section is new and necessary. The Commission ran into a problem in this regard in the A.J. case. The language is similar in part to that of Pennsylvania Statutes, Title 66, Sec. 1214. The Alaska Public Service Commission recommended the alternative provided in the last sentence of the section.

* Sec. 42.05.481. Inspection of Books and Records by Commission.

Inspection is currently provided for in AS 42.05.540. Although substantial revisions have been made in the language, there is little change of a substantive nature.

* Sec. 42.05.491. Unreasonable Management Practices.

Considerable change is provided in this section over the current provisions of AS 42.05.530. These changes are designed to clarify and beef up the Commission's authority in this area.

* Sec. 42.05.501. Impaired Capital.

The language in this section is taken from Sec. 535 of H.B. 164 (1967).

* Sec. 42.05.511. Distribution of Surplus,Profits and Operating Margins.

This section is a modified version of AS 42.05.200.

* Sec. 42.05.521. Effect of Rules, Regulations and Orders.

The language of this section was taken from H.B. 164, Sec. 545 (1967). It revises the current statute AS 42.05.230.

* Sec. 42.05.531. Review and Enforcement.

This section is adopted from H.B. 164, Sec. 555 (1967). There is no such provision in Alaska's current P.S.C. law.

* Secs. 42.05.541, 561, 571, 581 and 591. Concerning Penalties.

These sections are new to Alaska's law. They are adopted primarily from the California Public Utility Code, Sections 5312 - 5317 with some modifications reflecting Washington Public Utility Code, Sec. 80.04.405.

Under present law the P.S.C. has no means of enforcement other than to seek injunctive relief from the Court. This limitation is a unique situation in utility regulatory codes. The normal situation in most states is that injunctive relief is turned to as a last resort.

These sections provide both criminal and civil penalties Criminal penalties are fairly standard but more and more states are adopting alternative civil penalties as well as a better enforcement tool. Criminal penalties are difficult to secure, are not particularly desirable and are normally resorted to only in cases of very flagrant and continuing violations. As a result they are not especially useful in securing compliance.

Civil penalties work quite well as a means of obtaining compliance with the regulations and orders of the Commission. They work so well, in fact, that it is seldom necessary to recover them.

Section 571 gives the Commission the discretionary authority to determine whether a civil penalty should be levied and the extent (within maximum limits) if it is to be levied. It also provides authority to mitigate such a penalty if circumstances warrant.

* Sec. 42.05.601. Joinder of Actions.

This section is adopted from H.B. 164, Sec. 575 (1967).

* Sec. 42.05.611. Eminent Domain.

This section is new and is adopted from H.B. 164, Sec. 585 (1967).

* Sec. 42.05.621. Regulation by Municipality.

Subsection (a) of this section is taken from current law AS 42.05.620.

Subsection (b) is a substantially modified version of Sec. 587, H.B. 164 (1967).

* Sec. 42.05.631. Expenses of Investigation and Hearing.

With only minor changes, the provisions of this section are currently found in AS 42.05.610.

* Sec. 42.05.641. Regulatory Fees.

This is a new provision and is fairly standard in other state public utility codes. Its objective is to have the regulated industry pay at least a part of the cost of regulation.

In motor freight carrier regulation by the Alaska Transportation Commission, such regulatory fees are provided for in the form of weight fees (AS 42.10.240) and application fees (AS 42.10.160)

* Sec. 42.05.651. Public Disclosure of Information.

This section is taken from AS 02.05.240 of Alaska's Air Commerce Act.

See AS 09.25.110 - 120 provide in essence that all public records are open to public inspection, etc. "unless specifically

provided otherwise. Thus, the need here is not to provide that Commission records are open to public inspection, but merely to provide for those few circumstances under which they should not be available for public review.

* Sec. 42.05.661. Validity of Certain Certificates.

This section was considered necessary to protect the certificates, aready issued, of public utilities grossing less than $25,000, which utilities were exempted from regulation by Sec. 2, Ch. 188, SLA 1968.

* Sec. 42.05.671. Utility Classes.

This section is designed to fit the general plan of greater jurisdiction and authority of the Commission. It is easily recognized that all utilities should not be regulated to the same degree. Therefore,through the mediums of classifications and broad discretionary authority, the Commission can easily provide regulatory requirements that will fit the circumstances of utility variations, without encountering the disruption of statutory exemptions.

* Sec. 42.05.681. Definitions.

The general approach taken in the current statute, AS 42.05.640, was adopted here.

The definition of Public Utility confines itself to the extent possible with the matter of defining the term and leaves "exemptions" to a section of that title. The definition is quite comprehensive. However, it is noted that the furnishing of heat was inadvertently left out. This would appear to be easily corrected by inserting a comma and the word "heat" in subsection (1)(c) between the words "water" and "or" to read "furnishing water, heat, or sewer. . . ."

Two new definitions have been added and some of the existing definitions are modified to a limited extent.

The definition of "public" includes "public utility." This definition, when applied to the definition of public utility, assures the coverage by the Act of those utilities who may have a public utility as their only customer. An example

would be A. J. Industries at Juneau who wholesales all of its electric power and energy to Alaska Electric Light & Power Co.

The definition of "affiliated interest" is taken from Washington Statute 80.16.010. Its principal applications are found in proposed sections 42.05.491 and 691(a).

* Sec. 42.05.691. Exemptions.

Exemptions have been restricted to a very minimum in keeping with the overall plan of the bill.

Subsection (a) exempts supplies by truck, etc. as currently provided in AS 42.05.645. However, when the operator has an "affiliated interest" in a "public utility" which he is serving, this exemption does not apply.

All other exemptions relate to municipally owned and operated utilities. These municipal exemptions are not necessarily desireable from the regulatory viewpoint, but represent an effort to permit local governments as much freedom from state regulation as possible without disrupting the overall regulatory program.

This section in H.B. 202 differs from the Governor's bill, S.B. 128 in that S.B. 128 exempts municipal utilities from rate regulation within municipal boundaries. The question has been raised whether regulation of municipal utility rates outside the municipality only, can be accomplished. A similar provision is contained in Pennsylvania Statutes, Title 66, Section 1141. Time did not permit a thorough research of the degree of success the Pennsylvania Commission has had in its application. The annotations to the statute, however, indicate that such regulatory authority has been exercised by that Commission.

As stated earlier, the statutory exemptions tend to substantially compound regulatory problems. An excellent example of this is the exemption enacted in 1968 for utilities grossing less than $25,000. It immediately placed in question the legal status of certificates already issued to such utilities. Even more importantly, the exemption placed in question the Commission's jurisdiction to certificate any prospective utility because such utility, irrespective of size, would not have earned $25,000 prior

to actual operation. A third area of serious conflict was also raised, in that, anyone could provide unregulated utility service in any area already certificated and being served by an existing utility.

Another well known example of the regulatory problems created by exemptions is the duplication of facilities by municipal utilities and certificated utilities, particularly in the Anchorage area.

I have reviewed very hurriedly Committee Substitute for HB 202. Three of the revisions would have very substantial effects on the Act, & raise significant questions of desireability they are amended sections

42.05.121

42.05.171

42.05.441

I will comment on these & other revisions as soon as possible. If it is desireable I will be pleased to appear before the committee to discuss these matters as well as the bills.

I feel that most of the changes in the committee substitute are an improvement & make it a better bill.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

SECTIONAL ANALYSIS OF CSHB 202

* Sec. 42.05.020. Composition of Alaska Public Service Commission.

I have already commented at length on subsection (b) so will avoid repeating here.

* Sec. 42.05.030. Term of Office; Vacancy.

Changes made here are appropriate.

* Sec. 42.05.035 and .071.

No significant changes made.

* Sec. 42.05.081. Oath of Office.

The change here is appropriate.

* Sec. 42.05.091. Compensation of Members of Commission.

The question of dual salaries has already been brought to the Committee's attention.

* Sec. 42.05.101 and .111.

No significant changes made.

* Sec. 42.05.121. Employment of Commission Personnel.

The matter of a commissioner also serving as executive director has already been discussed. This, however, is optional. The question should be thoroughly researched before implementation.

The elimination of provisions for employing hearing officers has merit provided it does not contribute to delay rather than remedy the P.S.C. sad experiences with hearing officers in the past.

I agree that it is much more desirable to have the Commission hear all formal proceedings rather than use hearing officers. I do not foresee any problems from the exclusion of hearing officers for at least a couple of years.

* Sec. 42.05.131. Restrictions on Members and Employees.

The extension of restrictions is good.

* Sec. 42.05.141. General Powers and Duties of the Commission.

The revisions to subsection (1) should accomplish the objectives of the original bill. The revisions are an improvement.

Changes in other subsections are minor.

* Sec. 42.05.151. Administrative Authority of Commission; Regulations and Hearing Procedures.

I commented in some detail on the corresponding section in H.B. 202. The revised version is equally appropriate.

* Sec. 42.05.161. Application of Administrative Procedure Act.

I concur in the revisions made in the corresponding section in H.B. 202.

* Sec. 42.05.171. Formal Investigations and Hearings.

The objectives of this revised section are substantially the same as in the original. One difference is the number of commissioners required to hear a case. I commented on this aspect in my notes on this section in H.B. 202.

The restriction that a commissioner must have read or heard the entire record is well stated and appropriate.

* Deletion of section on Hearing Officers and Agents.

This substitute bill deletes the subject section (42.05.181 of H.B. 202). Since the committee has determined to eliminate the hearing officer from the procedural processes, this deletion is appropriate.

The purposes of the original section are expressed in my comments on the original bill.

* Sec. 42.05.181. Final Orders of the Commission.

This section has been added and is appropriate.

* Sec. 42.05.191. Reports on Proceedings.

This section has been added and is appropriate.

* Sec. 42.05.201. Publication of Reports, Orders, Decisions and Regulations.

This section has been added. To some extent it duplicates provisions of sections 42.05.161 and 191. The section is appropriate .

* Sec. 42.05.211. Annual Report.

The provisions of this section are found in Sec. 42.05.131 of H.B. 202.

* Sec. 42.05.221. Certificates Required.

This section contains the same provisions as Sec. 42.05.191 of H.B. 202 plus the addition of a subsection granting grandfather rights. I have commented on this previously.

* Secs. 42.05.231 and 241.

No substantive change from counterparts in H.B. 202.

* Sec. 42.05.251. Use of Streets In Cities and Boroughs.

This is a new section and is desirable.

* Sec. 42.05.261. Discontinuance, Suspension, or Abandonment of Certificated Service.

No substantive changes from original provisions.

* Sec. 42.05.271. Modification, Suspension or Revocation.

The inclusion of the word "willful" in subsections (4) and (5) is beneficial.

* Secs. 42.05.281, 291, 301, 311, 321, 331 and 341.

No substantive changes from corresponding sections in H.B. 202.

* Sec. 42.05.351. Testing of Appliances.

The Principal revision in this section corrects an error in the original.

* Sec. 42.05.361. Tariffs, Filing and Public Inspection.

The principal revision in subsection (a) reclassifies contracts which affect rates as special tariffs. This is a matter of convenience and not substantive. The word "rate" is defined in the definitions section as including "charges."

The revision to subsection (c) should not require a hearing but simply give opportunity for hearing after notice.

* Sec. 42.05.371. Adherence to Tariffs.

No substantive change from counterpart.

* Sec. 42.05.381. Rates to Be Just and Reasonable.

The addition of subsection (b) is probably unnecessary except the provision for taxes.

* Sec. 42.05.391. Discrimination in RAtes.

No objection to deletion of subsection (b) contained in the original. No other substantive changes have

been made.

* Sec. 42.05.401. Apportionment of Joint RAtes.

The deletion of subsection (b) of the original was discussed with the committee. I agree that the objectives are satisfactorily provided for in other sections.

* Sec. 42.05.411. New Or Revised Tariffs.

No substantive changes.

* Sec. 42.05.421. Suspension of Tariff Filing.

The only significant change here is in subsection (b) which reduces the suspension period from 7 to 5 months. The standard in most states is 10 months.

* Sec. 42.05.431. Power of Commission to Fix Rates.

No substantive changes.

* Deletion of Secs. on "reparations"

No objection to such deletion.

* Sec. 42.05.441. Valuation of Property of a Public Utility.

Subsection (b) of this section has been changed substantially. I have already commented on it in some detail to the Committee so will limit my statements here to matters not already covered.

Assuming that no change is to be made in the "original cost" - RCND formula, I suggest the addition of the words "and obsolescence" at the end of the sentence. The first sentence would then read:

> "(b) In determining fair value of public utility property for rate making purposes, the commission shall be guided primarily by the average of original cost, less accrued depreciation and reproduction cost, less physical depreciation and obsolescence."

This additional language should be acceptable to everyone since the principal concern is, or should be, that the value to be determined by the formula more nearly reflects the actual value at the time the determination is made. No reasonable argument can be made that the fair value should exceed the actual value at any given point in time. Requiring obsolescence to be taken into account provides an additional safeguard against the possibilities that a fixed RCND formula will yield something greater than actual value.

An accounting for physical depreciation does not necessarily account for obsolescence.

One additional matter should be touched upon and that is the relationship between plant valuation and financing. It has been suggested that a utility cannot obtain financing under an "original cost" valuation policy. However, a very substantial majority of the states apply original cost and reject RCND completely. I know of no instance (and I m sure that no one else can cite one) where these states have experienced abnormal utility growth. As

a matter of fact, California has one of the most vigorous and advanced electric utility industries in the nation and it has always been strictly an "original cost" state.

Public utilities cannot be compared with other industries in most respects and particularly financing, because they

(1) occupy a lawful monopoly position;

(2) the service is essential to their customer and is bought continuously by many small buyers;

(3) the consumer has an urgent need for the service and that need cannot be postponed; and

(4) the consumer has no acceptable alternative.

* Sec. 42.05.451. System of Accounts and Reports.

Subsection (a) will permit utilities to "adopt a generally recognized system of public utility accounting." This is the language of the current statute. H.B. 202 would revise this provision to allow the commission to prescribe the system.

The reasons for this revision are covered in my comments on Sec. 42.05.431 of H.B. 202.

Suffice it to repeat here that uniform accounting by all utilities of a type, is highly beneficial to the regulatory process. Subsection (b) relating to annual reporting changes the time allowance for annual reports from 75 to 90 days with provision for extensions if circumstances warrant. These are beneficial revisions.

* Sec. 42.05.461. Continuing Property Records.

No change from H.B. 202, Sec. 441.

* Sec. 42.05.471. Depreciation Rates, Initial Losses and ACcounts.

Subsection (a) and (b) - no substantive change from H.B. 202, Sec. 451(a) and (b).

Subsection (c) - This is a new subsection and allows a new utility to amortize operating losses, if any, which it has incurred in developing its market and system. This

provision has merit but could be the subject of abuse and possibly extra profit. I suggest that the commission be given additional discretionary control over the extent to which losses may be amortized. This could perhaps be accomplished by providing additional qualifications.

At the very least, the word "reasonable" should be inserted between the words "of" and "net" and the word "necessarily" be inserted between "losses" and "incurred." I would also suggest that the phrase "not otherwise compensable" be added after the word "losses." The subsection would then read, "(c) The amount of reasonable net operating losses, not otherwise compensable and necessarily incurred by. . . ."

To some extent net operating losses are compensated for by carry-over into future years for purposes of computing income taxes payable in such future years. Since a utility's profit is computed as a rate of return <u>after taxes</u> the utility could realize extra profit in the carry-over years unless the commission can take this factor into account.

* Sec. 42.05.481. Subsidiary Business Accounts.

No substantive changes.

* Sec. 42.05.491. Records and Accounts to be Kept in State.

No substantive changes.

* Sec. 42.05.501. Inspection of Books and Records by Commission.

Only clarifying langauge added.

* Sec. 42.05.521. Impaired Capital.

The added expression "or might become impaired by continuation of current practices" is desirable.

* Sec. 42.05.531. Distribution of Surplus and Profits.

I agree with the changes here.

* Secs. 42.05.541 - 621 - Re. Judicial Review, Penalties and Enforcement.

The principal substantive change in these sections is to remove their application to non-utilities. As indicated

in my comments on H.B. 202, these provisions, as originally drafted, k were similar to the California Code as well as that of Washington and Pennsylvania. (These were the only states researched on the subject.) Their application to non-utilities as well as utilities assures non-interference by parties not otherwise covered by the Act. I do not know to what extent, if any outside interference is or might be a problem.

Another change made in the substitute bill removes application of civil penalties to officers, etc. of the utility. I see no problem from this revision since they are covered under criminal penalties.

Sec 42.05.131. Regulation by Municipality
The provision (a) in the Bill 202 was taken from the current statute. By its deletion [Sec. 42.05.861 (a)] I take it the committee feels it has outlived it's usefulness or else the committee believes that such prior contractual arrangements should be terminated.

* Sec. 42.05.671. Public Disclosure of Information
This matter is covered in my comments on HB202. I do not believe the added language is necessary but at the same time no problem is created by leaving it in.

Anchorage, Alaska
March 6, 1965

TO: The Honorable Eugene Guess
Chairman - House Judiciary Committee

Re: House Bill No. 138

The Honorable Homer Moseley
Chairman - House Commerce Committee

Gentlemen:

Following is a summary of the amendments requested on behalf of ALASKA PIPELINE COMPANY - ANCHORAGE NATURAL GAS COMPANY, and in some instances utilities in general, presented and requested by the undersigned near the close of the hearings of your joint committees in Juneau last week.

We favor a board of not less then five (5) members, and feel that appointment from the various segments of the utilities industry has merit. Unless members are appointed who have some background in utility operation, whether from experience in the industry, accounting, legal, engineering, or as a previous service in regulation, it will take some time to become familiar with the philosophy,concepts, and obligations to protect the public, protect the utility, and to protect the investors. We feel that the proposed six-year term is moritorious and that removal should be for cause. We would like to see some independence,in the commission, whether it be organized within the Department of Commerce, or otherwise, such as election as the chairman by the commission, each two years. However, we are confident that the most capable commissioners will be sought out. The importance of having the most fit and capable commissioners cannot be over-emphasized, as a very large segment of the Alaskan economy will be under complete regulation under the terms of the proposed Act.

.035: add at end of section ", based on their professional qualifications and experience."

.055: We do not feel that high-type commissioners would be prejudiced in their decision making by owning stock in a truckline, gas company, air operation, telephone, or electrical utility.

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Thus we would be willing to see this entire section stricken. However, if it is not stricken, we see no reason that the equity holder of a REA financed co-op should be an exception in the restrictions. With the admitted lack of qualified persons, the restrictions eliminate a great mass of potentially qualified members for the Commission.

.085: If the Commission is to proceed to full scale regulation as this Bill contemplates, members of the Commission will have to be compensated on at least a part-time basis.

.105: In proceedings in which the Attorney General represents a party as a advocate in a proceeding, the Act should provide that his services terminate at the end of the taking of testimony so that he cannot continue to advise the Commission during the process of their making findings, conclusions, and decisions. The Commission will have in its staff, at that time, professionally trained persons competent to draw the findings, and the basis therefor.

.125: The Commission should not be permitted to delegate all of its functions, e.g. the judicial or quasi-judicial functions of decision making. Request that the word procedural or ministerial be inserted at line 18 before the word "function".

.165: A number of States finance utility regulation from the general fund. In the case of ALASKA PIPELINE - ANCHORAGE NATURAL GAS, franchise fees,or taxes of 2% of gross revenue,are paid within the Cities of Anchorage and Soldotna, and within the Greater Anchorage Borough for the services furnished within what was the Spenard Public Utility District, where a franchise is also held. These companies also pay real and personal property taxes within the cities - borough, presently pay gross business license tax to the State, and it is anticipated that substantial income tax payments will be made to the State and to the Federal

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Government when profits result. Thus, from this variety of tax contributions to local - State government, it can be argued that this industry is entitled to some services of the regulatory body. However, if an additional tax is to be imposed, it is obvious that the 1% tax on the entire industry in Alaska would bring in some $400,000 at this time, and that the amounts of this revenue would probably increase rapidly. Any such tax is burdensome, the burden being relative to the amount of the tax, and the method of collecting it. Comments at the hearing indicated the likelihood of applying the tax, if imposed, to wholesale sales, and to retail sales. In this event, we would request a specific provision, that where a company sells at wholesale to a wholly owned subsidiary, the tax would be collected but once, on total ultimate sales to consumers.

.175: Amendment is indicated in light of exemptions and definitions contemplated in the Act.

.185: The last sentence of this provision permits the Commission to delegate in writing to "any person" its authority to conduct an informal investigation. This would permit conceivably, the appointment of either an irate consumer, or a disgruntled competitor, to investigate the utility affected. We would suggest that an additional provision be inserted to the effect either that it be a person "having no interest in the outcome of the investigation," or, that the person appointed, if not a regular member or employee of the Commission, have the concurrence of the utility affected.

We note that the proposed Act has no prohibition or penalty against disclosure of information by members or employees without the approval of the Commission. This could be extremely dangerous to a utility. We recommend the language of the Illinois Statute, but others would probably be just as good. Section 18 of the Illinois Act, 111 2/3 §18, Penalty for Divulging Information

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provides as follows:

> "Any officer or employee of the Commission who divulges any fact or information coming to his knowledge during the course of an inspection, examination or investigation of any account, record, memorandum, book or paper of a public utility except in so far as he may be authorized by the Commission or by a court of competent jurisdiction, or a judge thereof, shall be guilty of a misdemeanor, and upon conviction, be subject to imprisonment in the county jail not exceeding one year, or to a fine not exceeding one thousand dollars, or to both."

This provision, and requirement, is important to all utilities, although none noted at the hearing the absence of such a provision.

.215: In the first sentence, insert after the words "shall make", "or cause to be made". Line 26, after the word "hearings", insert, "or investigations, formal or informal" are held.

The reason for this is that both the complaining party, and the utility, should be able to see and read in the Commission files or receive a report of the investigation, whether it be only a paragraph long.

Also, at line 26, and 27, and 28, after the words, "its decision and order", insert, "and the basis therefor".

I am advised that this serves a highly useful purpose in insuring against any pre-conceived or immature conclusions, or conclusions entered upon incomplete investigation. Such a requirement insures further thoroughness and fairness to all parties and provides a more clearcut record in the event appeal is sought by any party.

.225: Line 5, delete, "OR PRIVILEGE".

We cannot see and do not visualize any instance in which the denial of a privilege should result in a hearing It would seem that the present language might result in burdensome, numerous hearings, requested by parties wishing a privilege which does not

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exist under the law, or the rules and regulations of any affected utility.

In the last line of the same section, following the words "public utility", change the language to read, "or any party to the proceeding."

This change is recommended for clarification so that the Commission and the parties to any proceeding will be protected from demands for hearing by any one of a multitude of interested persons who are not, in the legal sense, interested parties or "party to the proceeding".

.235: As pointed out earlier, some States pay the entire costs of regulation from the general funds. Others, to varying degrees, pass the costs of hearing on to the party concerned, as anticipated by this section of the bill. We requested and recommended that in the basis for apportioning costs, the section making "ability to pay", one of the criteria be deleted. This is too much of an open invitation to load the costs against what might appear to be a prosperous utility, even though the utility were found to be acting in good faith. It must be remembered that the costs of a proceeding are not only the costs incurred by the Commission, but generally equal costs will be incurred by the utility affected, which it must absorb. Ultimately of course, all of the costs of the utility in preparing for and conducting its presentation before the commission, have to be borne by the consumers - rate payors of the utility, as would any portion of the commission's cost which are assessed against the utility. Therefore we further recommend the addition of further limiting language at line 17 after the words "mitigating circumstances" as follows: "HOWEVER, IN NO EVENT, SHALL ANY UTILITY, PARTY TO THE PROCEEDING, BE ASSESSED MORE THAN ONE-HALF THE COSTS THEREOF."

.245: There was general agreement that grandfather's rights should be preserved, or specifically, that existing certificates obtained under the present law of Alaska, should be validated.

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Otherwise, a tremendous amount of work already done by the utilities and the Commission, would be wasted and time and expense of re-application would be burdensome to all. At this point we recommended a new provision as follows:

> "Until changed by Order of the Commission, the rates rules, and regulations of Utilities, operating under franchises, or under the jurisdiction or local regulatory bodies empowered by law to so regulate, are hereby approved."

This brings us to the question we raised at the opening of our presentation, which is: What is the status under the proposed legislation of utilities presently regulated by Home Rule Cities under franchise granted by such Home Rule Cities? We feel that there is a real and serious question for the legislature to resolve at this time. Are we, for example, subject to dual regulation, and if so, do the determinations of the PSC override those of the Home Rule City where they conflict, or does the conferring of power by this Act upon PSC displace and negate the former powers of the home Rule City to regulate the matters over which jurisdiction is given to the PSC, or, as suggested by some of the electrical co-operatives and cities, in testimony before the Committees, would Home Rule Cities retain the power to regulate franchised utilities within their geographic boundaries and the PSC regulate only beyond the city limits.

.295: We recommend addition at the end of the Section, the following language:

> "Sale of equipment, appliances, and materials, and installation thereof, by the utility, directly or by contract, are hereby excluded, provided however, that records of all the revenues and costs associated therewith shall be maintained separate from the remainder of, or the general operating accounts of the utility."

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.325: The requirement of filing with rate schedules "all contracts which affect or relate in any manner to the rates" can be terrifically burdensome, both to the utility and to the Commission. This language would require filing copies of contracts for every purchase, every employment, every job, etc., as these do "relate in any manner". Our suggestion and recommendation is preferably to delete this requirement, otherwise the Commission will soon have warehouses full of copies of purchase orders, work orders, etc., and the utility will be burdened in its administration, or in the alternative, if the requirement must exist, change the language to read, "and all contracts which directly affect the rates." It should be pointed out that the Commission, through its very general and generous powers, can at all times ascertain any of these matters without having to become a great storehouse for a volume of paperwork, to which it could never pay any attention, without maintaining a horde of agents to scrutinize the minute detail of daily operations of all utilities affected.

.425: We find this section unclear and meaningless. We do not know the origin or intent of this section, and feel that the prior and subsequent two sections probably accomplish the intent of the drafter. If there is a purpose which we have overlooked or failed to understand, I would greatly appreciate an explanation, so that we would not be in a position of opposing something proper simply because of ignorance upon our part.

.435: At line 20, we recommend deleting the word "APPLIANCES" , and substituting the words, "metering equipment".

In our industry, appliances are conceived to be household items, such as ranges, heaters, dryers, etc.

Again, we do not understand the use of the word "standards" at line 22, of this section.

.455: In previous hearings on the present Act concerning valuation of public utility properties, our representative and perhaps others, sought and obtained the present reference to

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"fair value of such property", which appears in the present Act, and the language of the proposed Section. We propose a further revision which makes fair value a more significant ultimate goal of the Commission in determining valuation of utility property rate-making purposes. The language we propose and recommend is as follows:

> "The Commission may, when necessary, for rate-making purposes, investigate and ascertain the actual legitimate costs of the property used and useful of every public utility, the depreciation therein, and other facts which bear on the determination of such cost or depreciation, and the fair value in fact of such property."

The remainder of the proposed section seems satisfactory.

.465: This is a typical section, and exists in our present law. The need for it has generally disappeared with exemption of small utilities under $100,000.00 gross, as practically all larger utilities do utilize "generally recognized systems". Line 29 at the bottom of page 15, we recommend changing the word "system" to "systems", so that the Commission will not feel bound to prescribe one system which must be used by all varities of utilities. We further recommend and request the following addition within the section:

> "A public utility presently using a generally recognized system of accounting, will not be required to change to another system."

.475 and .485: We recommend substitution of provisions similar to that in effect in Illinois, at Section 111 2/3, §14, which provides as follows:

> "Depreciation accounts. The Commission shall have power, after hearing, to require any or all public utilities to keep such accounts as will adequately reflect depreciation, obsolescence and the progress of the arts. The Commission, may, from time to time, ascertain and determine and by order fix the proper

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and adequate rate of depreciation of the several classes of property for each public utility; and each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed."

In order to prevent misuse or dissipation of depreciation and other reserves, we would suggest addition of the following language:

"And may govern the use of such reserves to prevent any improper alienation of assets of the utility."

Our particular concern, and that expressed by other utilities at the hearing is, that the Commission should not be empowered to require the utility to maintain the reserve in the form of cash, or investment in U. S. or State bonds, or bank savings accounts, as none of these pay, or yield a return as high as the rate charged on the bonds and borrowings of the utilities. It is thus common practice, and the practice of the company making this presentation to project, schedule, and use these reserves for payment and repayment of interest, and indebtedness, and for extension of new facilities to obviate additional borrowing. The contrary situation is true in the case of REA financed co-operatives paying 2% interest. They, of course, could use their reserve account for investment earnings at a rate higher than their required interest payments. However, they too should have the right to utilize their funds to maximum advantage with the Commission empowered simply to see that they are not wasted dissipated, or alienated.

.485: We question whether the State is ready, or should be required to regulate the financing of all utilities. If it must, we strongly urge some definition and exceptions. Our information is that the Wisconsin Commission, whose Act was copied in this section, is a very mature Commission, which has gained a great deal of competence through the many years it has been in

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existance, and that it operates with a view to assuring and maintaining the health of the utilities as well as protecting the consumers, and that they also attempt to protect the purchasers of securities in their investments. I understand further that by practice, some leeway is given the utilities that is not actually provided within the strict language of the Act. We recommend and urge the following:

a. Exempt utilities complying with this act from the provisions of Alaska's general securities Act, "the Blue Sky Law", so that utilities would not be burdened with the administrative detail, costs and expenses of compliance with both. Regulation under this Act is much more comprehensive and affords the public full protection.

b. Exempt stock dividends and stock splits from the operation of this act. These do not affect the financial condition of the utility.

c. Exempt short-term borrowing. We would like to see borrowing up to three years exempt as such financing on a relatively minor scale is generally available in the normal money market to a sound utility, permitting the utility to finance temporary requirements in this manner without undertaking the burden of preparing and selling a bond issue for long-term financing, which is believed to be the true objective of this section. The Legislature could well consider in granting the exemption of short-term financing up to three years, placing some limitation on such borrowing, such as "not to exceed 10% of the total debt of the utility". This exception for short-term borrowing makes possible temporary financing from time to time, should the money market not be favorable to long-term bonded indebtedness.

d. Exempt endorsements and guarantee of the undertakings of others in due course of business. Many utilities, electrical co-operatives, as well as the gas industry . sell appliances, etc.

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on contracts, or take installment notes, which are then endorsed, sold, or assigned, to other financial institutions for cash. It would be extremely burdensome on the utility as well as the PSC to require these transactions to be processed by the Commission.

It is our strong recommendation that Section .585, the Power of Eminent Domain, is a definite and common requisite of public utilities. This power exists, and is presently exercised under the Code of Civil Procedure, Section 00.53.340, et seq. It might be well to so clearly state by adoption of this section, (.585), in the proposed Act.

We appreciate the opportunity to appear before the joint Committees and the fine manner in which the hearings were conducted, and the fair treatment accorded all witnesses including the undersigned.

If we can be of any assistance whatever, or if our comments or help is desired at any time in the process of preparing or considering the Act, we would be happy to be called upon.

Very truly yours,

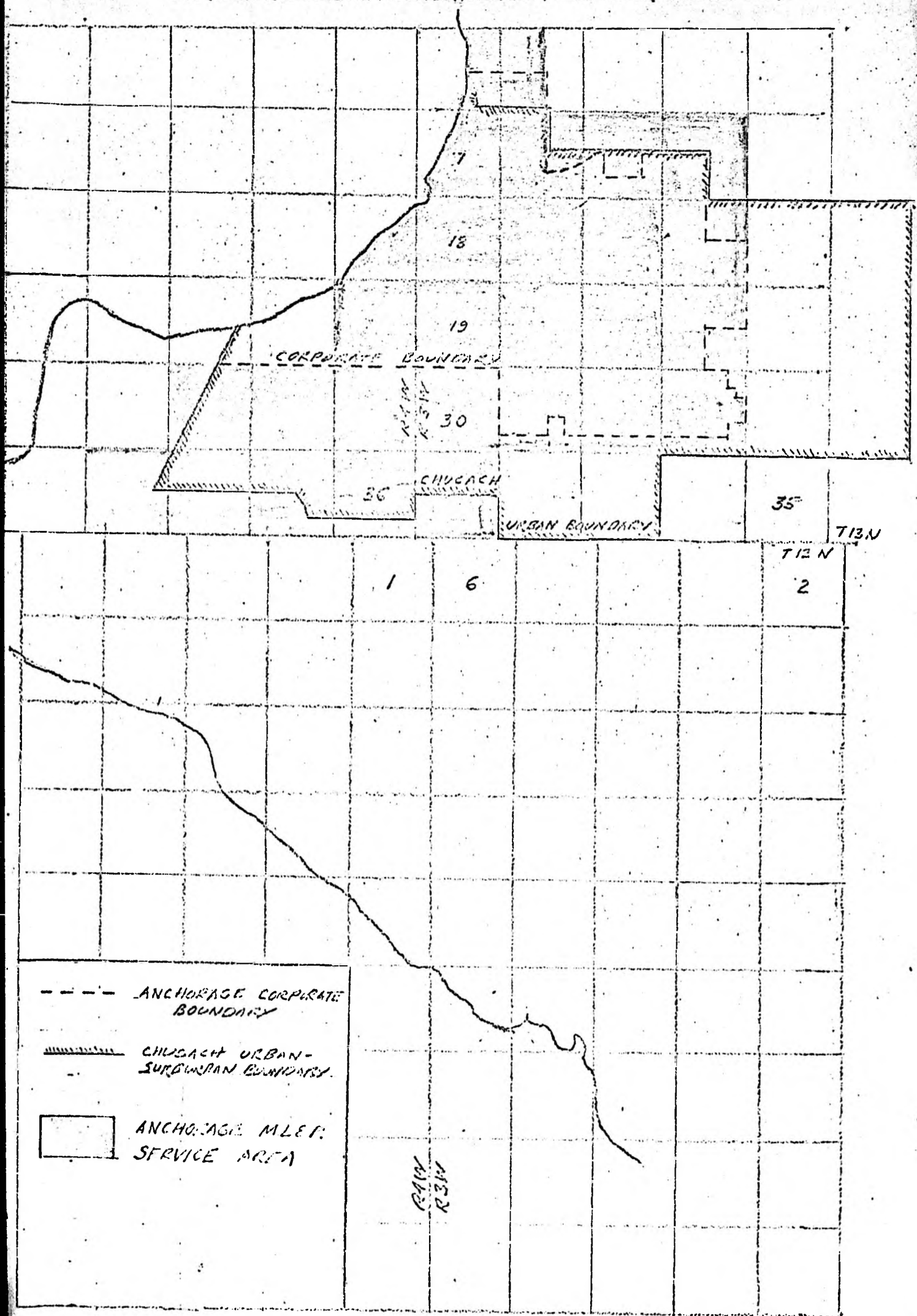
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MAP 2 -- SHOWING RELATIONSHIP OF Exhibit

CHUGACH URBAN ZONE & M.L.E.P. SERVICE AREA



UTILITY COMMISSION DATA

Jackson
PSC

I. Number of Commissions 57
   A. Includes District of Columbia and Puerto Rico; these and 48 others have one commission.
   B. Alaska and Arkansas are the only states that have two commissions.
      (a) Alaska has ATC and APSC.
      (b) Arkansas has a Commerce Commission and a Public Service Commission.
   C. Kentucky has 3 Commissions
      (a) State Corporation Commission
      (b) Department of Motor Transportation
      (c) Railroad Commission

II. Number of Commissioners
   A. 36 have 3 full time commissioners.
   B. 4 have 3 part time commissioners.
      APSC in Alaska, Del., Ky. RR Comm., and Md.
   C. 1 (NY) has 5 full time commissioners plus 2 part time commissioners.
   D. 1 (Va) has 1 full time commissioner plus 2 part time commissioners.
   E. 7 have 5 full time commissioners.
      Calif., Ga., Ill., Mo., Neb., N.C., and Penn.
   F. 1 (Hawaii) has 5 part time commissioners.
   G. 1 (Ark. Commerce Comm.) has 6 full time commissioners.
   H. 2 (Mass. and S.C.) have 7 full time commissioners.
   I. 3 (Ky. Dept. of Motor Trans., Oregon, and R.I.) have 1 commissioner.
   J. 1 (Alaska Trans. Comm.) has 2 full time and 1 part time commissioner.

   57 Total

III. Financing of Commission operations
   A. Power to assess cost of special investigations against the regulated utilities.
      (a) 24 Commissions do
      (b) 29 Commissions do not
      (c) 4 Commissions facts unknown
   B. Power to charge fees for special transactions and proceedings (i.e. application fees, etc.).
      (a) 29 Commissions do
      (b) 24 Commissions do not
      (c) 4 Commissions facts unknown
   C. Per cent of Commission expenditures paid from general tax funds.
      (a) 13 Commissions 100%
      (b) 8 Commissions None
      (c) 7 20% or less
      (d) 5 20% to 50%
      (e) 3 50% to 75%
      (f) 4 75% to 99%
      (g) 17 Commissions percentage not known
   D. Power to assess fees for general regulation
      (a) 31 Commissions do in varying percentages
      (b) 16 Commissions do not
      (c) 10 Commissions facts unknown

IV. Regulatory Jurisdiction over

A. Wholesale electric rates

(a) Private utilities

(1) Facts unknown 9 Commissions
(2) Yes 41 Commissions
(3) No 9 Commissions

(b) Publicly-owned utilities

(1) Facts unknown 12 Commissions
(2) Yes 14 Commissions
(3) No 31 Commissions

(c) Cooperative utilities

(1) Facts unknown 12 Commissions
(2) Yes 16 Commissions
(3) No 29 Commissions

B. Retail electric rates

(a) Private utiliites

(1) Facts unknown 8 Commissions
(2) Yes 47 Commissions
(3) No 2 Commissions

(b) Publicly-owned utilities

(1) Facts unknown 11 Commissions
(2) Yes 15 Commissions
(3) No 31 Commissions

(c) Cooperative utilities

(1) Facts unknown 12 Commissions
(2) Yes 17 Commissions
(3) No 28 Commissions

C. Power to suspend rate changes

(1) Facts unknown 12 Commissions
(2) Yes 45 Commissions
(3) No 5 Commissions

D. Rate change suspension period

Number of Commissions	Number of Months
1	2
2	3
4	4
3	5
8	6
1	7
1	8
2	9
5	10
1	11
3	12
1	Until Hearing
4	Indefinite
9	No detail

E. Power to initiate rate investigations

(1)	Facts unknown	6 Commissions
(2)	Yes	50 Commissions
(3)	No	6 Commissions

F. Power to prescribe uniform system of accounting

(1)	Facts unknown	4 Commissions
(2)	Yes	53 Commissions
(3)	No	0

G. Other Powers

		No. of Commissions		
		Yes	No	Facts Unknown
(1)	Permit to initiate service	47	7	3
(2)	Re discontinuance of service	50	4	3
(3)	Regulate territorial disputes	47	6	4
(4)	Issuing indeterminate permits	26	18	12
(5)	Allocate unincorporated areas	37	13	7
(6)	Regulate purchase, sale, merger or consolidation of facilities	37	15	5
(7)	Regulate issuance of securities	43	9	5
(8)	Regulate affiliated interest transactions	37	14	6
(9)	Regulate dividend payments	22	28	7
(10)	Require submission of budgets	20	32	6
(11)	Require competitive bidding on major projects	15	36	6

V. Method of Selecting Commissioners

Direct election	16 Commissions
Appointed by Governor	16 Commissions
Appointed by Governor with approval of Legislature	2 Commissions
Appointed by Governor with approval of Senate	18 Commissions
Elected by Legislature	2 Commissions
Facts unknown	3 Commissions

VI. Minority party representation on Commission

Facts unknown	10 Commissions
Yes	19 Commissions
No	28 Commissions

VII. Specific Qualifications of Commissioners, Other than Age, Citizenship, Residence, Conflict of Interest, or Previous Relationship with Regulated Utilities.

A. APSC--See AS 42.05.040 and .050.
B. Indiana--2 Commissioners must be attorneys.
C. Michigan--1 attorney; others must have knowledge of traffic and transportation matters.
D. Virginia--1 must have qualifications of a member of Supreme Court.
E. West Virginia--1 must be a lawyer.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

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COMMENTS OF DON HALL, EXECUTIVE DIRECTOR
OF ALASKA PUBLIC SERVICE COMMISSION, ON SB 54

SB 54
Section No.

.005 In my opinion 5 part-time commissioners would be impractical and needlessly expensive. Hawaii is the only state that now has 5 part-time commissioners. Seven commissions have 5 full-time commissioners, but they have large staffs and all of them regulate transportation agencies as well as public utilities. If there is anything wrong with the Commission it cannot be attributed to the fact that it only has 3 instead of 5 part-time commissioners. Thirty-six of the 57 state regulatory commissions have 3 full-time commissioners and four have 3 part-time commissioners; so it is apparent that three commissioners are all that are really needed. If we should have 5 commissioners in this State I am confident the Governor would find it advisable to appoint them so that various population centers and geographic areas were represented. Thus, the State would have to bear the expense of bringing 5 instead of 3 commissioners to meetings approximately once a month which would greatly increase inside travel costs. Moreover, I can testify to the fact that it requires a great deal of staff time to keep three Commissioners informed of current developments, as they occur, between regular meetings and that the task of assembling records and material for every Commission meeting takes far more time and effort than is generally realized. The staff burden would obviously be greater if there were 5 Commissioneers.

In the final analysis, I think it can be generally agreed that a Commission's success or failure depends mainly on how wise and fair the decisions are rather than how many people participate in the decisions that must be made. After all, three commissions have only one commissioner. This has been going on for many, many years.

.015 6 years is the term of office 35 states prescribe for commissioners.. 11 states prescribe 4-year terms. Only one prescribes a 5-year term. What if February 1, 1969 passes without enacting the law. It would be better to make the terms effective as of the effective date of the law.

.025 The term "fitness to exercise the powers and duties of the commission" is almost meaningless, unless it made meaningful by some procedure such as that of Idaho which requires an investigation by a gubernatorial appointment committee. Our present law is far superior in this respect to that of any other state. The qualifications should be definite. Since

Alaska is already head and shoulders above all other states in spelling out the qualifications of commissioners, we should not go backward. Only four other states now require specific qualifications as distinguished from those such as age, citizenship, residency, etc., namely; Indiana, Michigan, Virginia and West Virginia.

.035 In most states (28) the Governor names the Chairman during his term of office. In 22 others, however, the Commission elects one of its members as chairman. In 2 states the Chairman is designated by rotation and in one by seniority.

.045 No response

.055 No response

.065 No response

.075 The salary of $6000 is the maximum amount recommended by APSC consultants and the amount suggested in APSC proposed legislation for a 3-member Commission.

.085 OK except that the Commission would apparently be unable to name an Executive Director who did not meet the minimum qualifications established by the Personnel Department. This might hamper the selection if the Personnel Department should adopt the recommendation of the APSC consultants who suggested a college degree with emphasis in engineering, accounting, economics, business administration or a utility oriented field plus 10 years of experience in a governmental agency that regulates public utilities.

.095 Under what circumstances will the Attorney General be <u>required</u> to represent the public interest? The way the law is <u>written</u>, it appears that the Attorney General is the only one who would make this decision. There is a question in my mind as to the propriety of allowing the Attorney General to represent the Commission as well as the public in the same proceeding. In Washington State the Attorney General engages the services of an attorney in private practice. This, I believe, would be a more acceptable procedure.

.105 The word "are" in lines 13 and 14 seems to be the wrong word. "Shall be" would be better.

.115 No response

.125 Line 24: Place period after parentheses and strike the rest of the sentence. Is it necessary to include hearing officers, or would the would the word "officers" include hearing officers who are not on the Commission's regular payroll?

.135 No response

.145 If this means the Commission must print or mimeograph or multilith all of its orders and give copies to anyone who asks for them, free of charge, the cost could be prohibitive. Moreover, it would require a lot of staff time which could be better devoted to other matters. Large, well financed commissions can do this, and some do, but I doubt that it would be practical for Alaska. It would be more practical to simply provide that all of the Commission's orders and regulations shall be open to public inspection. Ordinarily people are interested only in a particular order or a particular set of regulations, and they would undoubtedly ask for a copy too, and maybe a certified copy, even if they already had a publication containing all orders or all regulations. In short, I feel that the implementation of this section would be needlessly burdensome and costly to the State. To save staff time, I think that if this section becomes law, the APSC would have to request contractual funds to have all the orders in its order book printed. Some idea of the extent of the printing bill can be gained by the fact that our order book for the year ended December 31, 1968 contains 379 pages 8½ x 14 in size.

.165 It should be realized that the Commission's budget does not now include sufficient funds to adequately regulate municipally-owned utilities and the Alaska Pipeline Company in addition to the ACS when it is sold. In fact, the present budget (after two revisions) is not even sufficient to take care of the problem of assembling a qualified staff to prepare for the job of regulating the ACS purchaser. This is something that needs to be started this year because it is going to be extremely difficult to find qualified employees. Without adequate funding the APSC could not possibly hope to effective regulate any more utilities than it already regulates.

.175(a) Utilities should be subject to "surprise audits." With a five day notice requirement, the Commission would often be frustated in its efforts to determine whether or not a utility is guilty of infractions of the law. This is clearly a utility-oriented provision which I believe is ill advised. Five days would give a utility plenty of time to hide or revise pertinent records.

.175(b) This does not help solve one of the biggest problems the Commission has encountered; namely, whether or not the Commission can, or should, issue a subpoena duces tecum order for the benefit of a party to an adversary proceeding. In our Cause No. U-68-7 the City of Anchorage asked the Commission to issue a subpoena duces tecum order requiring Chugach Electric Association to produce a vast amount of data--much of it, according to Chugach, for discovery purposes to find out if the City had a good case. As I understand it, subpoenas are issued only with respect to people, not records.

.185 This section is satisfactory but should possibly be accompanied by a provision allowing the Commission to assess the costs of an investigation against the utility investigated which is the situation in 29 other state commissions. Also nothing is said about instituting a formal investigation on the motion of a complainant with suitable safeguards to prevent expensive investigations from being instituted, on a mandatory basis, based only upon frivolous and totally unsupported allegations. Although this section, as written, does not prohibit investigations by the Commission on the motion of other parties, it could be improved by making the fact clear.

.195(a) Should specify a time for notice such as at least 10 days prior to the hearing--also specify the manner of determining the days such as 10 days not counting the mailing date or the hearing date.

.195(b) Trying to comply with the APA on hearings has proven to be so difficult and impractical that George Benesch and another Assistant Attorney General have concluded the APSC should be exempt from the APS except in respect to the provisions thereof relating to regulations. Other attorneys have concurred.

.205 Requiring reports in writing is an unnecessary and burdensome requirement. So long as written orders are entered in respect to all formal proceedings it should not be necessary to make written reports. Also, the word "proceeding" should be defined to mean only formally docketed proceedings. This is the present system--and it works. Informal investigations could also be classified as proceedings, but it would be highly impractical to make a written report on proceedings of that kine. If all formal files are open to public inspection the Commission should not have to also make written reports. Possibly a satisfactory solution would be to require that all formal orders in formal proceedings must include a reasonably complete statement of all the pertinent facts and circumstances. Then the order itself would be the equivalent of a written report. We simply do not have staff enough to do anything that is not absolutely necessary. In the past, APSC orders have been sufficiently detailed, in my opinion, to obviate the necessity of a separate written report.

.215 No response

.235 How about grandfather certificates? Does this section mean that grandfather rights will no longer be recognized? In view of Sec. 42.05.615 (2)(A) does this section make it clear that utilities that already hold a certificate will continue to be regulated even if their gross revenues do not exceed $25,000. In this connection, I refer to the words "now

issued" in line 24. The phrase (in line 23) "delineating the area where service is to be provided." is not adequate. When the ACS purchaser applies for a certificate it would be inadvisable to grant it the whole State of Alaska as its service area because this would give it a monopoly of all toll service. Instead, it will be found that the practical way to proceed in many cases is to grant it the right to provide toll service between point A and point B by wire line, or radio links. In other words, we will often be certifying toll routes, rather than areas; although certain area certifications will also be required such as the places where toll centers are located.

It has also been found wise to require a separate certificate for each kind of utility service a utility provides. In view of the foregoing, I would suggest that a period be placed after the word "option" on line 22; then strike the rest of the section and substitute the following:
When a utility seeks to provide more than one kind of utility service a separate certificate of public convenience and necessity shall be required for each of such utility services. Every certificate shall describe the nature and extent of the authority granted therein including, as appropriate for the utility services involved, a description of the area or areas granted and the authorized scope of operations of the utility.

.245 No response

.255 I suggest that this section be revised to read as follows:
No certificate shall be issued unless the commission finds that the applicant is fit, willing, and able to provide the utility services applied for and that such services are required for the convenience and necessity of the public. The commission may issue a certificate granting an application in whole or in part and attach to the grant thereof such terms and conditions as it deems necessary to protect and promote the public interest including the condition that the applicant must serve an area or provide a necessary service not contemplated by the applicant. The commission may, for good cause, deny an application with or without prejudice.

.275 I suggest a period be placed after the word "stated" in line 25 and strike the rest because it places the Commission is the impossible position of making a "finding" as to the reasonableness of rates charged within a municipality. This would require an investigation concerning the reasonableness of rates within corporate boundaries of every municipality that wants to place in effect a franchise tax or other charge to be separately stated on the utility bills of customers who reside in the municipality. I submit that the proposed statement would place an unwarrented burden on municipalities. It is enough to simply require that the city's charges be separately stated.

.295 Suggested Revision: (Should be .305)

Sec. 42.05.295. COMPLIANCE WITH TARIFFS. No public utility may, directly or indirectly, demand, charge, or receive a greater or lesser compensation for any utility service rendered or utility commodity furnished than is specified in its effective tariff filed in the manner provided in this Act, or fail to provide facilities of the kind and quality offered pursuant to its effective tariff. A public utility may charge its customers, and others, an amount not exceeding the actual cost for extraordinary services provided, including the cost of repairing damages to its facilities.

.305 Suggested Revision: (Should be .295)

Sec. 42.05.305. FILING OF TARIFFS AND CONTRACTS. (a) Under regulations prescribed by the commission each public utility shall file with the commission its tariffs and all contracts. Such tariffs and contracts shall show every rate and charge associated with the sale of any utility service or commodity and every classification, rule, regulation or practice affecting rates or charges. Each public utility shall print, or type, its complete tariff and keep an up-to-date copy of it on file at its principal business office and at each station or office where payments for service are accepted. Such tariffs shall be made available to, and be subject to inspection by, the general public on demand.

(b) The commission may reject, or modify, any tariff or any provision thereof which it finds inconsistent with the public interest or the utility tariff regulations of the commission. Any tariff or tariff provision which is rejected is void.

.315 Suggested Revision:

Sec. 42.05.315. NEW AND REVISED TARIFFS AND CONTRACTS. (a) Unless the commission otherwise orders no new rate or charge, classification of service, or contract relating thereto shall become effective and no change in any existing rate, charge, classification, regulation or contract shall become effective, except after 30 days' notice to the commission and to the public. This notice shall be given by the utility by filing with the commission and keeping open for public inspection the new or revised tariff or contract plainly stating the nature of the filing and the effective date thereof and by issuing a public notice briefly summarizing the facts and the effect of the filing in such a way as to clearly acquaint the public with its scope and purpose. The commission may prescribe additional means of giving notice. For good cause shown, the commission may allow a new or revised tariff or contract to take effect without requiring 30 days notice by issuing an order specifying the changes to be made, the time they shall take effect and the manner in which they

shall be filed and published. [Note: This supersedes (and improves upon) previously proposed legislation I suggested which is word for word the same as sec. 42.05.315 of SB 54.]

(b) Coincident with the filing of any new or revised tariff or contract with the commission the utility shall also place a true copy thereof on file at its principal business office and at every office or station where payments for service are accepted. [Note: This provision is in AS 42.05.500 of present law.]

.325 Line 28--Change heading as follows:

Sec. 42.05.325. SUSPENSION OF TARIFF OR CONTRACT FILING. (a) When a tariff or contract is filed containing a new or revised rate, charge, toll, rule, regulation, classification, or practice, the commission may, either upon complaint or upon its own iniative without complaint, at once, or if it so orders, upon reasonable notice, enter upon an investigation and hearing on the lawfulness of the proposed filing.

(b) Pending the investigation, hearing and decision, the commission may, by order, suspend the operation of the proposed new or revised tariff or contract for a period of time not more than ten (10) months beyond the date the proposed filing would otherwise go into effect. After a full hearing, during the suspension period, the commission may issue orders granting, denying or modifying the proposed new or revised tariff or contract in whole or in part. If no order is issued during the suspension period, the proposed revision shall go into effect at the end of the 10-month suspension period.

(c) In the case of a proposed increased rate or charge, the commission may be order require the interested utility or utilities to keep accurate account, in detail, of all amounts received by reason of the increase, specifying by whom and in whose behalf the amounts are paid. Upon completion of the hearing and decision the commission may be order require the public utility to refund, with interest not exceeding six per cent per annum, to the persons in whose behalf the amounts were paid, that portion of the increased rates or charges which by its decision was found not to be justified.

(d) At any hearing involving any proposed new or revised tariff or contract filing the burden of proof to show that the filing is fair and reasonable shall be upon the public utility. The commission shall give to the hearing and decision of these questions priority over other questions pending before it and render its decision thereon as speedily as possible.

NOTE: Sec. 42.05.325 of SB 54 reduces suspension period to 5 months. Only 3 states now have a 5-month suspension period. Eight states have a 6-months period and 5 have a 10-month period. I favor a 10-month period because of the Commission's limited staff, which makes it difficult to complete investigations within a short period of time. This should be the determining factor--and 10 months is not out-of-line. Ten months gives greater flexibility since if an investigation can be completed in 5 months there is nothing to prevent limiting the suspension period to 5 months. On the other hadn, a 5-month period could force the staff to do a sloppy job in order to meet the statutory deadline.

The filing of a written statement of the reasons for a suspension together with the suspended filing would be a burdensome and unnecessary requirement. The suspended tariff or contract would be on file anyway; so all that need be done, actually, is for the Commission to make a complete statement of the reasons for the suspension in the suspension order itself. This would be adequate, in my opinion, since a suspension order would have to be served on the utility in any event.

Regarding the provision beginning on line 26 with the words "At a hearing involving a rate or charge sought to be increased...: I don't believe it is a good idea to limit the burden of proof requirement only to increased rates or charges. Right now we have a proceeding before the Commission which was instituted by Chugach Electric Association to reflect a substantial rate reduction. The City of Anchorage and a number of CEA's customers have objected to the reduction on the grounds it is unjustly discriminatory. Chugach should, and is, assuming the burden of proof in this case. Therefore the controlling law shoudl be substantially like section (d) of my suggested revision.

.335 No comment except that if the rates of a municipality should be changed pursuant to any covenant with bondholders (which, more aptly, should be bond purchasers) the law should require the municipality to file its revised rates with the Commission together with a statement, under oath, setting forth the reason for the filing (along with supporting documents and data) and require that the Commission allow such rates to become effective of the desired date, if properly supported, without regard to any complaint that might be filed. In any event the rates, when fixed by contract with bond purchasers, should be filed with the Commission as provided in AS 42.05.305 and .315 rather than being completely exempt from all filing requirements as indicated by the reference to "secs. 275 - 405" on line 14.

.345(a) No comment

.345(b) Line 23: examine misspelled.
This section should be strong enough to enable the Commission to make all salaries subject to the Commission's prior approval to the extent they are not established by arms-length bargaining. Otherwise the owners of small utilities and the affiliated interests of large utilities will be in a position to absolutely control their rate of return by salary charges to utility operating expenses over which the Commission has no control. I question whether the section, as written goes far enough to give the Commission a chance to control salaries adequately.

.355 Suggest that AS 42.05.271 of SB 128 be substituted for following reasons:
1. Line 29, p. 9: the utilities regulated by the Commission do not have tracks or subway so these words should come out.
2. Line 12, p. 10: a telephone utility is the only kind that transmits messages.
3. Line 13, p. 10: telephony in this day and age has gone far beyond the simple transmission of messages. It now includes circuitry for data processing, facsimile transmission, remote control faciliites, etc. In addition, we must recognize that many telephoee connections are now effected by radio links rather than the physical connection of wires.
4. Line 21, p. 10: the word "physical" should be omitted for the reason indicated above.
5. Sec. (c), pp. 10-11: it is a recognized and normal industry practice for public utilities to include a line extension policy in their tariffs. I wrote section (c) of 42.05.271 in SB 128 and believe it is a better way to handle the problem because, among other reasons, it is uniformly applicable to all utilities rather than being limited only to electric utilities.

.365 Sec. 42.05.281 of SB 128, as drafted, includes a number of suggested revisions I made--and I think it is better. Subsection (b) is a case in point because there are times when it would be totally unfair to require one party or the other to bear all the cost of maintaining a connection. Sometimes both parties benefit from a connection, or share the revenues (as when toll revenues are shared or when EAS is established between adjoining exchanges of two utilities.)

.375 I think this section should be omitted. Industry practice determines the commercial units of any utility product or service. Further, I can see no practical need for any such provisions. I suggested it be omitted from an early draft of SB 128, for the above reasons, and it was.

.385 No response

.395 No response

.405 In actual practice this sort of thing is never done because it is not necessary for the Commission to "provide for a comprehensive classification of services for each public utility" except in an indirect way by regulatory supervision over tariff filings. Large utilities employ highly skilled consultants to advise them on classifications of service--and it is not uncommon for them to recommend that previous classifications be revised to adjust to changed conditions. Any comprehensive classifications the Commission might prescribe would tend to place all utilities in an undesirable straight jacket and make it difficult for them to achieve the flexibility required to adopt to changed costs and new market conditions. As for the smaller utilities, the problem of classification is usually so simple and self-evident that no regulatory control is necessary. In short, this is an area where regulatory safeguards need not be provided.

.425 Commissions in twenty-eight states, the District of Columbia and Puerto Rico plus the Federal Power Commission and the Federal Communications Commission follow the so-called original cost theory of rate base determination. The fact that a total of 32 regulatory commissions (including the largest such as California and New York) consider this method feasible provides a rather convincing argument for Alaska to do likewise. It is mainly for this reason that I recommend the section 42.05.411 of SB 128 be substituted for the language in sec. 42.05.425 of SB 54. There is a vast body of law and precedent for the original cost theory which, in essence, reduces rate base determinations mainly to an accounting procedure. Even a state, like Ohio, the only one in the nation that follows the reproduction cost theory, finds it it expedient to adopt, for accounting purposes, that uniform systems of accounts prescribed by the FPC and the FCC--both of which require original cost accounting.

.435 P. 13, lines 8-9: I am unable to reconcile the phrase "which are otherwise exempt from this chapter" with the broad definition of the term "public utility" as set forth in sec. 42.05.615(2) as applied to municipal corporations.

P. 13, lines 9-10: The present law, AS 42.05.290, provides that any "generally recognized system of accounting" can be followed, but the term "generally recognized" is not defined. Consequently, the various utilities in any given class are free to follow different systems. This completely destroys any effort to bring about uniformity of accounting procedures. Accounting uniformity is essential in utility regulation because without it the Commission cannot compare the accounts of one utility with those of others of the same kind without extensive analysis. Meaningful statistics cannot be compiled without such analyses in the absence of uniformity. In my 34 years of regulatory experience I have never found a state or federal regulatory agency that does not require uniform systems of accounts for the utilities they regulate. It is important to

achieve effective regulation because it simplifies the task of maintaining constant surveillance which enables commissions to quickly determine whether or not there is good cause to suspect that any given utility is earning more than a reasonable return on its investment. In short the law, as it stands, should be changed in the manner indicated so that the Commission will not be hampered in its efforts to regulate utilities effectively--and without excessive and unnecessary cost to the State. The Commission is, of course, aware of the fact that the task of bringing about accounting uniformity cannot be accomplished overnight. It may take a considerable period of time--but it is something which, in the long run, must be done, as other states have discovered after many years of experience.

In view of the foregoing facts and circumstances I am compelled to say I prefer section 42.05.431 of SB 128 over section 42.05.435(a) of SB 54. However, I see nothing wrong with subsection (b) of 42.05.435.

.455 I think this section should be omitted because it requires burdensome reporting by utilities for no good reason other than to obtain information. The information that is required is along the lines of what is required in a public law regulating the issuance of securities by public utilities such as RCW 80.08.030 of the laws of Washington State which I administered for over 17 years. But the Washington law gives the Commission the power to grant, deny, or condition and restrict the issuance of securities. In the absence of this follow-up power, I see no good reason for this section. Further, I believe the APSC would be better off, at this stage of the game, if it did not undertake the task of regulating utility security issues.

.465 No response

.475 No response

.505 No comment except I recommend that a period be placed after the word "chapter" in line 3 and the rest of the sentence be stricken.

.515 No response

.525 I suggest that this section be re-written as follows:

Penalties. (a) In addition to all other penalties provided by law, any person who knowingly violates or knowingly aids in the violation of any provision of this chapter, or of any rule, regulation or order of the commission adopted under this chapter, is subject to a penalty of not more than $100 for each violation and, in the event of a continuing violation, not more than $100 for each day that the violation continues.

(b) The commission is authorized to determine, after hearing initiated by a complaint describing the alleged violation or violations with reasonable particularity, the existence of any violation described in (a) of this section and to impose such monetary penalties, not to exceed the amount provided in (a) of this section, as it deems justified under the circumstances. The determination and penalty imposed by the commission shall be enforced by suit commenced in the Superior Court by the Attorney General in the name of the commission.

(c) In the event the commission elects not to proceed pursuant to (b) of this section, or in the event a complaint is not answered within the time provided by the commission for answer, the Attorney General shall enforce the provisions of (a) of this section by suit commenced in the Superior Court in the name of the commission. In all such actions, the procedure and rules of evidence shall be the same as are applicable in ordinary civil actions.

(d) All penalties recovered under this section shall be paid into the general fund of the State of Alaska.

REASONS: At a meeting of the Legislative Council in Anchorage on October 12, 1968, Senator Brad Phillips asked me what the Commission could do in the event it made an investigation of a utility and found its services and facilities were sub-standard and that complaints to that effect by its customers were fully justified. I had to inform him our only recourse, under the present law, would be to revoke the utility's certificate of public convenience and necessity, in which event the company would then be free to completely abandon service if it so desired. It was then I informed him I had suggested last year that we have a monetary penalty law to take care of such cases and he seemed to think it was a good idea. In fact, he said the Legislative Council was going to meet again before the next session and would like to have all of our recommendations at that time.

It is very apparent to anyone who views the matter realistically that one of the most outstanding defects in AS 42.05 is the almost complete absence of any effective enforcement tools. The only specific enforcement provisions I find in the law as it stands now are for the purpose of dealing with specific problems. (See AS 42.05.055, AS 42.05.200, and AS 42.05.550). Insofar as I can determine, if there are any other enforcement tools that can be applied to other infractions of the governing law, they will be found in AS 44.62--the Administrative Procedure Act. It is my understanding, also, that the Commission must turn <u>all</u> of

its enforcement problems over to the Attorney General--a tremendous burden. There is no procedure whereby the Commission can take direct action to deal with violations of AS 42.05. This is comparable to depriving State Patrolmen of the power to arrest traffic violators. The purpose of this proposed legislation is to remedy the situation and at the same time relieve the Attorney General of carrying the full burden of enforcement. There is absolutely nothing more frustrating to an administrator of laws containing numerous mandatory provisions than to be forced, as a practical matter, to depend almost exclusively upon voluntary compliance with the law and to have no prompt and effective recourse when voluntary cooperation is not forthcoming. In short, it is completely unrealistic to expect truly effective administration of AS 42.05 as it is now written, unless the APSC has a realistic means of enforcement.

.535 No response

.555 No response

.565 No response

.575 No response

.605 Sec. (2) cannot be reconciled with lines 8 and 9 on page 13 where reference is made to the exemption of municipally-owned utilities.

Sec. (2)(A) This section in the present law has been extremely difficult to interpret and administer as evidenced by the attached request for an opinion of the Attorney General and the opinion which contains the following statement: "But only one thing seems certain, the legislature must not have been aware of the collateral problems it created by the amendment."

Attention is also directed to omission of the words "for compensation" which is a qualification that is present in the definitions of all other types of utilities.

There is reason to believe that the term "telephone" needs to be more specifically defined. Should it include mobile telephone systems that are not connected with a local telephone exchange or a long-lines carrier? Shoudl it also include a wire line telephone utility not connected to a long-lines carrier? Should it include a mobile telephone service operated by a certificated company that has no telephone exchange of its own but does have a patch connection with a wire line exchange that, in turn, is connected with a long-lines carrier?

In view of previously recommended changes, I suggest that the term "tariff" be defined as follows:

"Tariff" means any or all rates, charges, tolls, rules or regulations of a utility relating to commodities or services furnished by a utility to the general public for compensation and every map, page, adoption notice, instrument or other document filed with the Commission setting forth the terms and conditions under which utility services or commodities are offered to the public together with instruments of concurrence and all other documents and data setting forth the terms of a utility's business relations with any other utility insofar as they affect the general public either directly or indirectly.

MEMORANDUM

State of Alaska

TO: Kent Edwards
Attorney General
Department of Law

DATE : September 12, 1968

FROM: Don Hall
Executive Director
Public Service Commission

SUBJECT: AS 42.05.640(2) as Re-enacted by HCSCSSB 167 (Chapter 188, Laws of 1968, Second Session)

AS 42.05.640(2), (A) provides that the term "public utility" or "utility" includes electric, telephone, and telegraph utilities "which produce an annual gross income in excess of $25,000. Prior to the effective date of the new law (July 29, 1968), all such utilities were included in the term "public utility" without regard to their annual gross revenue. It appears from the latest available information that approximately 16 electric, telephone, and telegraph utilities had gross revenues of less than $25,000 from operations during their latest fiscal year, and therefore, are not subject to regulation by the Commission.

Unfortunately, the problem of administering the new law is not limited to a simple determination of which utilities no longer fall within the definition of the term "public utility." The Alaska Public Service Commission has directed me to ask you for a legal opinion on these additional administrative problems as outlined below:

1. Can the Commission continue to regulate a utility simply because it states that it wishes to submit to regulation even though it is exempt from regulation by the controlling law? This is not a theoretical question as evidenced by the attached letter dated July 31, 1968 from John B. Heafer, President of Greater Anchorage Borough Telecommunications, Inc.

2. Is there an implied requirement that the Commission must specifically revoke all certificates of public convenience and necessity previously issued to utilities that are no longer required to have a certificate? The problem here is that these utilities were put to considerable time, effort, and expense to obtain their certificates. Some are now approaching the $25,000 gross revenue figure, and may reach it in the near future, at which time they would again be required to have a certificate.

In addition, there is a possibility the next legislature might strike the gross revenue requirement from the law, in which case all utilities would again be required to have a certificate. If it is discretionary with the Commission as to whether or not it should revoke the aforementioned certificates, could the Commission legally reinstate them (due to increased revenues or a change in the law) without requiring a new application and possibly a hearing? If the Commission could legally reinstate such certificates without application or hearing, it would simplify the task of reasserting its regulatory jurisdiction and, of course, spare the utilities a lot of time and expense. If this procedure is improper, what course of action would be open to the Commission to force the re-certification of a utility in the event it does not voluntarily make application?

3. If a utility with annual gross revenue in excess of $25,000 should apply for a certificate to serve an area served by a utility that has been de-regulated, would the Commission be within its legal rights to deny it on the grounds that it would result in duplication of utility facilities? Would it be within its legal authority to grant such an application if it found that the area could be served more adequately by the certificated utility?

4. Attached hereto is a letter from the Alaska Village Electric Cooperative, Inc. inquiring if it is required to obtain a certificate to serve five villages this year. The basic question is whether or not the Commission should require the Cooperative to apply for a certificate on the basis of projected revenues in excess of $25,000 or whether the Commission should inform the Cooperative that no certificate will be required until such time as it has actually earned $25,000 gross revenue during any consecutive 12-month period. Your opinion in this regard is needed right away because of the urgent need to start construction to serve five villages this year. If a certificate is required, the REA probably will not advance construction funds until the Cooperative has obtained

a certificate authorizing it to serve the five villages.

5. In the event the Commission had good reason to believe, or even suspected, that an electric, telephone, ~~communications~~ had earned gross revenue in excess of $25,000 in any given annual period, would it have a right to demand access to its accounting records to determine the facts in regard to its annual revenue? If not, what legal recourse, if any, would the Commission have to ascertain the facts necessary to require certification? This will undoubtedly become a problem in respect to certifying the Alaska Village Electric Cooperative either this year or next year when its gross revenues will apparently exceed $25,000. A corollary question is what legal penalty a utility would become subject to if it failed, or refused, to apply for a certificate after its annual revenue exceeds $25,000.

6. Also attached hereto is a copy of the statement of profit and loss of Sidney C. and Shirley J. Childers, dba Communications Equipment & Service Co., who have applied for a certificate of public convenience and necessity. The Commission received the said application prior to the effective date of the new law.

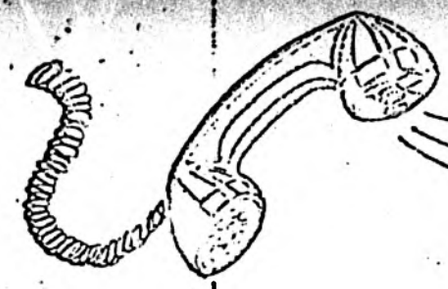
According to the data they submitted, the public utility portion of their business had expenses in 1967 of $27,541 from which could be imputed a gross revenue greater than $25,000; however, the question is whether or not the Commission may issue a certificate to the Childers at this time when their actual "utility" revenue was only $15,322 for the year.

A decision on the issuance of a certificate is a matter of urgency for the Childers since the FCC won't grant them an MCC license until they are able to show either that they have appropriate operating authorization from the State or that no such authorization is required. (They are

operating now under the pseudo-authority of an FCC license which was issued to a predecessor company.)

By Don Hall
Don Hall.





GREATER ANCHORAGE BOROUGH

TELECOMMUNICATIONS COMPANY, INC.

PHONE 272-5132
BOX 2473
ANCHORAGE, ALASKA

31 July 1968

Mr. Don Hall, Executive Director
Alaska Public Service Commission
700 MacKay Building
338 Denali Street
Anchorage, Alaska 99501

Reference: APSC Letter, dated 21 June 1968, re: Exclusion of Utility Under $25,000 Revenue From Regulation

Dear Mr. Hall:

This utility has complied with the request contained in the above reference. However, the Alaska Statute does not prohibit a utility from voluntarily subjecting itself to regulation by the Commission. Accordingly, in the public interest, this utility respectfully requests that it be continued under regulation for the service area so designated in its certificate.

Sincerely,

John B. Heafer

John B. Heafer
President

cc: Governor Walter J. Hickel
Commissioner George Sharrock
Commissioner James R. Clouse
Commissioner Loren H. Lounsbury
Commissioner Gordon J. Verbetz

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Alaska Village Electric Cooperative, Inc.

Room 25 Reed Building 608 Fourth Avenue P. O. Box 1739
ANCHORAGE, ALASKA 99501

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August 21, 1968

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Mr. Don Hall
Executive Director
ALASKA PUBLIC SERVICE COMMISSION
700 Mackay Building
338 Denali Street
Anchorage, Alaska 99501

Dear Mr. Hall:

This letter is to advise you that we are starting construction on a Rural Electrification Project to include approximately 60 villages in the State of Alaska.

The projected gross revenue upon completion of the entire construction project is $1,500,000 per year. Present plans indicate that we will complete construction of distribution systems in five villages in this calendar year. Annual revenue will be less than $25,000 per year from each of the five villages during the first five years of their operation. However, next year we contemplate the installation of an additional 25 projects and some of these will exceed $25,000 per year in revenue.

Will you please acertain for us whether or not our entire project will be subject to regulation by the Public Service Commission or will it be necessary for us to apply for certificates only for these individual villages where we expect the revenue to exceed $25,000 per year.

Any cooperation you can give us in this matter will be greatly appreciated.

Sincerely yours,

W. C. Rhodes
MANAGER

WCR:dba



COMMUNICATION EQUIPMENT & SERVICE Co.
1010 College Road
Fairbanks, Alaska

PROFIT & LOSS STATEMENT
for
Year of 1967

		Total	General Sales	Radio Telephone
INCOME		$87,625.23	$71,001.05	$16,624.18
Inventory 12/31/66	$ 6,125.00			
Parts Purchased	12,692.06			
	$18,817.06			
Less Inventory 12/31/67	13,610.00			
		5,207.06	3,905.30	1,301.76
Equipment Purchased for Resale		13,370.86	13,370.86	
		$69,047.31	$53,724.89	($15,322.42)
EXPENSES:				
Payroll		$11,410.64	$8,557.98	$2,852.66
Shop Expense		2,344.10	1,758.08	586.02
Supplies		142.04	106.53	35.51
Office Expense		1,199.30	899.47	299.83
Vehicles Expense		938.26	703.70	234.56
Telephone		1,408.22	352.06	1,056.16
Electricity		904.74	678.56	226.18
Fuel		1,056.57	792.43	264.14
Advertising		1,180.96	590.48	590.48
Repair		512.08	384.06	128.02
Promotion & Entertainment		899.09	674.32	224.77
Dues & Subscriptions		295.46	221.60	73.86
Rent		1,125.00		1,125.00
Insurance		2,451.80	1,225.90	1,225.90
Equipment Rental		495.03	371.27	123.76
Professional Services		373.53	186.76	186.77
Airplane Expense		246.50	184.88	61.62
Contract Labor		3,115.32	2,336.49	778.83
Travel Expense		735.48	551.61	183.87
Fed. Unemployment Tax		76.47	57.35	19.12
Fed. Excise Tax		495.45		495.45
Business License		25.00	18.75	6.25
Sales Tax		467.29	350.47	116.82
Auto Licenses		140.00	105.00	35.00
Property Tax		243.60	182.70	60.90
Interest Expense		2,358.62	1,768.97	589.65
Freight		238.21	178.66	59.55
MCC Dispatch Expense		541.67		541.67
E.S.C. Taxes		331.22	248.42	82.80
F.I.C.A. Taxes		506.87	380.15	126.72
Misc. Expense		242.00	181.50	60.50
Bad Debts		743.78	371.89	371.89
Depreciation Expense		25,094.75	10,377.57	14,717.18
Total Expense		62,339.05	34,797.61	(27,541.44
NET PROFIT OR LOSS		$ 6,708.26	$18,927.28	($12,219.02)

FORM SA-18

MEMORANDUM State of Alaska

TO: Don Hall, Executive Director
Alaska Public Service Commission
Anchorage

DATE : November 13, 1968

FROM: G. Kent Edwards
Attorney General

By: George L. Benesch
Assistant Attorney General

SUBJECT: Effect of 1968 amendment (Sec. 1, Ch. 188, SLA 1968) on jurisdiction of Public Service Commission to certificate utilities prior to actual operation.

The question to which this opinion is primarily directed can be stated as follows:

Does the 1968 amendment establish the prerequisite that a new utility actually be operating and have realized the specified revenue before it comes within the jurisdiction of the Public Service Commission? Stated another way, does it preclude commission certification of all prospective utilities?

At the outset we advise that all interpretations of the amendment create difficult problems, of application, regulation, enforcement and discretion. The answer is essentially a matter of determining the legislative intent. But only one thing seems certain, the legislature must not have been aware of the collateral problems it created by the amendment.

In our judgment, the matter requires legislative clarification. This should be sought at the earliest possible time.

If it is necessary or desirable for the commission to take positive action within the framework of the amendment prior to legislative clarification, our interpretation is as follows:

(a) An operating utility which grosses $25,000 or less during a full year of operation is not a public utility for the purposes of regulation.

(b) A utility which has not yet operated a full year but which is not expected to receive more than $25,000 gross revenue during its first full year of operation, is not subject to the commission's regulatory jurisdiction.

(c) A prospective utility whose gross revenue during its first full year of operation is reasonably projected at $25,000 or less is not subject to the commission's regulatory jurisdiction.

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(d) All other utilities, whether prospective or operating, are within the commission's jurisdiction unless specifically exempted by AS 42.05.645.

(e) All utilities exempt from regulation simply because of the $25,000 limitation come within commission jurisdiction as soon as that limitation is exceeded in actual operations.

Although the language of the amendment is, in many respects, unfortunate and inadequate, we believe that the single, basic objective of the legislature was simply to relieve small utility systems from the presumed burdens of regulation. The systems it had in mind are defined in terms of annual monetary income. We are convinced that the legislature did not intend to otherwise change the commission's jurisdiction beyond achieving that objective. It is reasonably certain that the legislature considered the application of the amendment to be one of simple mechanics and procedure. That the application may prove to be difficult and involve numerous unforeseen legal problems does not necessarily mean that the legislature must have intended a more far-reaching jurisdiction restriction which would avoid some of those problems. This is particularly true in this case. Any interpretation of the amendment, different from that we have given here, also involves comparable difficulties and legal problems.

The provisions of the 1968 amendment with which we are here concerned reads as follows:

> AS 42.05.640(2). "'Public utility' or 'utility' includes every corporation, whether public, cooperative, or otherwise, company, individual, or association of individuals, their lessees, trustees, or receivers appointed by a court, that owns, operates, manages or controls any plant, pipeline, or systems for
>
> (A) the generation, transmission, or distribution of electric energy and power, or the furnishing of telephone or telegraph communications, any of which produces an annual gross income in excess of $25,000;". (Underlining added.)

Except for the language underlined above (which is new language) this quoted portion of the amendment reads exactly the same as the statute it supersedes.

The amendment is written in the present tense. But, as a matter of fact, the superseded statute also sounded in the present tense. Neither the previous statute nor the amendment says anything about a prospective utility. The tense employed in both appears to have been essentially a matter of convenience, without special meaning. AS 01.10.050 together with AS 01.10.020 provide the interpretive rule that "words in the present tense include the past and future tenses" unless "the construction would be inconsistent with the manifest intent of the legislature."

The "manifest intent" which must be ascertained here is not whether the legislature intended to exclude small utility systems from regulation. This intent is quite obvious. The interpretive problem is rather to determine whether the legislature intended to do away with certification of all prospective utilities irrespective of size.

If the legislature did not intend the broader exemption, then the achievement of the more limited objective is a matter of commission procedure rather than statutory interpretation.

In assessing the legislative intent, AS 42.05.640(2) must be read in context with the other provisions of AS 42.05. In this vein it should be kept in mind that AS 42.05.640(2) is simply a "definition" statute. It merely defines a "public utility" or "utility." The amended definition even encompasses municipal utilities.

As a definition statute the 1968 amendment reflects some improvements over its predecessor. The statute previously included a number of exemptions to the commission's jurisdiction. These exemptions are now removed from the definition and incorporated in a separate exemption statute, AS 42.05.645.

Having determined to remove primarily jurisdictional matters from the definition, it would be inconsistent to conclude that the legislature intended to nevertheless provide therein a new, purely jurisdictional limitation that removes all authority over all non-operating utilities. If this had been an objective of the legislature, it seems certain that it would have been expressly stated and placed elsewhere in the chapter, for example as an amendment to AS 42.05.193 or as an exemption in AS 42.05.645.

As a practical matter, the definition provided in the amendment is also jurisdictional in nature. But, aside from the fact that the amendment is written in the present tense (a matter already discussed), there is nothing to indicate that the legislature intended it to revoke commission jurisdiction over all prospective utilities.

The 1963 Legislature imposed certification requirements upon all public utilities coming within the commission's jurisdiction. (Sec. 1, Ch. 95, SLA 1963). Thus prospective as well as operating utilities were to be regulated. But this was accomplished by enacting a new statute, AS 42.05.193, not by amending the definition statute. AS 42.05.193 provides that "no public utility shall operate after January 1, 1964, without first having obtained . . . a certificate. . . ." By law, then, no public utility can now gain operating experience prior to certification unless otherwise exempt.

A companion statute, AS 42.05.196, enacted by the same legislature, grants the commission discretionary authority to "issue a certificate as requested or for good cause shown deny the same in whole or part." This discretionary authority is limited by a grandfather clause applied to utilities which were "actually operating in good faith on October 15, 1962 . . . or . . . installing the facilities necessary to furnish service under a franchise as of that date." (AS 42.05.194).

The language of these certification statutes remains the same today. The commission derives its jurisdictional authority and guidance from them insofar as prospective utilities are involved. Neither the definition statute nor the exemption statute expressly revokes that authority.

Certification of prospective utilities is a very important function to effective regulation. The rescission of such authority should not be presumed in the absence of a clear indication that that was the result intended. In order to find such an intention in the 1968 definition amendment it would also be necessary to conclude that the legislature intended to do away with all future certification. Delay of certification until after a utility has commenced operation is analogous to closing the barn door after the horse escapes. A principal objective of certification is establishment of controlled monopoly. Furthermore, this interpretation would lead to perhaps the most complicated legal problems of any interpretation.

What, for example, happens to the utility that builds its system, commences operations and shortly thereafter grosses $25,000? Must it wait until that point in time to receive certification? And must it cease operation thereafter until certified? Furthermore, does the commission still have the discretion at that time to grant or deny certification?

Theoretically, the answers to all three questions would be yes. The 1968 amendment could not be construed as yielding a different result. These could be very serious problems where two prospective utilities build competing facilities to serve the same area; or if the new utility was seeking a certificate in an area already certificated.

Thus we arrive at the conclusion that if the commission previously had jurisdiction to certificate proposed utility systems (and we find that it did), it was not divested of that authority by the 1968 amendment. The basic difference now is that the commission must first determine whether a particular system or prospective system is that of a utility within the "25,000" definition. Although it may be difficult in some instances, we doubt that this is an insurmountable task. The degree of difficulty in performing a task does not negate jurisdiction.

Even though the commission may not have jurisdiction over a particular utility system which will not gross $25,000, it nevertheless has the inherent authority to make that determination. 1/

We recognize that our conclusions in this matter leave a number of pressing questions on application unanswered. Hopefully, however, it provides a sufficient working guide to permit reasonable functioning of the commission in the area of prospective utilities until such time as the legislature takes corrective measures. It would be our thought that any prospective utility can voluntarily confer jurisdiction on the commission by stating that it expects to produce an annual gross income in excess of $25,000. Whether or not the commission necessarily loses jurisdiction thereafter if the first full year of actual operating experience shows less than $25,000 is a question we defer until such time as it may arise. We suggest, however, that in the case of a voluntary invitation to continued jurisdiction there may be room for relying on a future projection, even for an operating utility.

GKE:GLB:rw

1/ In Sayre Land Co. v. Pennsylvania Public Utilities Commission, (1959) 27 PUR3d 502, the Pennsylvania Court of Common Pleas stated "The commission has the function to determine the existence of the fact of ownership or operation of public utility facilities, upon which fact the commission's jurisdiction over public utilities depends."

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

Jackson PSC

SUMMARY

Rank of Alaska Public Service Commission compared with All Other State Regulatory Agencies in Respect to the Following:

Subject	Alaska No.	Alaska Rank
No. of Regulated Electric, Gas and Telephone Utilities	60	28
Total No. of Regulated Electric Utilities	35	14
No. of Private Electric Utilities Regulated	24	1
No. of Publicly-Owned Electric Utilities Regulated *32 other commissions share 21st place.	0	21*
No. of Regulated Cooperative Electric Utilities	11	14
No. of Regulated Gas Utilities	3	45
No. of Private Gas Utilities Regulated	3	44
No. of Publicly-Owned Gas Utilities Regulated #41 other commissions share 12th place.	0	12#
No. of Regulated Telephone Utilities	22	33

No. of Employees:

	No.	Ratio (a)
Professional Staff	4	1
Clerical Staff	3	3/4
Total Staff	7	50

(a) The nationwide average ratio is 2 clerical employees for each professional employee.

TOTAL OF REGULATED ELECTRIC, GAS AND TELEPHONE UTILITIES

State	Total	State	Total	State	Total
Iowa	491	North Carolina	90	Montana	38
Puerto Rico	361	Arkansas	85	Maryland	37
Wisconsin	264	West Virginia	84	Utah	36
Indiana	238	Virginia	75	Tennessee	35
Kansas	206	Wyoming	73	Arizona	33
Pennsylvania	192	New Mexico	72	Idaho	31
New York	173	Washington	62	New Jersey	29
Minnesota	165	Alaska	60	Connecticut	22
Illinois	138	South Carolina	58	Rhode Island	14
Texas	138	Georgia	57	Delaware	8
Missouri	133	Nebraska	54	Hawaii	8
Ohio	120	Oregon	54	District of Columbia	3
Kentucky	119	Maine	53	Virgin Islands	1
California	112	Vermont	53		
Michigan	110	Alabama	52		
Oklahoma	110	South Dakota	52		
Colorado	101	North Dakota	45		
Louisiana	97	Florida	42		
Mississippi	95	Nevada	42		
Massachusetts	94	New Hampshire	40		

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas and Telephone Utilities published by the Federal Power Commission and from the 1966 Statistics of the Independent Telephone Industry published by the United States Independent Telephone Association.

NUMBER OF REGULATED
TOTAL ELECTRIC UTILITIES PER STATE

State	Utilities	State	Utilities
Iowa	225	New Jersey	15
Wisconsin	107	Utah	15
Indiana	97	California	14
New York	67	Missouri	13
Massachusetts	60	Ohio	12
North Carolina	51	Connecticut	11
Colorado	49	South Carolina	8
Illinois	47	Idaho	7
Kansas	45	Hawaii	6
Mississippi	43	Rhode Island	6
Wyoming	42	Florida	5
Kentucky	38	Louisiana	5
Vermont	35	Montana	5
Alaska	35	Tennessee	5
Arkansas	31	Oklahoma	4
Michigan	29	Oregon	4
New Mexico	29	Washington	4
West Virginia	26	Delaware	3
Virginia	24	North Dakota	3
Maryland	23	Alabama	2
Pennsylvania	20	Georgia	2
Maine	19	District of Columbia	1
New Hampshire	18	Minnesota	0
Nevada	17	Nebraska	0
Arizona	15	Puerto Rico	0
		South Dakota	0
		Texas	0
		Virgin Islands	0

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas, and Telephone Utilities Published by the FPC.

NUMBER OF REGULATED
PRIVATE ELECTRIC UTILITIES PER STATE

State	Utilities	State	Utilities
Alaska	24	Idaho	7
New York	22	Kansas	7
West Virginia	21	Arizona	6
Wisconsin	21	Hawaii	6
Massachusetts	20	Connecticut	5
Pennsylvania	18	Florida	5
Vermont	16	Louisiana	5
Illinois	14	Montana	5
Michigan	14	New Jersey	5
Missouri	13	Rhode Island	5
North Carolina	13	Colorado	4
Maryland	12	Oklahoma	4
Nevada	12	Oregon	4
Ohio	12	Washington	4
Indiana	11	North Dakota	3
Maine	11	Tennessee	3
New Hampshire	11	Utah	3
Iowa	10	Alabama	2
California	9	Delaware	2
Kentucky	9	Georgia	2
Wyoming	9	Mississippi	2
New Mexico	8	District of Columbia	1
South Carolina	8	Minnesota	0
Virginia	8	Nebraska	0
Arkansas	7	Puerto Rico	0
		South Dakota	0
		Texas	0
		Virgin Islands	0

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas, and Telephone Utilities Published by the FPC.

NUMBER OF REGULATED
PUBLIC ELECTRIC UTILITIES PER STATE

State	Utilities
Iowa	142
Wisconsin	86
Indiana	81
New York	45
Massachusetts	40
Mississippi	15
Vermont	15
Colorado	12
New Jersey	9
Maryland	7
Wyoming	7
Connecticut	6
New Hampshire	6
Arkansas	5
Maine	5
Pennsylvania	2
Tennessee	2
West Virginia	2
Rhode Island	1
Utah	1
Alabama	0
Alaska	0
Arizona	0
California	0
Delaware	0
District of Columbia	0
Florida	0
Georgia	0
Hawaii	0
Idaho	0
Illinois	0
Kansas	0
Kentucky	0
Louisiana	0
Michigan	0
Minnesota	0
Missouri	0
Montana	0
Nebraska	0
Nevada	0
New Mexico	0
North Carolina	0
North Dakota	0
Ohio	0
Oklahoma	0
Oregon	0
Puerto Rico	0
South Carolina	0
South Dakota	0
Texas	0
Virginia	0
Virgin Islands	0
Washington	0

This information was taken from the 19[illegible] Federal and State Commission Jurisdiction and Regulation of Electric, Gas, and Telephone Utilities Published by the FPC.

NUMBER OF REGULATED
COOPERATIVE ELECTRIC UTILITIES PER STATE

State	Utilities	State	Utilities
Iowa	73	Alabama	0
Kansas	38	Connecticut	0
North Carolina	38	District of Columbia	0
Colorado	33	Florida	0
Illinois	33	Georgia	0
Kentucky	29	Hawaii	0
Mississippi	26	Idaho	0
Wyoming	26	Louisiana	0
New Mexico	21	Massachusetts	0
Arkansas	19	Minnesota	0
Virginia	16	Missouri	0
Michigan	15	Montana	0
Utah	11	Nebraska	0
Alaska	11	New York	0
Arizona	9	North Dakota	0
California	5	Ohio	0
Indiana	5	Oklahoma	0
Nevada	5	Oregon	0
Maryland	4	Pennsylvania	0
Vermont	4	Puerto Rico	0
Maine	3	Rhode Island	0
West Virginia	3	South Carolina	0
Delaware	1	South Dakota	0
New Hampshire	1	Tennessee	0
New Jersey	1	Texas	0
		Virgin Islands	0
		Washington	0
		Wisconsin	0

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas, and Telephone Utilities Published by the FPC.

NUMBER OF REGULATED
TOTAL GAS UTILITIES PER STATE

State	Utilities	State	Utilities
Puerto Rico	360	Arizona	8
Texas	138	Connecticut	8
Pennsylvania	87	Montana	8
Louisiana	60	North Carolina	8
Kentucky	50	Tennessee	7
Indiana	48	Washington	7
West Virginia	43	Arkansas	6
Iowa	40	Nevada	6
Oklahoma	36	New Jersey	6
New York	34	Rhode Island	6
Ohio	33	South Carolina	6
Massachusetts	30	Alabama	5
Mississippi	27	New Hampshire	5
Kansas	24	Delaware	4
Missouri	21	North Dakota	4
Virginia	21	Oregon	4
Illinois	20	Utah	4
New Mexico	20	Vermont	4
California	18	Georgia	4
Colorado	17	Alaska	3
Wisconsin	17	Idaho	2
Florida	16	Maine	2
Wyoming	16	District of Columbia	1
Maryland	12	Hawaii	1
Michigan	11	Minnesota	0
		Nebraska	0
		South Dakota	0
		Virgin Islands	0

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas and Telephone Utilities published by the FPC.

NUMBER OF REGULATED
PRIVATE GAS UTILITIES PER STATE

State	Utilities	State	Utilities
Puerto Rico	360	Arizona	8
Pennsylvania	87	North Carolina	8
Texas	76	Connecticut	7
Louisiana	60	Montana	7
Kentucky	50	Tennessee	7
West Virginia	43	Washington	7
Oklahoma	36	Arkansas	6
Indiana	34	Nevada	6
Ohio	33	New Jersey	6
New York	32	Rhode Island	6
Massachusetts	26	South Carolina	6
Kansas	24	Alabama	5
Missouri	21	New Hampshire	5
Virginia	21	Delaware	4
Illinois	20	North Dakota	4
California	18	Oregon	4
New Mexico	17	Utah	4
Wisconsin	17	Vermont	4
Colorado	16	Georgia	3
Florida	16	Alaska	3
Wyoming	16	Idaho	2
Iowa	12	Maine	2
Maryland	11	District of Columbia	1
Michigan	11	Hawaii	1
Mississippi	9	Minnesota	0
		Nebraska	0
		South Dakota	0
		Virgin Islands	0

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas and Telephone Utilities published by the FPC.

NUMBER OF REGULATED PUBLIC GAS UTILITIES PER STATE

State	Utilities
Texas	62
Iowa	28
Mississippi	18
Indiana	14
Massachusetts	4
New Mexico	3
New York	2
Colorado	1
Connecticut	1
Maryland	1
Montana	1
Alabama	0
Alaska	0
Arizona	0
Arkansas	0
California	0
Delaware	0
District of Columbia	0
Florida	0
Georgia	0
Hawaii	0
Idaho	0
Illinois	0
Kansas	0
Kentucky	0
Louisiana	0
Maine	0
Michigan	0
Minnesota	0
Missouri	0
Nebraska	0
Nevada	0
New Hampshire	0
New Jersey	0
North Carolina	0
North Dakota	0
Ohio	0
Oklahoma	0
Oregon	0
Pennsylvania	0
Puerto Rico	0
Rhode Island	0
South Carolina	0
South Dakota	0
Tennessee	0
Utah	0
Vermont	0
Virginia	0
Virgin Islands	0
Washington	0
West Virginia	0
Wisconsin	0
Wyoming	0

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas and Telephone Utilities published by the FPC.

NUMBER OF REGULATED
TELEPHONE UTILITIES PER STATE

State	Utilities	State	Utilities
Iowa	226	Kentucky	31
Minnesota	165	North Carolina	31
Wisconsin	140	Virginia	30
Kansas	137	Mississippi	25
Missouri	99	Montana	25
Indiana	93	New Mexico	23
Pennsylvania	85	Tennessee	23
California	80	Alaska	22
Ohio	75	Florida	21
New York	72	Idaho	22
Illinois	71	Nevada	19
Michigan	70	New Hampshire	17
Oklahoma	70	Utah	17
Nebraska	54	West Virginia	15
Georgia	52	Wyoming	15
South Dakota	52	Vermont	14
Washington	51	Arizona	10
Arkansas	48	New Jersey	8
Oregon	46	Massachusetts	4
Alabama	45	Connecticut	3
South Carolina	44	Maryland	2
North Dakota	38	Rhode Island	2
Colorado	35	Delaware	1
Louisiana	32	District of Columbia	1
Maine	32	Hawaii	1
		Puerto Rico	1
		Virgin Islands	1
		Texas	0

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas and Telephone Utilities Published by the FPC and from the 1966 Statistics of the Independent Telephone Industry Published by the USITA.

SA-12
State of Alaska
Department of Administration
Budget & Management Div.
(Rev. 5-68)

STATEMENT OF PROGRAM

For the Fiscal Year Ending June 30, 1970

		Code
Department	Commerce	08
Division	Public Service	3
Program	Operations	1
	Utility Regulation	01

STAFFING COMPARISON OF REGULATORY AGENCIES BY STATE

State	Professional Staff	Clerical Staff	Total Staff
Alabama	13	12	25
Alaska	4	3	7
Arizona	1	102	103
Arkansas	15	0	15
California	280	515	795
Colorado	8	44	52
Connecticut	14	35	49
Delaware	2	5	7
District of Columbia	11	20	31
Florida	30	111	141
Georgia	8	26	34
Hawaii	21	9	29
Idaho	5	11	16
Illinois	55	187	242
Indiana	17	28	45
Iowa	20	90	110
Kansas	26	137	163
Kentucky	20		
Louisiana	10	19	29
Maine	14	28	42
Maryland	25	33	58
Massachusetts	11	107	118
Michigan	69	29	98
Minnesota	11	47	58
Mississippi	5	47	52
Missouri	91	5	96
Montana	4	13	17
Nebraska	10	65	75
Nevada	13	11	24
New Hampshire	5	6	11
New Jersey	58	72	130
New Mexico	8	0	8
New York	295	331	626
North Carolina	19	37	56
North Dakota	12	17	29
Ohio	62	64	126
Oklahoma	28	164	192
Oregon	76	151	227
Pennsylvania	204	143	347
Puerto Rico	28	8	36
Rhode Island	4	11	15
South Carolina	7	43	50
South Dakota	4	3	7
Tennessee	7	27	34
Texas			
Utah	6	6	12
Vermont	9	4	13
Virginia	19	258	277
Virgin Islands	0	4	4
Washington	46	83	129
West Virginia	23	64	87
Wisconsin	73	61	134
Wyoming	5	35	40

ANALYSIS	NO. EMPLOYEES		RATIO	
	Nationwide	Alaska	Nationwide	Alaska
Professional	1810	4	1	1
Clerical	3331	3	2	3/4

This information was taken from the 1967 Federal and State Commission Jurisdiction and Regulation of Electric, Gas, and Telephone Utilities published by the Federal Power Commission.

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March 3, 1969

Senator P. B. Haggland
Chairman, Senate Commerce Committee
Alaska State Legislature
Juneau, Alaska 99801

Re: Senate Bill No. 128 - Alaska Public Service Commission

Dear Senator Haggland:

I wrote to you on February 17, 1969 regarding Senate Bills Nos. 54 and 128. That letter was principally with respect to the composition of the Commission, the employment of Hearing Officers and the advantages of having at least one full-time Commissioner. Since writing that letter I have obtained from the Secretary of State information concerning the amount paid for Hearing Officers in the important proceedings before the Commission. The following is offered for your information:

1966-67 Application of Native Village of Tyonek, $1,680.00

Rates, services and facilities of Alaska Electric Light and Power Company, $3,318.50

1967-68 Rates of A. J. Industries, Inc.,$3,279.02

Applications of North State Telephone and Glacier State Telephone, $13,369.20.

The following are observations concerning Senate Bill No. 128 and to some extent the same apply to Senate Bill No. 54.

The present law requires that one member of the Commission be an attorney, one an engineer and one an accountant. I was instrumental in having that provision put in the present law and I think it is essential that the Commission have talent which includes all of these three fields in order for the Commission to be able to sit down and make intelligent decisions without reference to information other than is contained in the record of the proceeding. Under my proposal

for a full-time Commissioner I believe he should be an attorney.

The bill requires that tariffs be filed according to rules set by the Commission. The Commission has never adopted any tariff rules, but it is in the process of doing so.

The bill sets up a procedure for obtaining reparations for charges which have been unreasonable, but collected according to a tariff, provided that the rates have not previously been determined by the Commission as fair and reasonable. The Commission has had a rate proceeding for Alaska Electric Light and Power Company in which it has approved the rates. So far as I know, all other utilities filed their rates at the time they received Certificates of Public Convenience and Necessity and have never had those rates approved. Therefore, in any future proceeding, if the Commission determines that the rates which have been charged have been excessive, it could order a refund to customers, many of whom could not even be found. This would be making rates retroactively and in my opinion is strictly unconstitutional. The common law is that rates cannot be made retroactively and refunds cannot be ordered to be made by a Commission except where rates have been put into effect on the condition that a portion of the revenue be put in a trust fund and refunded later if it is determined that the temporary rates are excessive. I have been advised by the attorney for the Commission that he caused this provision to be inserted in the law and admitted it was a job done in a hurry without a great deal of thought.

Section 42.05.351 provides that there be no unreasonable discrimination in rates "either as between localities or between classes of service". Therefore, if you are furnishing telephone service in a city where you have a density of population amounting to hundreds or thousands per square mile you cannot charge any more than you would in a rural area where the density of population is only ten or fifteen customers to the square mile. Moreover, a utility which operates in several communities would have to have the same rate for each community regardless of the cost of service. For instance, in one community you may have a fine head of water and produce all of the power by a hydroelectric system at a very low cost whereas in another community you have to operate with small diesel engines at very

high cost. The provision against discriminating for classes of service is also unrealistic. Almost all electric and telephone rates distinguish between the service for business establishments and those for domestic establishments. Under this provision a business establishment which may have hundreds of telephone calls in a day could not be charged any more than a householder who only had a few calls a day.

Section 42.05.431 provides for a system of accounts and submission to the Commission within 75 days after the close of an annual accounting period of a report of the operations. These reports are prepared and certified by the accountants under present law. Particularly at the end of the calendar year corporations find it impossible to get their auditors to complete their audits and submit reports within 75 days. The Internal Revenue Service allows three and one-half months for filing income tax returns and an accountant can automatically get an extension of time by mailing a form stating that he is unable to complete the audit and returns on time. Most corporations do not file within the three and one-half months because they do not have the reports. This provision is wholly unrealistic and there should be an allowance of three and one-half months with the right of the Commission to extend the time for good cause shown.

Section 42.05.511 needs revision. It provides that the surplus, profits and operating margins of public utilities shall be distributed in accordance with the bylaws or ordinances controlling the utility. The words "operating margins" should be deleted for obvious reasons. Since utilities are under the control of the Public Service Commission, no control by municipal ordinances should be permitted. This section would allow the Commission to adopt regulations governing the distribution of surplus, profits and operating margins. In other words, the Commission could regulate by some unknown manner the amount of distributions to shareholders or prohibit them entirely. There is nothing wrong with allowing a public utility commission to enjoin the distribution of profits in the form of dividends if such distribution will impair the ability of the utility to furnish adequate and reliable service. There is no reason to give the Commission any more than this limited authority.

The Legislature has never amended the Municipal Code to delete the power of political subdivisions to regulate

utilities so as to prevent a conflict between the powers granted to political subdivisions and those granted to the Public Service Commission.

Section 29.10.141 allows the Council to grant franchises for the exclusive right to furnish utility services. This power has been transferred to the Public Service Commission which issues Certificates of Public Convenience and Necessity. Since the authority of the Commission was granted subsequent to the authority granted to municipalities it is my opinion that the authority of the Commission is exclusive but it is very confusing to laymen to find that the law still gives the right to the municipalities to determine who shall furnish the service and in what areas. The authority of the Council to grant the use of the streets and other public places is also contained in the same section. In my opinion this power should be transferred to the Public Service Commission to be exercised under such rules and regulations as the Commission shall promulgate. In other words, if the Commission wants to allow a municipality to make a charge for the use of its streets such as the 3 per cent gross franchise tax imposed by the City of Juneau on Alaska Electric Light and Power Company, it should be allowed to do so but no municipality should be allowed to determine which utilities can use the streets when the Public Service Commission has determined who shall furnish the service. When the franchises of the presently operating utilities expire, the utilities have no rights to use the public streets and could theoretically be put out of business unless the municipalities are willing to grant such privilege on some reasonable basis. The Commission should be able to determine what is reasonable and to protect the utilities against municipalities making unreasonable charges. Alaska Electric Light and Power Company is now paying the City of Juneau in excess of $35,000 a year for the use of the streets while other public utilities pay nothing.

Section 29.10.144 gives the political subdivisions the right to regulate public utility rates and the Public Service Commission has subsequently been granted that right. This resulted about three years ago in the Attorney General of Alaska giving the Greater Juneau Borough an opinion that there was concurrent jurisdiction in both the Public Service Commission and the City to regulate rates. It seems to me that the opinion is ridiculous on its face. I have advised my clients that the Public Service Commission received its authority subsequent to the receipt of such authority by municipalities. Therefore,

the Commission has exclusive jurisdiction and the Municipal Code should be amended in this regard. However, armed with that opinion from the Attorney General, the Chairman of the Greater Juneau Borough stated in a large public meeting that the Borough would regulate utility rates outside of the City of Juneau and outside of the City of Douglas.

I hope to be able to appear at the meetings which you will have on Senate Bill No. 128 but if I am not able to be present I would like to have my two letters to you on this subject read at the meeting.

Yours very truly,

N. C. Banfield

NCB:db

cc: Clarence D. Bramhall
Don H. Wallach
Don H. Brooks
F. D. Nagel

STUDY OF STATE SUPERVISION OVER MUNICIPALLY OWNED UTILITIES

Prepared by the City of Fairbanks
Office of the City Attorney
January 3, 1961

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STUDY OF STATE SUPERVISION OVER MUNICIPALLY OWNED UTILITIES

I. INTRODUCTION

This study is based primarily upon the article on the same subject by Charles M. Kneier appearing in 49 Columbia Law Review, pp. 180-200. Other sources are indicated by the citations.

The principal of regulation of public utilities is generally accepted since they are ordinarily monopolies, and where there is a monopoly, regulation is necessary to insure adequate service at reasonable rates. As of 1948, therefore, all of the states but Delaware had state commissions regulating public utilities. In some of these, local public utilities were largely regulated by the cities they served.

However, it is frequently questioned whether such regulation should extend to municipally owned utilities. Do the reasons for control of private monopolies apply to municipally owned public utilities? If regulation is needed, should it be by the state or by the voters of the city through their control over the city officials and by the initiative and referendum? As might be expected, the states vary greatly in the extent of regulation of such utilities.

II. DIFFERING POLICIES OF THE STATES

In many states, including Oregon, such utilities are exempt from state regulation by constitutional or statutory provisions, at least as to service within the city. A smaller group of states

have statutes clearly giving some degree of state control. In some it is over service beyond the corporate limits. In others it is limited to such matters asprescribing methods of keeping accounts, requiring reports, and requiring certificates of convenience and necessity. In a third group of states the statutes and constitutions neither expressly include nor expressly exclude, control by the state commissions.

Three states, Lousiana, New Mexico, and Indiana, leave the question of state regulation up to the voters of the city, the first two by voting to ask for regulation. In Michigan and Kansas the commissions are required to advise the cities upon request, but cannot regulate city owned utilities. Other commissions give such advice and assistance informally.

III. STATE POWER TO REGULATE

A. General.

In the absence of a constitutional prohibition it is clear that the legislature may provide for regulation of municipally owned utilities by a state commission. It is equally clear that such utilities may be exempted, and privately-owned utilities cannot complain of deprivation of due process or equal protection under either the state or federal constitutions.

In Colorado, Montana and Utah the state constitutions provide that the legislature shall not delegate to a special commission any power to make, supervise, or interfere with any municipal functions. Holding that the purpose of such a provision is to "hold inviolate the right of local self-government...with re ct to municipal improvements, money, property, effects, the lev ng of taxes, and

the performance of municipal functions" the Utah Supreme Court held unconstitutional a statute attempting to confer regulatory powers upon the state commission. Logan City v. Public Utilities Comm'n, (1928) 72 Utah 536, 271 Pac. 961, 972. Accord, Holyoke v. Smith, (1924) 75 Colo. 286, 226 Pac. 158; contra, Public Service Comm'n. v. Helena, (1916, held not a "special commission") 52 Mont. 527, 159 Pac. 24.

B. Home Rule As a Restriction On State Power.

Home rule usually restricts the power of the state legislature to interfere in local affairs. Under this doctrine Ohio has held that the state commission has no power to regulate rates of municipally-owned utilities, Shoemaker v. Village of Granville (Ohio Civil App., 1958) 156 N.E.2d 757. Water supply is a local affair in Oklahoma, Pitts v. Aleen (1929) 138 Okla. 295, 281 Pac. 126, and California, City of Pasadena v. Charleville, (1932) 215 Cal. 384, 10 P.2d 745. Sale and distribution of electricity is a local affair in California, Los Angeles Gas and Electric Corp. v. City of Los Angeles, (1922) 188 Cal. 307, 205 Pac. 125. The only state which permits a measure of control is Michigan, which has held that the provisions of the state labor mediation act is applicable to city employees of the utility, Local Union No. 876 v. State of Michigan Labor Mediation Board, (1940) 294 Mich. 629, 293 N.W. 809, 811. See also Antieau, Municipal Corporation Law, Section 3.19. Colorado has also held that home rule cities cannot be regulated as to utility services, at least as to service within the city limits, see infra.

C. Home Rule in Alaska.

Despite these cases and the lack of contrary decisions it is questionable whether they will be of help to Alaskan home rule cities in avoiding regulation. The local affairs-state concern dichotomy does not appear to be embodied in the Constitution of Alaska.

The convention, believing that the dichotomy led to an erosion of local powers through court decisions, instead vested "all legislative powers not prohibited by law or by charter" in home rule cities. It appears to be the intent of the framers that home rule cities would never have to ask for any enabling legislation, while reserving to the legislature the power to limit the city's powers in the event the city "abused" its powers or in the event the city came into conflict with the home rule borough (county) of which it is a part. See Article X, Constitution of Alaska, especially Sections 1, 2, and 11.

> "3. Specifically reviewed were the provisions authorizing the adoption of home rule charters. It was generally agreed that the procedure should be left to the legislature and to the local government body. The grant of powers is to be based upon "legislative powers" rather than a specific enumeration. Enumerations have frequently been restrictively interpreted by the courts. Nor was it felt desirable that the grant be on the basis of powers covering "local affairs" or "local government". Such terms have also given rise to continuous judicial interpretations, causing great uncertainty in what the actual powers of local government are. The grant of "legislative" power would be subject to restrictions contained in the constitution, to powers specifically withheld by the legislature and to powers withheld by the people in the adoption of their local charter." (emphasis added) Minutes, 24th Meeting, Committee on Local Government, Constitutional Convention. See also Minutes of the 35th and 40th Meetings.

Nevertheless, since the distriction was avoided in order to

to protect the powers of home rule cities, such cities may argue that the omission was not intended to and did not sweep away the protection from unwanted and unwarranted interference by the legislature in municipal affairs, the protection which is afforded by constitutional home rule in the other states. Otherwise, the legislature could provide, for example, that home rule cities shall not use the city manager plan. Obviously there must be a line drawn somewhere, and in view of the cases cited it is at least possible that the courts would hold that the legislature cannot vest in the State Public Service Commission the power to regulate municipally-owned public utilities as to service within city limits.

This reasoning is especially applicable to certain aspects of such regulation contemplated by Chap. 199, S.L.A. 1959. Section 37 appears to give the commission control over staffing patterns, wage and salary scales, and management generally and the commission may order the correction of "abuses" which "adversely affect the cost...or service." Section 50 requires the commission to review municipal bonding ordinances, providing for issuance of bonds to construct or improve a public utility, and permits the commission to make orders in the event the commission finds that the ordinance will preclude the operation of the utility in the "best" public interest. Presumably the commission could order that proposed bonds not be issued.

It is probable that the extensions of the Fairbanks water system will be financed in part by revenue bonds and, at a lower interest rate, by general obligation bonds. Revenues would not be sufficient to finance wholly by revenue bonds. Though the interest

rate would be lower, the City will probably not want to finance the extensions wholly by general obligation bonds because of the limit on such bonds in the city charter. Could the commission order the city to finance such extensions wholly by general obligation bonds? Apparently so, yet if the commission can do so, home rule in Alaska will not be a guarantee of maximum local self-government. The annual trek of city lobbyists to the state legislature will not be diminished, the only change will be that instead of seeking legislative authorization to handle their own affairs, they will be seeking to prevent further inroads of state interference.

Of course, home rule cities could, by ordinance, exempt their utilities from state control, but there can be little doubt that the legislature would react immediately to "specifically" withhold this legislative power from the cities.

D. Alaska Constitution, The "Appropriation"Clause.

One constitutional protection is, however, clearly available. "Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected." Section 19, Article II, Constitution of Alaska. While restricted to local acts of the legislature, it seems doubtful that the State Public Service Commission could make orders requiring appropriations by the cities, as for example, to make extensions of a utility system, and avoid the election where the legislature could not do so. Not being bound by such a constitutional limitation, the state of New York appears to have required the City of New York to acquire and finance the public transit systems in that city, operational control

of which was vested in a state board. See McCabe v. Voorhis (1926) 243 N.Y. 401, 153 N.E. 849 and McAneny v. Board of Estimate and Approptionment of City of New York, (1922) 232 N.Y. 377, 134 N.E. 187.

IV. EXTENT OF STATE REGULATION

A. Management.

In those states which do give regulatory powers over municipally-owned public utilities, some commissions have been relatively liberal in regulation, as compared to regulation of privately owned utilities, especially as to extensions. Further, the commissions repeatedly state that the power to regulate municipally-owned utilities is not the power to manage. Yet on occasion the commissions have invaded the area of management, ordering such utilities to give discounts on bills paid before the first of the month, to require safety guards on equipment, and to require the city to employ an engineer to inspect a building to ascertain whether the roof was in danger of collapse. Section 38 of Chapter 199, S.L.A. 1959 would appear to give carte blanche to the commission to manage city utilities once a complaint has been made. In this respect Alaska appears to vary greatly from the practice in the other states.

B. Rates and Discriminatory Practices.

Only nine states, as of 1948, gave their state commissions power to fix rates for municipal utility service within the city limits. An argument advanced in support of such regulation is that without it rates have been kept high and the surplus transferred to the general fund. This is condemned by some as inequitable, as

favoring business property by reducing property taxes through surplus accumulated from the small holders, who are said to use proportionately more utilities.

Yet if to some it seems unwise to finance general city services out of utility earnings, is it necessary or good policy to control this through a state commission? If the citizens approve, why should the state interfere? If the citizens do not approve they can easily effect a change by election, recall, initiative or referendum. If such control is said to be more theoretical than practical, the same can be said of citizen control of all governmental activities. Shall the state now regulate and control the fire protection services of cities? And who shall regulate and control the state ferry system if the democratic controls provided by our constitution are deemed inadequate to prevent the state from operating it at a profit?

Speaking of profit, it should be noted that the Municipal Utilities System of the City of Fairbanks makes no contributions to the general fund, except by way of in lieu of tax payments, and the general fund is charged for utilities furnished to the city.

Though it is not yet true in Alaska, some cities have financed general operations out of utility earnings not by choice but by necessity, since many states have taken over all the best sources of tax revenue, and only through surplus earnings have city property taxes been kept within reasonable limits.

Finally, it has been well said that "experience teaches us that state government is not the repository of all wisdom."

State commissions which do have jurisdiction have found and removed discriminatory rates and other practices and, while

there is somewhat greater justification for control to prevent discrimination as contrasted with control of profits, yet it is often a reasonable question as to whether a particular practice is discriminatory. Further, not only is state control contrary to the principle of local self-government, but bad practices may be corrected by the voters or by the courts, under the common law. The courts have not hestitated to correct real discrimination and other abuses wherever they have found such to exist, see McQuillin, Municipal Corporations, Sections 35.34 and 35.35, Antieau, Municipal Corporation Law, Sections 19.01, 19.02, 19.03 and 19.04.

C. Accounting and Reporting.

About 18 states have given state commissions the power to prescribe accounting methods and require reports from municipal utilities. A strong case can be made for this. Comparable statistics are needed by the public as well as the commission, and proper accounting and reporting are essential if the citizens of cities are to exercise effective local control over their municipally-owned utilities.

D. Critique.

> "Advocates of state control over municipal utilities take the position that if not necessary it is nevertheless desirable. They cite cases in jurisdictions making use of state control where rates have been increased or lowered on the basis of scientific ratemaking and not on the basis of what an uninformed public favors; where questions of discrimination in service or rates have been decided on the basis of experience and accepted practice rather than according to the influence or persuasivenss of the individual persons objecting; and where by the requirement of proper accounting and reporting not only the state commission but the people of the city have been able to judge the results of municipal operation of utilities. They look upon

state control of municipal utilities as a means by which a staff of experts with accumulated knowledge assists and guides cities in the operation of their plants and saves them from errors.

A distinction might be made between the technical questions of operation of a municipally owned utility and questions of public policy. As to the latter, good practice would seem to dictate local determination, even though some mistakes might be made. The New York Public Service Commission, in refusing to grant a certificate to a village for the construction of a publicly owned electric plant, said: "The Commission is therefore called on to protect the village against itself. Public convenience and necessity do not require a village to embark on a disastrous business enterprise." Even though we assume that the case was properly decided and that the Commission did, as it suggested, protect the City against itself, there is a serious doubt as to whether the policy question of municipal ownership should be left to the determination of a state commission. If a city in some cases "burns its fingers," this is a small price to pay for local determination of public policies. And if, as many city officials feel, state commissions are in general believers in the principle of private ownership and public regulation, state control may place a serious obstacle in the path of the spread of municipal ownership. The Montana Commission, in ordering service restored to a customer, condemned as "inhuman, inconsiderate, cruel and un-American the action of the water commission and clerk in shutting off water." The customer, a county charge who failed to pay his bill, was, according to the Commission, "denied service without consideration and more despicably, more lowly and more contemptibly than he would have been by any of the predatory and greedy privately owned utilities in this state". It appears as if the practice here was bad, and the Commission was right in its disapproval. However, the management of the utility was subject to control by the electorate and the situation might have been remedied there. And if the principle of state supervision is accepted in such a case, then the door is open for interference in other questions of policy." Cited, Columbia Law Review, pp. 192, 193.

V. REGULATION WHEN SERVICE RENDERED OUTSIDE MUNICIPAL LIMITS

Here is the strongest case for state control, as the consumers are not citizens who can effect a change in policies if they are dissatisfied. In addition to nine states which regulate within as well as without the city limits, ten other states, in 1948, had given to their commission jurisdiction over service performed outside the city limits by municipally-owned public utilities. In some this is by statute, in others it is by judicial decision, and the courts have noted the need for protecting such consumers.

However, such jurisdiction is generally restricted to those cases where the city holds itself out as serving the general public beyond the city limits, thus becoming a public utility. If the city acts on a limited, contractual basis, the state commission will have no jurisdiction. Denver thus avoided regulation, though it had 4500 water users outside the city limits. Re City and County of Denver, (1937) 18 P.U.R. (N.S.).

In the absence of commission control there are varying state doctrines on the remedies available in the courts to consumers residing outside the city limits. The majority rule appears to be that the city is subject to all the common law duties of a public utility, at least where it holds itself out as such. At the other extreme, Georgia and South Carolina appear to impose no duties upon the city. At the risk of over simplification, it may be said that the remaining states require that the city not discriminate in service among such consumers and that the out of city rates not be excessive in comparison to the rates within the

city, but the courts will not require the city to make extensions into new areas, nor will the courts examine the overall rate structure to determine whether the rate of return is excessive.

The reaction of this third group of states to these problems is reflected by the actions of the commissions which have regulatory powers. Most commissions permit higher rates to be charged to those consumers outside the city. Justifications for such a practice are said to be the added cost of service, the city assumes the risk of casualty losses, and, most frequently, such consumers have foregone nothing as taxpayers, and cannot expect to share in the benefits. Most commissions hesitate to order major extensions, recognizing this to be a matter of internal management, and that financing problems of such a utility are different from privately owned utilities.

VI. KNEIER'S CONCLUSION

> "That no right, conclusive, and unquestionable solution have yet been found to the problem of whether a state commission should have the same supervisory control over municipal utilities that it does over privately owned utilities is indicated by the varying practices in the states. City officials speaking as individuals and through state municipal leagues oppose such control. They look upon it as a further unnecessary interference with the right of cities to manage their own affairs. They believe that a remedy is available to the voters if there is mismanagement or if unpopular policies are adopted. If the state commissions have technical experts who can be helpful, then city officials believe their assistance should be available on a voluntary basis. The evidence, however, indicates that in the states where the latter practice has been adopted, cities have made little use of the technical service.
>
> Those who favor state control point to what they consider to be cases of mismanagement, discrimination in service and rates based on the political influence of individuals or groups, poor accounting methods, and rates that cannot be justified on economic grounds.

Some advocates of state control favor such a policy on the ground that it is fairer to privately owned utilities; "otherwise privately owned plants operate at a competitive disadvantage compared with municipally owned plants".

Opponents of state control are on their weakest ground when opposing supervision over methods of accounting and the requirement that reports be made to the state commission. Proper methods of accounting are not questions of policy to be left to local discretion. A state commission should be helpful, and giving control in this area can hardly be considered an encroachment on local self-government.

With an increase in the service by municipal plants beyond the corporate limits of the city, a strong case for state supervision of the rates and service can be made. Otherwise the remedies available to the outside consumer are inadequate. When served by a municipal plant he should pay higher rates than those who reside within the city. And state commissions have approved such higher rates. However, there should be a limit to the amount which he must pay for the privilege of living outside. To say that he can resort to the courts or that he can have a privately owned utility invade the field is hardly adequate.

State control of accounting or of rates charged beyond the corporate limits appears to the cities, however, as merely an opening wedge, a toe-in-the-door, and a step to full control of municipal utilities. On the basis of experience with state legislatures and with state boards and commissions, they fear a further invasion of the rights of local self-determination. The right of self-government is still charished, and this includes the management of municipally owned utilities." Cited, Columbia Law Review, pp. 196, 197.

STATE COMMISSION JURISDICTION OVER MUNICIPALLY OWNED UTILITIES*
(Electric, Gas, and Water Unless Otherwise Indicated)

	Regulate Rates		Regulate Service				License for Operation	
	Within Corp. Limits	Outside Corp. Limits	Within Corp. Limits	Outside Corp. Limits	Prescribe or Control Accounting	Require Reports	Within Corp. Limits	Outside Corp. Limits
Alabama	No	No	No	No	No	No	No	No
Arizona	No	No	No	No	No	No	No	No
Arkansas	No	Yes	No	Yes	No	No	No	Yes
California	No	No	No	No	No	No	No	No
Colorado	No	Yes[1]	No	Yes	Yes	Yes	No	Yes
Conn.	No	No	No	No	Yes	Yes	No	No
Delaware	No Commission							
Florida	No	No	No	No	No	No	No	No
Georgia	No	Yes	No	Yes	No	No	No	No
Idaho	No	No	No	No	No	No	No	No
Illinois	No	No	No	No	No	No	No	No
Ind.[2]	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Iowa	No	No	No	No	No	No	No	No[3]
Kansas	No	No	No	No	No	No	No	No
Kentucky	No	Yes	No	Yes	No	No	Yes	Yes
Louisiana	No	No	No	No	No	No	No	No
Maine	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Maryland[4]	Yes	Yes	Yes	Yes	Yes	Yes	Yes[5]	Yes[5]
Mass.[6]	No[7]	No[7]	Yes	Yes	Yes	Yes	Yes[8]	Yes[9]
Michigan	No	No	No	No	Yes[10]	Yes[10]	No	No
Minnesota	No	No	No	No	No	No	No	No
Miss.	No	No	No	No	No	No	No	No
Missouri	No	No[11]	No	No[11]	No	No	No	No[11]
Montana	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Nebraska	No	Yes	No	Yes	No	No	No	No[12]
Nevada	Yes	Yes	Yes	Yes	Yes	Yes	No	No
N. H.	No	Yes	No	Yes	Yes	Yes	No	No
New Jersey	No	Yes[13]	No[14]	Yes[15]	Yes	Yes	No	Yes[16]
New Mexico	No	No	No	No	No	No	No	No
New York[17]	Yes	Yes	Yes	Yes	Yes	Yes	No	No[18]
No. Carolina	No	No	No	No	No	Yes	No	No
No. Dakota	No	No	No	No	No	No	No	No

STATE COMMISSION JURISDICTION OVER MUNICIPALLY OWNED UTILITIES*
(Electric, Gas, and Water Unless Otherwise Indicated)

	Regulate Rates		Regulate Service				License for Operation	
	Within Corp. Limits	Outside Corp. Limits	Within Corp. Limits	Outside Corp. Limits	Prescribe or Control Accounting	Require Reports	Within Corp. Limits	Outside Corp. Limits
Ohio	No	No	No	No	No	No	No	No
Okla.	No	No	No	No	No	No	No	No
Oregon	No	No	No	No	No	No	No	No
Penn.[19]	No	Yes	No	Yes	Yes	Yes	No	Yes
R. I.[20]	No	No	No	No	No	No	No	No
So. Carolina	No	Yes[21]	No	Yes[21]	No	No	No	Yes[21]
So. Dakota[22]	No	No	No	No	No	No	No	No
Tenn.	No	No	No	No	No	No	No	No
Texas	No	No	No	No	No	No	No	No
Utah	No	No	No	No	No	No	No	No
Vermont[23]	No	Yes	No	Yes	Yes	Yes	No	No
Virginia	No	No	No	No	No	No	No	No[24]
Wash.	No	No	No	No	No	No	No	No
West. Vir.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Wisc.	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Wyoming	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Source: This table is reproduced from Kneier State Supervision Over Municipally Owned Utilities, 49 Columbia Law Review, 180, 198-200 (1948).

*This table is based on state laws and the decisions of courts and public utilities commissions. The answers given in the table have been approved by the commissions in the following states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The Indiana, Maryland, Massachusetts, Pennsylvania, and Rhode Island Commissions have furnished data on which the table is based, but they have not passed upon the specific answers given in the table. Data in table as of August 15, 1948.

1. Where the city takes on a few customers by special contract the commission has no jurisdiction.
2. The Indiana statute is very confusing and in fact the provisions are in conflict as to state supervision over municipally owned utilities. Data in the table based in part on Opinions of Attorney General of Indiana given to Chairman of the Public Service Commission of that state under date of April 24, 1947, and April 5, 1948.
3. The "Commission does have jurisdiction over construction and operation of all electric transmission lines outside cities and towns. Franchise is required and given after application, hearing and determination of propriety."
4. The Maryland Commission has no jurisdiction over water utilities except some very limited jurisdiction when water is supplied outside the municipal limits.
5. Baltimore is excepted from this requirement.
6. The Department of Public Utilities has no regulatory authority over municipal water system.
7. Municipal plant may not sell at less than cost of production without approval of state Department of Public Utilities; and it is limited to profit of eight per cent. Mass. Ann. Laws c.164 § 58 (1933).
8. The statutory requirement is for "towns", but this has been construed to include cities.
9. Required only for municipal gas and electric utilities.
10. No statutory provision for enforcing compliance. "Municipally owned utilities may completely disregard the forms as prescribed by the Commission."
11. Missouri municipalities have very limited power to furnish utility service beyond their corporate limits. City of Springfield v. Monday, 353 Mo. 981, 185 S.W. 2d 788 (1945); Re City of Springfield, 58 P.U.R. (N.S.) 237, 60 P.U.R.(N.S.) 161 (No. 1945); Taylor v. Dimmitt, 336 Mo. 330, 78 S.W.2d 841 (1934). The General Counsel of the Missouri Public Service Commission writes (letter dated Aug. 9, 1948) that: "If a municipally owned utility should attempt to render service to customers outside of the corporate limits, then to that extent it would lose its status as a municipal operation and would become subject to the regulation of the Commission in the same manner as any other privately owned public utility."
12. "Authorizes construction of lines, but does not issue certificates of convenience and necessity."
13. No jurisdiction over municipal water utilities except in cities of second class having over 120,000 population supplying water to inhabitants of another municipality.

14. The answer is "yes" for municipal electric utilities.
15. The answer would be "no" for municipal water utilities.
16. The answer would be "no" for municipal water utilities.
17. Commission no jurisdiction over municipal water works.
18. Consent of commission is necessary if service is extended to adjoining municipalities and a private utility is operating in the new territory.
19. "Municipal Corporation" as used in the statute means cities, boroughs, towns, townships, or counties, and also any public corporation, authority, or body whatsoever created for the purpose of rendering service similar to that of a public utility.
20. The only municipally owned utilities in Rhode Island are water works, and they are exempt from supervision by the Public Utility Administrator.
21. Electric utilities only.
22. The commission has no jurisdiction over municipally owned water, gas, or electric plants; it does have jurisdiction over the two municipally owned telephone systems. (Brookings and Beresford).
23. The Vermont commission has no jurisdiction over municipally owned water utilities.
24. The answer would be "yes" for transportation, but no municipally owned systems are operating in Virginia.

The Legislature of the State of Alaska
FISCAL NOTE
First Session - Sixth State Legislature

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST, POUCH V
___THE LEGISLATIVE FINANCE COMMITTEES' STAFF, POUCH Y
___THE DIVISION OF BUDGET & MANAGEMENT, POUCH C
___RETAIN A COPY FOR YOUR FILES

subject HB 202 SB
requested by Chairman Barry W. Jackson, House Judiciary Committee
referred to date of request
completion date requested date received

EXPENDITURE DETAIL	FY 1969-70	FY 1970-71	FY1971-72
100 PERSONAL SERVICES	$228,300	$250,400	$257,700
200 TRAVEL	26,500	24,300	25,000
300 CONTRACTUAL SERVICES	120,400	73,000	73,000
400 COMMODITIES	4,000	5,000	5,000
500 EQUIPMENT	7,700	2,500	2,500
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
900 Inter-agency Charges	22,000	23,000	23,000
TOTAL	$408,900	$378,200	$386,400
FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	408,900	378,200	386,400
Man Months	180	204	216
Permanent Positions	15	17	18
Temporary Positions	0	0	0

FISCAL ANALYSIS

Please see attached.

DATE 3/4/69 SIGNATURE George Sharrock

NAME & TITLE George Sharrock, Commissioner of Commerce

FORM SA-18

MEMORANDUM State of Alaska

TO: B. L. McMurtrey
Deputy Commissioner
Department of Commerce

DATE : February 27, 1969

FROM: Don Hall
Executive Director
Public Service Commission

SUBJECT: HB 188 and HB 202

You asked for my comments in regard to HB 188 but made no similar request in regard to HB 202.

I have compared HB 188 and SB 54 and find that they are identical in every respect. I have also compared HB 202 with SB 128 and find that they too are identical in every respect with one exception; namely, that Sec. 42.05.691(b) of SB 128 has been omitted from HB 202. This deletion has the effect of broadening the Commission's authority.

I have already prepared detailed comments on SB 54 and SB 128, copies of which are in Mr. Sharrock's possession--and these comments, of course, apply also to their respective House companion bills.

You have the Commission's original budget in the amount of $347,800 as subsequently modified by the cost of upgrading certain positions and by adding $8,500 to cover the cost of regulating pipeline companies (principally the Alaska Pipeline Company). The cost of administering SB 54 would be somewhat greater than the cost of administering SB 128 because of the fact that SB 54 requires more extensive regulation of municipally owned and operated utilities. However, I believe that the aforementioned original budget as modified would be adequate to administer SB 54, at least during the first year.

Estimates have also been submitted regarding our budgetary requirements for the years ending June 30, 1970, 1971, and 1972. These estimates were specifically based upon administering SB 128 and consist of a three-year projection compiled in one document.

I believe the foregoing is an adequate response to your request for information in regard to the House and Senate bills mentioned above.

By Don Hall

DH:SG

ALASKA PUBLIC SERVICE COMMISSION

Detail of Personnel Requirements

NOTE #1

Position Title	Approved FY 1968-1969	Projected FY 1969-1970	Projected FY 1970-1971	Projected FY 1971-1972
Executive Director	18,888	21,612	21,612	21,612
Deputy Director	17,844	19,992	19,992	19,992
Utilities Engineer	14,916	17,844	17,844	17,844
Financial Analyst II	15,876	15,876	15,876	15,876
Tariff Specialist II		15,876	15,876	15,876
Financial Analyst I	12,156	13,908	13,908	13,908
Tariff Specialist I		13,908	13,908	13,908
Accountant IV			13,032	13,032
Assistant Utilities Engineer		12,156	12,156	12,156
Administrative Officer I		12,156	12,156	12,156
Accountant II	9,960			
Secretary III		8,496	8,496	8,496
Secretary II	7,956			
Secretary I		7,488	7,488	7,488
Secretary I		7,488	7,488	7,488
Documents Clerk III		7,488	7,488	7,488
Clerk Steno II	6,420	6,420	6,420	6,420
Clerk Steno II			6,420	6,420
Clerk Typist III	6,420	6,420	6,420	6,420
Clerk Typist III				6,420
Sub-total	110,436	187,128	206,580	213,000
Commissioner		5,000	5,000	5,000
Commissioner		5,000	5,000	5,000
Commissioner		5,000	5,000	5,000
Employee Benefits	11,164	26,172	28,820	29,700
Total Personnel Services	$121,600	$228,300*	$250,400	$257,700

*The difference between this amount and the request for personnel services included on our original FY 1969-1970 budget request ($228,300 - $194,900 = $33,400) is comprised of nominal salaries for the three Commissioners plus six reclassifications which were recommended by consultants in recommendations on Commission Staffing.

NOTE # II

200 Travel
We anticipate that our travel fund requirements, both outside and within the State, will remain fairly constant for the next three years. The moderate decrease projected for FY 1970-1971 is comprised of two items included in our present budget (ACS Sale Bid Proposal Evaluation conferences and transportation of new employees) which will no longer be needed. The moderate increase in FY 1971-1972 is anticipated because of increase in workload.

NOTE # III
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The $28,500 increase in FY 1969-1970 projected requirements is made up of the following costs:

a) $20,000 to provide funds for hearing officers appointed pursuant to AS 42.05, Section 181 of SB 128
b) $8,500 to provide funds for consultants to investigate operations of existing oil transmission pipelines within the State

The $47,400 decrease in FY 1970-1971 was computed as follows:

a) $5,100 increase in overall contractual services account due to increase in workload and change in methods and procedures utilized in accomplishing program of utility regulation.
b) $52,500 total decrease possible because of anticipated finalization of ACS sale by July 1, 1970 ($35,000); completion of investigation of safety programs of natural gas utilities ($18,500); completion of investigation of oil transmission pipelines ($8,500); and an increase of $10,000 for hearing officer fees.

NOTE # IV
400 Commodities
Our requirements in this area have reached a fairly stable level. The increase in FY 1970-1971 is necessary because of additional personnel to handle the added workload. However, we then expect requirements in this account to level off at the amount shown.

NOTE V
500 Equipment
Continuing decrease in requirements in this area is a reflection of the adequacy of budget requests made and appropriations received in the past.

NOTE VI
900 Interagency Charges
Moderate increase is for additional travel funds for the attorney on full-time assignment from Department of Law.

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

	FY 1969 - 1970	FY 1970 - 1971				FY 1971 - 1972			
	Original APSC Request	Increase	Decrease	Projected Budget Requirement	Increase	Decrease	Projected Budget Requirement	Increase	Decrease	Projected Budget Requirement
- General Services (See attached Note I)	194900	33400		228300	22100		250400	7300		257700
- Travel (See attached Note II)	26500			24500		2200	24300	200		24500
- Contracted Services										
1. Communications	5100			5100	900		6000	500		6500
2. Printing & Binding	3500			1500	1500		3000		2000	3000
3. Rent	4900			4900	1200		10500			10500
4. Repairs	700			700	300		1000	200		1200
5. Transportation of Things	1200			1200		500	700			700
6. Spec. Rental	2400			2400	1000		3400			3400
7. Misc. & Reserve	700			300	100		400			400
8. Professional Services	63000	25500		76000		52000	47500	1500		49000
9. Utility Fees	300			200	100		1000			1000
Sub-total (See attached Note II)	91900			120400			73000			73200
- Commodities (See attached Note III)	4000			4000	1000		5000			5000
- Equipment (See attached Note IV)	7700			7700		5200	2500			2500
- Contingency Charges (See attached Note V)	22000			22000	1000		23000			23000
TOTALS	342000			405700			378200			386400

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LEGIBLY BECAUSE OF POOR QUALITY OF THE
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The Legislature of the State of Alaska
FISCAL NOTE
First Session - Sixth State Legislature

COPIES: ___THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST, POUCH V
___THE LEGISLATIVE FINANCE COMMITTEES' STAFF, POUCH Y
___THE DIVISION OF BUDGET & MANAGEMENT, POUCH C
___RETAIN A COPY FOR YOUR FILES

subject HB 188 SB
requested by Chairman Barry W. Jackson, House Judiciary Committee
referred to date of request
completion date requested date received

EXPENDITURE DETAIL	FY 1969-70	FY 1970-71	FY1971-72
100 PERSONAL SERVICES	$243,300	$265,400	$272,700
200 TRAVEL	28,500	26,300	27,000
300 CONTRACTUAL SERVICES	120,400	73,000	73,200
400 COMMODITIES	4,000	5,000	5,000
500 EQUIPMENT	7,700	2,500	2,500
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
900 Inter-agency Charges	22,000	23,000	23,000
TOTAL	$425,900	$395,200	$403,400

FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS	425,900	395,200	403,400
Man Months	180	204	216
Permanent Positions	15	17	18
Temporary Positions	0	0	0

FISCAL ANALYSIS

Please see attached.

DATE 3/4/69 SIGNATURE George Sharrock

NAME & TITLE George Sharrock, Commissioner of Commerce

ALASKA PUBLIC SERVICE COMMISSION

Detail of Personnel Requirements

NOTE #1

Position Title	Approved FY 1968-1969	Projected FY 1969-1970	Projected FY 1970-1971	Projected FY 1971-1972
Executive Director	18,888	21,612	21,612	21,612
Deputy Director	17,844	19,992	19,992	19,992
Utilities Engineer	14,916	17,844	17,844	17,844
Financial Analyst II	15,876	15,876	15,876	15,876
Tariff Specialist II		15,876	15,876	15,876
Financial Analyst I	12,156	13,908	13,908	13,908
Tariff Specialist I		13,908	13,908	13,908
Accountant IV			13,032	13,032
Assistant Utilities Engineer		12,156	12,156	12,156
Administrative Officer I		12,156	12,156	12,156
Accountant II	9,960			
Secretary III		8,496	8,496	8,496
Secretary II	7,956			
Secretary I		7,488	7,488	7,488
Secretary I		7,488	7,488	7,488
Documents Clerk III		7,488	7,488	7,488
Clerk Steno II	6,420	6,420	6,420	6,420
Clerk Steno II			6,420	6,420
Clerk Typist III	6,420	6,420	6,420	6,420
Clerk Typist III				6,420
Sub-total	110,436	187,128	206,580	213,000
Commissioner **5 ea @$6,000 each per year**		**30,000**	**30,000**	**30,000**
Employee Benefits	11,164	26,172	28,820	29,700
Total Personnel Services	$121,600	**$243,300**	**$265,400**	**$ 272,700**

*The difference between this amount and the request for personnel services included on our original FY 1969-1970 budget request ($228,300 - $194,900 = $33,400) is comprised of nominal salaries for the **five** Commissioners plus six reclassifications which were recommended by consultants in recommendations on Commission Staffing.

ALASKA PUBLIC SERVICE COMMISSION Cont.

NOTE # II

200 Travel
We anticipate that our travel fund requirements, both outside and within the State, will remain fairly constant for the next three years. The moderate decrease projected for FY 1970-1971 is comprised of two items included in our present budget (ACS Sale Bid Proposal Evaluation conferences and transportation of new employees) which will no longer be needed. The moderate increase in FY 1971-1972 is anticipated because of increase in workload. **Add increase of 2,000 for each Year covering additional 2 commissioners for a total of 5 .**

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- Travel (See attached Note II)	26500			24500 + 2000		2200	24700 + 2000	200		25000 + 2000
- Contractual Services										
(a) Communications	5100			5100	900		6000	500		6500
(b) Printing & Binding	3500			1500	1500		3000		2000	3000
(c) Rent	9600			9600	1200		10800			10800
(d) Repairs	700			700	300		1000	200		1200
(e) Transportation of Things	1200			1200		500	700			700
(f) Office Rental	2000			2400	1000		3400			3400
(g) Fees & Books	500			300	100		400			400
(h) Professional Services	65000	28500		93500		52000	41500	1500		43000
(i) Utility fees	1000			2000	100		1000			1000
Sub-total (See attached Note II)	91900			120400			73000			73200
- Commodities (See attached Note III)	4000			4000	1000		5000			5000
- Equipment (See attached Note IV)	1700			7700		5200	2500			2500
- Contingency Charges (See attached Note V)	22000			22000	1000		23000			23000
TOTALS	347000			468900			378200			384400
			+	17000		+	17000		+	17000

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FORM SA-1B

MEMORANDUM State of Alaska

TO: B. L. McMurtrey
Deputy Commissioner
Department of Commerce

DATE : February 27, 1969

FROM: Don Hall
Executive Director
Public Service Commission

SUBJECT: HB 188 and HB 202

You asked for my comments in regard to HB 188 but made no similar request in regard to HB 202.

I have compared HB 188 and SB 54 and find that they are identical in every respect. I have also compared HB 202 with SB 128 and find that they too are identical in every respect with one exception; namely, that Sec. 42.05.691(b) of SB 128 has been omitted from HB 202. This deletion has the effect of broadening the Commission's authority.

I have already prepared detailed comments on SB 54 and SB 128, copies of which are in Mr. Sharrock's possession--and these comments, of course, apply also to their respective House companion bills.

You have the Commission's original budget in the amount of $347,800 as subsequently modified by the cost of upgrading certain positions and by adding $8,500 to cover the cost of regulating pipeline companies (principally the Alaska Pipeline Company). The cost of administering SB 54 would be somewhat greater than the cost of administering SB 128 because of the fact that SB 54 requires more extensive regulation of municipally owned and operated utilities. However, I believe that the aforementioned original budget as modified would be adequate to administer SB 54, at least during the first year.

Estimates have also been submitted regarding our budgetary requirements for the years ending June 30, 1970, 1971, and 1972. These estimates were specifically based upon administering SB 128 and consist of a three-year projection compiled in one document.

I believe the foregoing is an adequate response to your request for information in regard to the House and Senate bills mentioned above.

By Don Hall

DH:SG

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

Jackson

COMMENTS OF CITY OF ANCHORAGE
S.B. 128 - PROPOSED AMENDMENTS

INTRODUCTION

The City of Anchorage has reviewed S.B. 128 and in this commentary would point out certain deficiencies in the bill and offer amendments to the bill. The fact that the City makes these comments and proposed amendments does not signify that the City is not strongly opposed to any jurisdiction of the Public Service Commission over municipally owned and operated utilities. The City still maintains that no sound reason exists for public service commission regulation, and that such regulation would constitute an unnecessary costly and time-consuming process to add to the almost prohibitive cost of living in this state.

This bill would establish a commission practically unlimited in its powers as the analysis will show. In addition, this bill could eliminate the City's municipal light and power utility because of its certificate requirements. This bill as designed is punitive in nature and proposes an invidious discrimination against municipally owned and operated utilities.

COMMENTS

ESTABLISHMENT

1. AS 42.05.020(a)

Add: "The Commission shall be an independent, quasi-judicial body."

Comment: The purpose of this amendment would be to establish the Commission as a "Section 26" board and to carry out the proposal that any commission having jurisdiction over valuable public properties should be a full-time commission.

2. AS 42.05.040-050.

These two sections should be repealed and reenacted as a new section to provide for qualifications commensurate with the concepts of a full-time commission .

Comment: A full-time commission is contemplated by the proposed amendment. A full-time commission should not necessarily be limited to a lawyer, engineer or accountant. The expertise in these fields, although helpful, could be

supplied by staff members. Nevertheless, some qualifications should be stated so that the commission offices do not become patronage plums. It is a serious business to regulate one of the largest businesses in this state, as many of the utilities in this state constitute multi-million dollar operations. A bad commission decision may involve hundreds of thousands of dollars, and the commission should be composed of the most competent people with the full time available to dispatch with adequate review the commission business.

3. AS 42.05.091(d)

Amend the first sentence to read:

> "The annual salary for each member of the commission is the same annual salary received by the head of a principal department of the state."

Comment: The salary should be commensurate with the responsibility, and a commission member should be paid as well as the head of a state department, or as much as a superior court judge. Without such a salary incentive, it is doubtful that competent persons would be attracted to the position. The present $5,000 salary proposal may make a commissioner feel that he could afford a little more commission time, but it does not resolve the problem of providing a commission which would adequately tend to the increased number of utilities and their problems caused by regulation. The present commission apparently is of the opinion that it cannot adequately handle its present business. The present commissioners are doing the best job they can, but it is unfair to classify them as even being "part-time" commissioners because of the two or three days a month that they are able to meet. However, the extra $5,000 is not going to create even a part-time commission.

4. AS 42.05.133. Add a new section to replace existing AS 42.05.180 to read:

> "Facts and information in the possession of the commission are public and reports, files, books, accounts, papers and memoranda of every nature in its possession are open to public inspection at reasonable times, except commission work papers or agency memoranda not used by the commission in determining an issue before it. Facts and information developed or used by the commission, its staff or consultants affecting a commission proceeding or decision shall be disclosed to the parties prior to the hearing and are subject to cross-examination."

Comment: The total elimination of existing AS 42.05.180 would undoubtedly see materials required to be filed by the commission be classified as confidential information. If the commission is to regulate utilities, the utilities regulated should have full access to all of the facts, documents and statistics available to the commission without a Supreme Court case to obtain the information. The public should have a right to readily determine if the commission is accomplishing its tasks. Courts require commissions to divulge and make available for cross examination facts and statistics developed by staff personnel and usually used to brief the commission in secret. The prejudice of unknown evidence influencing a decision is evident and its use should be eliminated.

5. AS 42.05.135. Add a section to read:

"The commission shall provide for the publication of its reports, orders, decisions, rules and regulations. Publication shall be in a manner and form best adapted to public information and use."

Comment: Under the total regulation proposed by the bill the commission will build up a body of commission law and guideline which should be known to all utilities spread throughout this vast state, many of which just cannot afford to hire lawyers or other experts in Anchorage to find out what the commission requires, but who would be substantially affected by many of the commission actions, otherwise buried in files known only to the commission. Utilities and the public should have a readily available source of commission laws, decisions, policies, etc., in order to comply with proper regulations and to review the work of the commission.

POWERS AND DUTIES OF THE COMMISSION

6. AS 42.05.141(1) Amend to read:

"Supervise and regulate every public utility engaged or proposing to engage in such business within the state of Alaska except to the extent exempted by AS 42.05.641 [AND MAY DO ALL THINGS, WHETHER SPECIFICALLY DESIGNATED IN THIS CHAPTER OR IN ADDITION THERETO, WHICH ARE NECESSARY OR CONVENIENT IN THE EXERCISE OF SUCH POWER AND JURISDICTION] and the powers of the commission shall be reasonably construed to accomplish its stated purposes;"

Comment: This section clearly states that the commission may do all things in addition to those things which the Legislature

has expressly empowered the commission to do. This is dangerous language and grants the commission carte blanche powers to regulate in areas in which the legislature undoubtedly would not desire the commission to regulate. No utility in this state should be subject to a complete legislative delegation of all regulatory powers to the commission. The proposed language is probably what is intended, and that is to give the powers of the commission a reasonable and not a strict construction by courts of law.

7. AS 42.05.141(6). Delete in its entirety.

[SUPERVISE AND REGULATE A PUBLIC UTILITY IN ALL OTHER MATTERS AFFECTING ITS RELATIONSHIP WITH OTHER PUBLIC UTILITIES, ITS CUSTOMERS AND WITH THE GENERAL PUBLIC.]

Make clear what is meant?

Comments: This provision is so vague as to be utterly meaningless. If a public utility is to be regulated, the public utility should understand in exactly what way it is being regulated so that it may protect itself against unwarranted and litigious commission interference. For example, this section could be construed to give the commission regulatory authority over the manner in which a city may establish a special assessment district for the furnishing of sewer or water service. The commission could presumably prescribe uniforms for customer service representatives. Such a vague grant of powers should not be tolerated by the legislature if only because the commission would not have the staff to handle every conceivable detail entrusted to it by this provision. If the commission is given power to regulate, it should be entrusted only with those matters it can regulate effectively within the power granted.

8. AS 42.05.151(a). Amend to read:

"The commission may make such reasonable regulations . . .".

Comment: As commission regulations have the effect of law, the commission regulations at their inception should be reasonable and not arbitrary.

9. AS 42.05.151(b). Amend to read:

"The commission shall by regulation establish reasonable rules of practice and procedure . . .".

Comment: The term "reasonable" here implies fundamental fairness, and due process of law does not in every case accord with what is reasonable.

10. AS 42.05.161(a) Amend to read:

> "The administrative adjudication procedures of the Administrative Procedures Act (AS 44.62) do not apply to adjudicatory proceedings of the commission except as final administrative determination by the commission are subject to decision procedure and judicial review as provided in AS 44.62.510,.520, .540, .560,.570."

Comment: The sections on judicial review are correlated to the APA sections concerning the commission decision and reconsideration. The APA provides mechanics for reconsideration of a final decision, and the judicial review sections, particularly the time for appeal, would be confusing without the prior sections containing decisions.

11. AS 42.05.161(b). Delete: Words after "rules of agency organization", lines 9-13, page 6.

Comment: The APA was originally conceived to correct the abuse of agencies adopting unknown (even to the agency) rules, including rules of practice and procedure. A person desiring to process a matter before the commission should have the right to consult the Alaska Administrative Code to determine what the rules of practice and procedure are. The APA does provide for emergency rule changes, and it is hard to visualize a situation which would be "contrary to the public interest" to avoid publication of a rule affecting public utilities. The commission should abide by its rules, and these rules should be available to everyone. The interpretive rules, general statements of policy and rules of agency organization should also be promulgated if the proposed amendment in Comment No. 5, appropriate means of making this information available, is not adopted.

12. AS 42.05.171. Amend next to last sentence to read:

> "A determination or order of a commissioner or commissioners on such an investigation or hearing, undertaken or held by him or them shall not be effective until approved and confirmed by at least a quorum of the commission upon a review of the entire record and after the parties have the opportunity for argument, to the commissioners not present at the hearing."

Comment: The amendment would add a procedural safeguard in that any commissioner who did not sit in on the hearing must

have a record available and review that record. All parties should have the right to make an argument to at least a quorum of the commission when they must rely upon the cold record.

13. AS 42.05.181(d). Add new subsection to read:

"(d) The commission shall hold hearings in the locality where the utility involved is located."

pmb OK

Comment: Because of the drastic powers of the commission, it should hold hearings where the utilities are located. This amendment points out the insurmountable task of an effective commission regulation in this state.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

14. AS 42.05.191(b). Delete this subsection.

Comment: This provision is discriminatory as to utilities previously not subject to public service commission regulation. Most, if not all, service areas were granted by the commission in 1964 without a hearing or even notice of hearing, and certificates were issued without regard to the service areas of utilities not subject to commission jurisdiction.

For example, Chugach Electric Association was granted a certificate which blankets almost the entire City of Anchorage, even though Chugach was not in fact serving all of the city which was being served by the city utility. The problem becomes more acute where the blanket certificate of Chugach contains an area which is not served by either utility, and there is no actual conflict as to facilities. The fairest way to treat the new certificate problem would be to repeal without a savings clause all certificates. Further analysis will indicate that the discrimination between municipally owned utilities is even more invidious by the failure to include a grandfather clause.

15. 42.05.191(c) Delete this subsection.

Comment: Much ado has been made about service area conflicts, and protaganists for public service commission regulation have always pointed to the conflict of service area problems. Subsection (c) constitutes the magic formula of public service commission regulation which is intended to solve this conflict. The legislature merely states that the commission shall take "appropriate action" to eliminate competition and duplication of facilities" by delineation of service area or services. Surely, is the commission to be granted absolute regulation over municipal electric, telephone

water and sewer utilities just so a bill may be passed to require the commission to take "appropriate action". No standards are supplied or direction given, even though the answer to the problem is simple. Unless the commission shall order one utility to relinquish its service, a doubtful conclusion of the authorization, no ready solution is offered by this entire bill. A court under simple standards, could easily and readily resolve the problem and would grant a local forum.

The commission will undoubtedly spend a couple of years and thousands of dollars of everyone's time in delineating and apportioning each resident, lot and parcel to each and every utility within this state. An appeal is bound to follow to ensure years of litigation at great cost to the consumer. But the fact exists that no duplication of facilities can be avoided except by expropriation and the payment of just compensation, a judicial matter. However, this bill does provide the commission with an even greater tool, it could conceivably destroy the competition altogether by not granting the municipal utility a certificate of public convenience and necessity.

16. AS 42.05.192. Add a section to read:

> "A certificate shall be granted if it appears to the commission that the public utility was actually operating in good faith on October 15, 1969, within the confines of the requested area, or that the public utility was installing the facilities necessary to furnish service to the requested area as of that date."

Comment: The absence of such a section in the bill as drafted represents invidious discrimination to municipally owned and operated utilities. The above section is commonly referred to as a "grandfather" provision, because it must constitutionally recognize existing rights. When the public service commission granted the original certificates of public convenience and necessity in 1964, every existing utility in this state regulated by the commission received a certificate based on its "grandfather" rights. Without exception, this state has provided in granting licenses to professions and operating authorities to motor carriers, air carriers and in all other situations where a person or entity was operating prior to the licensing, without requiring an examination or a showing of right to continue an occupation or operation within this state. However, publicly owned and financed municipally owned and operated utilities are not to be granted this long recognized right which could be destroyed by a prejudiced commission under this Act.

Certificated utilities in this state have received their grandfather certificates without a hearing or notice of hearing and have been granted more than their fair share of service areas, and have been granted areas within cities not served by them. Only an application was required to be filed with certain relevant information to grant a grandfather certificate, and most utilities had to make no showing other than to describe its area and scope of operations on the grandfather date.

Municipally owned and operated utilities, on the other hand, must come before the commission as if they were a brand new utility desiring to operate in an area with a certain utility service for the first time. The burden of proof would be upon the municipally owned and operated utilities that it would be to the public convenience and necessity to operate in each and every area in which it had previously operated prior to regualtion. The existing utility, where there is a service area conflict, would be the utility to be protected by the commission from the invasion of the certificated area by the upstart municipality, and the municipally owned and operated utilities would in most every case suffer an extreme loss of its operating territory. Municipal and bond revenues would be impaired, and the ability of the utilities to expand could be effectively destroyed. A city would undoubtedly have to hire experts and expend thousands of dollars of the consumer's money in trying to prove to the commission that it is entitled to serve a territory which conceivably could be, but in fact is not, served by the existing certificated utility.

The absence of the above section violates every concept of due process and fundamental fairness. Surely a municipally owned and operated utility should not have to bear the expense of proving public convenience and necessity, and/or of a long drawn out court fight to prevent its property being taken without due process of law and its bonding being impaired by the absence of such a right. The commission would be flooded by public convenience and necessity hearings, and without doubt many municipally owned and operated utilities would, in effect, be out of business, if the commission procedures take the not unusual two or three years for hearing and decision.

17. AS 42.05.193. Add new section to read:

"The commission upon obtaining jurisdiction and after notice and hearing shall proceed to delineate the service areas between public utilities with conflicting service areas in order to avoid duplicating facilities and services, and the commission shall consider and make full findings as to each of the following standards and preferences in making the

delineation of the service areas:

(1) The commission shall consider the capabilities of the utilities involved to furnish an economically feasible and adequate service to the public in the areas in conflict without excessive or major extensions of facilities to serve the areas. The commission shall consider the ability of the utilities to expand their services and facilities into areas other than those in conflict in order to maintain appropriate expansion and a proper level of service.

(2) In areas where the conflicting facilities are close, but not intersecting or crossing, the commission shall apportion the service areas between the existing facilities in order that the existing facilities may be utilized to the fullest extent possible without duplication or unreasonable extensions of service between the existing facilities.

(3) In areas where the conflicting utility facilities are intermingled, each utility may continue to serve its existing customers. The commission shall apportion the service area to enable each utility to recoup its investment in the facilities and to make the best economic utilization of the existing facilities with the fewest and least expensive extensions of facilities.

(4) Where the facilities of one utility are substantially surrounded by the facilities of the other utility, the surrounded utility may continue to serve the existing customers within the enclave and such other customers in the proximity of the existing facilities as may enable the utility to recoup its investment and to make the best economic use of the existing facilities with the fewest and least expensive extension of facilities in the enclave.

(5) In contiguous areas where there are no existing facilities and no present demand, but a significant demand for services in the near future is likely, the commission, all other matters being equal, shall include the service area within the service area of the utility nearest the area to be served if the utility is ready, willing and able to furnish an adequate service at reasonable rates to the area and such service is economically feasible.

(6) In areas where there are no existing facilities and no present demand and a significant demand for electric utility services in the near future is unlikely to arise, the commission, particularly when an area exceeds five acres, shall not include the area within any service area until a reasonable demand or need for the service exists.

(7) In delineating any service area within a municipality, the commission shall give a preference to the municipally owned and operated utility if the municipality is ready, willing and able to serve the service area in conflict, and the extension of the municipal utility facilities into the area would be economically feasible. In delineating service areas outside municipalities, a municipally owned and operated utitity shall be given the same and equal consideration as any other public utility.

(8) Where a customer may be served by the existing facilities of more than one utility, the commission shall consider the customer's preference.

(9) The public utilities may, with the approval of the commission, assign, exchange, or otherwise transfer in writing to each other customers, facilities or service areas.

(10) "service area" as used in this section, includes any territory in which the utility is furnishing service to the public, or any territory which a utility claims is an extension of the territory in which the utility is presently providing service."

Comment: This section would provide the commission with reasonable guidelines to delineate areas and to protect municipal utilities from unfortuitous commission action based on the sole fact that cooperatives have received prior certificates from the commission. The section would permit the commission to apportion the service area with the least possible additions of new facilities and to avoid the taking of property without due process payment of just compensation.

The section illustrates the fact that the commission just cannot order a utility to abandon facilities and customers at the whim of the commission. If the legislature intends to "clean up" service areas, the legislature must provide other legislation which will contain provisions for the payment of just compensation for the facilities and business lost. Because any such matter will be appealed to the courts, jurisdiction in the courts in the first instance will save the affected utilities and the state thousands of dollars and time in having only one procedure. Besides, the commission has no expertise in such matters.

Any legislative action does not establish standards and the vested rights of cities is totally unacceptable to cities which recognize the announced prejudice of the commission to protect its regulated utilities.

The City of Anchorage is working on a bill which it intends to propose to the legislature to resolve the conflict problem as to duplicating and intermingled facilities, based on legislation from other jurisdictions having the same problem. The City legislation would not involve commission action.

18. AS 42.05.221(a). Amend the first sentence to read:

> "Except as otherwise provided in this section, no public utility may discontinue or abandon a service for which a certificate has been issued by the commission unless upon the application of the public utility and if after notice and opportunity for hearing the commission finds that discontinuance or abandonment [WILL NOT MATERIALLY HARM THE PUBLIC INTEREST] is not required by public convenience and necessity.

Appears good amendment

Comment: The same test set forth in (b) for resumption should be required for discontinuance. A discontinuance of service may be justified on the grounds of economic feasibility, lack of facilities, etc., even though the public interest might be "materially harmed".

19. AS 42.05.231. Delete in line 22, page 9 the language

> "includes but is not limited to" and lines 28-29 stating: [FAILURE TO COMPLY WITH THE PROVISIONS OF THIS CHAPTER OR THE RULES, REGULATIONS OR ORDERS OF THE COMMISSION]"

Comment: No utility should be placed in the position of having to guess what might be good cause for the loss of its certificate to operate, where the "not limited to" language grants the commission unlimited grounds. If the commission may revoke a certificate, the

standards for revocation should be specifically set forth. Blanket provisions such as this have been stricken as being unconstitutional.

The fourth ground is extremely and unreasonably punitive. In the first place, no allowance is made for a lawful failure to comply with a commission order, etc. In the second place, there are ample grounds for enforcement of a commission order both civilly and criminally. The purpose of the public service commission is to "regulate" a utility and not to have the power of life or death over that utility. The commission did not create or finance the utility, nor should it have the unrestrained authority to revoke a certificate upon the slightest pretext that an insignificant regulation of the commission has been violated. In view of the prior section, which does not require "reasonable" rules or regulations, this provision is extremely onerous. The ability of the commission to revoke a certificate upon the slighest pretext can lead to great abuses of power because a utility must live in fear of punitive action in a variety of unknown ways, including specially designed orders and regulations to be punitive.

SERVICES AND FACILITIES - JOINT USE

20. AS 42.05.251(a). Amend the first sentence to read:

> "Each public utility shall furnish and maintain reasonably adequate [EFFICIENT, SAFE AND REASONABLE] service and facilities.

Comment: The amendment would change the statute back to the existing language. The added words seem to be innocuous enough, but they do underly a basic concept of more commission control and authority.

For example, what are "safe" services and facilities? By the addition of this little word, the legislature makes the public service commission the guardian and inspector for the state of the safety of every utility and utility plant in this state. It is submitted that there are other local and state laws and methods of enforcement of this provision which could permit the revocation of a certificate for what the commission thinks is a minor safety violation. If a safety problem exists the commission can refer the matter to the proper authority.

The commission is further given the power to inquire into management prerogatives and utility financing to an unreasonable extent. In the first place the word "adequate" generally includes efficiency. In the second place, the word "efficient" is not

qualified by the word "reasonably" and this qualification is important. There is little doubt in this state that many utilities exist which do not have efficient service and facilities if only because of the economic feasibility to provide them. The word "reasonably" implies that a utility cannot do what it does not have the resources to do. Again the commission has arbitrary authority to dictate to a utility how the utility shall conduct its business, even though adequate facilities are provided.

21. AS 42.05.251(c). Delete on lines 16-17 the language:

"including the crossing of facilities".

Add the following sentence:

"In so doing, the commission shall conform to the standard practices of the industry."

Comment: It is not clear what the phrase "the crossing of facilities" means, a term more appropriate to Luther Burbank. The phrase could mean that the state and municipalities would no longer have any authority to control over roads and rights-of-way, a not too unlikely a possibility, in view of prior public service commission attempts to destroy the operations of the city electric utility by having the state highway department deny permits. The commission apparently acknowledges that it cannot handle today's business let alone handle all right-of-way permits.

The addition of the sentence would require the commission, as much as possible, to adhere to the standards of the industry. A utility and its management necessarily is bound by certain national standards in its practices and equipment, and a nascent public service commission hardly has the wisdom to change these standards. The utilities should have some objective standard by which they are protected against arbitrary and unreasonable commission action.

22. AS 42.05.251(d). Amend to read as follows:

"Whenever the commission, upon its own motion or upon complaint, after providing reasonable notice and opportunity for hearing finds that the service or facilities of a public utility are unreasonable, [UNSAFE] inadequate, [INSUFFICIENT], or unreasonably discriminatory, or otherwise in violation of this chapter, the commission shall determine and prescribe by regulation or order the reasonable [,] and [SAFE] adequate [SUFFICIENT] service or facilities to be

observed, furnished, enforced or employer [INCLUDING ALL SUCH REPAIRS, CHANGES, ALTERATIONS, EXTENSIONS, SUBSTITUTIONS OR IMPROVEMENTS IN FACILITIES] as shall be reasonably necessary and proper for the [SAFETY] accommodation [,] and convenience of the public and shall fix the same by its order or regulation."

Comment: Changes are to clean up and delete unnecessary language in view of the prior comments concerning safety and in that adequate certainly includes sufficient service. The "including" language is not necessary in view of the prior comprehensive language.

23. AS 42.05.271(a). Amend the first section to read:

"A public utility having sewers, conduits, utilidors, poles, pole lines, pipes, pipelines, mains or other distribution or transmission facilities shall, for reasonable compensation, permit another utility to use them when public convenience and necessity requires such use and the use will not then or in the planned forseeable future result in substantial injury to the owner, or in substantial detriment to the service to the customers of the owner.

Comment: The planned upgrading or change in facilities may create, not now but a future situation which would cause substantial injury.

24. AS 42.05.271(b). Amend by inserting in line 8, page 12, after "public utility" the words:

"subject to regulation by the commission".

Comment: No interconnection should be required by a regulated to a nonregulated utility. At present telephone toll facilities are owned and operated by the federal government. The federal government has always used it leverage of not being subject to regulation in enforcing its will upon all telephone utilities in this state. No utility in this state should be required to connect merely because ACS expects the Alaska consumers to subsidize its entire operations by unfair toll separation settlements or other actions.

25. AS 42.05.301. Add a new subsection (b) to read:

"(b) In providing for testing, standards and measurements of meters or appliances, the commission shall conform to the standard practices of the industry."

Comment: Again industry standards should be followed by the

commission, as the commission undoubtedly should adopt such standards when required.

26. AS 42.05.311. Add a new sentence after the first sentence to read:

"In so doing, the commission shall conform to the standard practices of the industry."

Comment: Again the commission would be required to do what it probably would do in any event.

RATES AND RATE SCHEDULES

27. AS 42.05.321(c) Amend to read:

"The commission may reject for filing all or part of a tariff which does not comply with the reasonable form or filing regulations of the commission. The commission may reject upon notice and hearing all or part of a tariff which is not consistent with this chapter or the reasonable regulations of the commission. A tariff or provision so rejected is void."

Comment: The commission should be able to reject a tariff which does not meet the minor, ministerial form and filing requirements of a tariff without notice and hearing. However, the commission should not arbitrarily be permitted to reject a tariff without a notice and hearing, and a public utility should be protected from arbitrary action, in having its vital rates denied without reason and hearing.

28. AS 42.05.321(d). Add a new subsection to read:

"Special arrangement contracts affecting rates and charges shall likewise be filed with the commission."

Comment: A utility at times, because of unusual or special circumstances not precisely covered by tariff, will enter into an agreement to furnish a utility service. Such agreements are usually made with a large user of electric power for example, because of the load and other factors not commonly present. Wholesale contractors for power are another source of agreement. The act should be made clear that these agreements are permissible under special circumstances.

29. AS 42.05.321(e). Add a new section to read:

"A municipality is entitled to a fair and reasonable rate of return in fixing the rates of municipally

owned and operated utility, and a municipality may include in the utility revenue requirements a franchise fee and an amount the utility, if investor owned, would have paid to the municipality for taxes."

Comment: This section would insure that a municipally owned and operated utility will not be treated differently than an investor owned utility as to rates. A municipally owned and operated utility is entitled to the same return on its invested capital and should meet the same requirements as to franchise fees and taxes as would an investor owned utility.

29. AS 42.05.351(b). Delete this section.

Comment: This section apparently serves no good purpose if the commission does have the jurisdiction over the utility furnishing the toll. At present the commission has no jurisdiction over ACS and it is difficult to determine what this specific section intends. On the other hand, it appears that the utility "demanding" the charge is the culprit. Telephone utilities in Alaska operate as the collector of ACS tolls in return for which they obtain a certain toll settlement charge per call. The local telephone company has absolutely no authority over the rates charged by ACS, or over any connecting carrier. A local interconnecting company should not be responsible for irresponsible toll rates. A telephone toll rate is not the sum of various segments of rates, but is related to other factors. A ten mile call in Los Angeles is much more expensive than a ten mile call in rural Nebraska, because the plant, expenses and service necessary is much more complicated and expensive. However, the wisdom of a toll rate should be left to the commission, and certainly this provision could be a commission regulation or policy. Unless there is some unknown justification for this section, it should be omitted.

30. AS 42.05.361(b). Delete this subsection.

Comment: In this section the public service commission makes no decision but the vital rights of the utilities involved are left to "professional consultants" to decide the issue. If the commission does nothing except to select an arbitrator, the section should say so. But this the courts can do. If the parties desire to arbitrate the matter, the parties should provide for their own arbitrator and mode of arbitration. The costs of this section could be prohibitive. In a telephone toll separation settlement controversy, both sides could expend twenty-five or fifty thousand dollars apiece to prepare its case, and then have to spend an additional twenty-five or fifty thousand dollars apiece for the commission's consultants who must examine both utilities. The additional expense is unwarranted, and the consultants are not given any kind of standards by which valuable rights are to be tested.

31. AS 42.05.371(a). Amend the first sentence to read:

> "[UNLESS THE COMMISSION OTHERWISE ORDERS NO] Changes may be made by a public utility in its rates, classifications, rules, regulations or practices where any contract or agreement relating to a rate, classification, rule, regulation or practice upon [EXCEPT AFTER] thirty days notice to the commission and to the public."

Comment: The present statute, and the usual regulatory practice, is to permit a utility to file a rate which will become effective within thirty days and which will be the lawful rate unless objection to the rate is made within the thirty day period of time. Again the commission desires arbitrary powers to tell a utility how that utility is to be operated, when it may file a tariff and when a tariff becomes effective. A utility cannot operate and meet its financial commitments under this discretionary provision. Under the language perhaps the public utility could never change a tariff if the commission merely decides to order otherwise. The utility cannot wai months or years while the commission decides what it is going to do and the rate should become effective without commission interference upon suspension or punitive action.

32. AS 42.05.381(b), (d) Delete these subsections.

Comment: This suspension provision does not exist in the present statute and a commission suspension of seven months is totally unreasonable.

Once a rate is not charged, then the utility is the looser forever. City bonds and bondholders would be affected if a rate could not go into effect for a period of up to eight months (including the initial filing period). The suspension provision does not even contain a date in which the commission must act, and conceivably the commission could suspend a new tariff change which had been in actual operation for several months. Subsection (d) would give the commission the power to escrow a proposed rate increase, a much fairer provision. But the costs of such escrow would probably exceed any refund to the average small consumer in Alaska. Again no period is given in which the commission may order an escrow, and the commission should act within the thirty day objection period. (Subsection (e) should also be changed to eliminate the suspension language.) With the commission meeting generally only once a month and the demonstrated slow decision process of the commission the commission should first justify to the legislature that it has the maturity to exercise a suspension clause before such power is granted to the commission,

and not to a court. Let the commission operate and show to the legislature that a suspension clause is necessary and will be administered properly before the power is given to cripple the ability of a utility to earn a timely and reasonable rate of return. In other words, if the commission is wrong the utility will have lost seven or eight months of its ability to earn a fair rate of return and to protect its finances and investment.

33. AS 42.05.391(b). Add a new subsection (b) to read:

> "No order of the commission shall change or affect any rates established or to be maintained under the covenants of any general obligation or revenue bonds of a municipality."

Comment: The contractual rights of bondholders should not be subject to possible impairment.

34. AS 42.05.401. Delete this section. The punitive nature of this bill is again demonstrated by this particular provision which enables the commission, at any time, to order reparations for perhaps ten or twenty years. In any event, once a tariff has been filed and no objection has been made to the tariff then no reparations should be required. If experience and facts show an abuse, then perhaps this power could be granted to the commission, otherwise, the utilities must have some indication and body of law and experience on which to draw to avoid what may be unlawful charges subject to reparation. If the commission is doing its job, a tariff change would be analyzed and proper proceedings instituted before reparations are necessary.

35. AS 42.05.411. Delete this section.

Comment: See above comments.

ACCOUNTS RECORDS AND REPORTS

36. AS 42.05.431(a). Amend to read:

> "Each public utility shall use and follow a system of public utility accounting prescribed by order of the commission [.], except where the public utility uses and follows a system of federal regulatory agency. The Commission shall prescribe wherever possible a generally recognized syster of public utility accounting.

Comment: Most of the large utilities in the state are required to maintain records by a federal regulatory agency which have developed generally accepted forms of utility accounting. The commission should not put a utility at the expense of adopting a whole new system of accounting merely to suit commission procedures. Where there is no federal regulation, then the commission should, nevertheless, follow recognized systems of public utility accounting wherever possible as these systems are generally used by most utilities and would enable accurate comparisons with other utilities.

36. AS 42.05.431(b). Amend line 23, page 20, by inserting "reasonable" before the word "regulation".

Comment: This requirement could cost a utility thousands of dollars and the utility, even with the inclusion of the word "reasonable", would probably have to spend thousands of dollars preparing the necessary reports and statistics. The maintaining of records is quite expensive, and it is doubtful that smaller communities in this state could keep up the required accounts and reports except at prohibitive costs. A continuing property record requires expert accounting preparation and supervision.

37. AS 42.05.451(a). Insert in line 8, page 21, the words "by reasonable regulation" after the word "determine". Amend line 13, page 21, by inserting "allow" for "determine allowable". If the commission is to establish rates of depreciation, the commission should do so by regulation so that all public utilities affected may have an opportunity to be heard and to be guided by a proper regulation. The last sentence has been changed to require the commission to allow depreciation expense rather than to let stand the impression that the commission need not so allow.

38. AS 42.05.451(b). Delete this subsection.

Comment: This subsection is vague and evidently serves no good purpose. If the section is merely an attempt to establish an evidentiary rule, the commission can certainly do this by its reasonable regulations governing its proceedings. In any forecast "estimates" must be given because no actual depreciation and "statements" of depreciation under the section are inexplicable. If the subsection cannot be understood, the section should be stricken.

39. AS 42.05.481. Insert in line 17, page 22, the words "person authorized by it" for "of its employees". Insert in line 19, page 22, the words "or their affiliated interests", after the words "public utilities". Insert on line 20, page 22, the words "or its employees". ~~Insert in line 19, page 22, the words "or their affiliated interests" after the words "public utilities".~~ Insert on line 20, page 22, the words "or its affiliated interest"

after the words "public utility".

Comments: The commission should have the authority to designate persons, such as its consultants, other than employees to examine records. The Section should make clear that affiliated interest records may be inspected.

FINANCIAL AND MANAGEMENT REGULATIONS

40. AS 42.05.501. Insert in line 8, page 23, the words:

"or may become impaired by continuation of current practices" after the word "impaired".

Comment: The proposed amendment would eliminate the "lock the barn door after the horse is stolen" situation, because it would make clear that practices which would impair the capital should be immediately stopped.

41. AS 42.05.511. Delete the second and third sentences of the subsection, lines 15-19, page 23.

Comment: Once the utility has somehow managed to receive a profit, what business is it of the commission to determine how that profit is to be distributed? Certainly the by-laws or ordinances are supposed to prevail, and the distributees would have their lawful recourse in the event that some ordinance or by-law was not followed. Just how the commission should interfere with corporate business in a matter which has nothing to do with the rates and services of the utility is not clear. What evil is to be avoided by this section is not explicit, and if there is a particular problem, then that problem should be dealt with openly. Again, the all powerful, arbitrary commission is promoted.

JUDICIAL REVIEW, PENALTIES AND ENFORCEMENT

42. AS 42.05.531(a). Insert "AS 44.65.510,.520,.540,.560, .570" for AS 44.62.560" in line 26, page 23. See comment No. 10.

43. AS 42.05.531(b). Delete in line 3, page 24, the words "and other process".

Comment: The words "and other process" are unknown in effect. Injunction is a normal remedy by which a commission order is enforceable, and whether dire, unpredictible consequence may ensue is unknown. If a reasonable explanation can be given as to how the court would otherwise act to enforce the order, other than an injunction, perhaps that form of relief should be provided.

44. AS 42.05.541. Reenact new section to read:

> "A public utility which knowingly and willfuly violates any provision of this chapter, or a rule, regulation or requirement, or order adopted under this chapter, or a term or condition of a certificate is guilty of a misdemeanor, and upon conviction is punishable for each offense by a fine of not more than $500.00."

Comment: This section illustrates the cops and robbers approach to the entire bill. The commission is the "good guy" and all utilities, including everybody that works for a utility, or is affiliated with a utility, is a "bad guy" who needs to be brought to justice. The vagaries of the proposed criminal section would place every employee of a public utility in jeopardy, particularly when the intricacies of utility regulation are present. A simple violation would subject a minor employee to criminal sanction. The commission has civil means of enforcement of its orders without resort to criminal process which in practice is a last resort in any event. The above amended section has been taken from the Motor Carrier Act, AS 42.10.410, and appears to be a more reasonable provision, passed by a prior legislature.

45. AS 42.05.551, .571, .581(a), .591(a). Delete these sections and subsections.

Comment: These provisions are unconscionable. These provisions transform the public service commission into a court of law for no good reason. If a utility has not acted properly, the utility may be coerced by court action or deterred by criminal violation. A third, additional "civil penalty" may be applied to anyone who happens to be concerned with the violation and that person is subject to a fine without any legal safeguard other than to have an "opportunity to be heard" in the commission kangeroo court. A penalty may be levied even if a person in ignorance or negligently violates, or aids or abets any violation of any of the what should be numerous technical provisions, orders, rules or regulations of the commission. This concept of a civil penalty certainly is foreign to commission regulation, and probably unconstitutional in making the commission a court. If there is to be a civil penalty, the activities of the commission should be specifically spelled out in great detail so that a person may know in fact and law what he is supposed to do to avoid the commission kangeroo court.

GENERAL PROVISIONS

46. AS 42.05.611. Amend to read as follows:

"A public utility may exercise the power of eminent domain for public uses authorized by law, except as to publicly owned property. This section does not authorize the use of a declaration of taking by any public utility which does not have that power under another law."

Comment: A utility should not be permitted to condemn state, borough, and city properties and rights-of-way which should at all times be responsible to public needs. The other amendment makes clear that the declaration of taking is not limited if otherwise granted.

47. AS 42.05.621. Add a section as follows:

"Nothing in this chapter shall be interpreted to limit the power of a municipality to regulate and control, in the manner and to the extent provided by law, a public utility not otherwise subject to the express provisions of this chapter. Jurisdiction and control of public streets and rights-of-way within a municipality shall be vested in the municipality."

Comment: The amendment reinstates the present existing AS 42.05.620 with the addition that control of streets would remain with the municipality. In other words, the public service commission cannot authorize Anchorage Natural Gas to excavate under the city streets without meeting the city requirements. Nor can the commission supersede the city's building code, electrical safety code, etc. The extent of commission regulations should be to establish service areas and to review the rates and service provided by a public utility. This bill creates a commission with powers so broad that the commission, even with the best intentions, could not even review the paperwork necessary to review its jurisdiction.

48. AS 42.05.621(c). Add a new section to read:

"The commission shall have concurrent jursidiction with a municipality as to a franchise held by a public utility subject to regulation by the commission. Except when the commission acts on its own motion, the jurisdiction of the commission shall be to decide appeals from the franchise holder or grantor as to a decision of the grantor concerning rates or services."

Comment: A franchise holder obtains valuable rights from a city in exchange for a promise to render a service at certain rates. It would be manifestly unjust for a utility to obtain a franchise from a city, and then to evade its responsibilities under the franchise by obtaining the franchise and then turning around to the commission for different rates and service. The commission could still act in the public interest, but would give the franchise grantor the first opportunity to enforce the franchise on a local level. The commission just does not have the tools to enforce all franchises, and the local entity is the best means of seeing that the franchise is enforced.

49. AS 42.05.622. Add a new section to read:

"(a) The attorney general may, upon the complaint of the commission, or upon the complaint of customers of a municipally owned and operated utility residing outside the municipality, commence an action in the superior court in the judicial district in which the entity is located for relief to

(1) Order the municipality to cease and desist from imposing unreasonable rates or charges upon customers residing outside the boundaries of the municipality; or

(2) Order the municipality to cease and desist from any unreasonable difference in the standard of service provided nonresident customers of the utility.

(b) The consumers and the consumer's complaint shall meet all requirements of a complaint as required in § 672 of this chapter.

(c) The rates, charges or service of a municipality for a public utility service furnished beyond the corporate boundaries shall not be considered unreasonably discriminating solely by reason of the fact that a different rate, charge or standard of service exists for a similar service within its corporate limits.

Comment: This section would give consumers outside municipal boundaries the additional right to address a grievance to the attorney general over municipal service outside the boundaries. In view of the lack of justified complaints in this area, the commission and attorney general should be able to resolve the matter before the courts without costly commission jurisdiction.

50. AS 42.05.631. Amend the first sentence to read:

"At the conclusion of any public hearing held under this chapter the commission shall determine the cost and <u>may apportion</u> the costs among the parties, including the

commission, as shall be [IT CONSIDERS] just."

Comment: The sentence as written is ungrammatical because the apportionment provision has been left out. The City of Anchorage has just experienced the arbitrary use of this section by the commission. The intent was not to give the commission arbitrary power to unreasonably assess costs, as the commission has done, and the objective standards should be made certain by striking the words "it consider". This provision is certainly unjust in many ways, because the utility, which may be brought into a public hearing by the commission, must pay for its share of the costs, even when it is not at fault.

51. AS 42.05.641(b). Amend to read as follows:

"With each application, except one filed under §192 of this chapter, filed with the commission pursuant to §191 of this chapter, the applicant shall pay the commission a fee of $50.00.

52. AS 42.05.651. Add a sentence to read:

"The superior court may permit an examination of the information filed upon a showing of good cause for the examination."

Comments: Secrecy of information is proper, provided that the statute does not preclude a legitimate reason or purpose for the examination. A court should permit the examination if good cause is shown.

53. AS 42.05.671. Insert "reasonable" after the word "by" on line 29, page 27, and on line 4, page 28.

54. AS 42.05.673. Add a new section to read:

"(a) A complaint involving the service, rates, charges, rules or regulations of a public utility shall first be made to the utility pursuant to such reasonable procedures as the utility or municipality owning and operating the public utility may prescribe. The decision of the utility or municipality on the complaint may be appealed to the commission.

(b) A complaint involving the rates, charges, rules or regulations of the utility may be appealed to the commission only if the complaint when first made to the utility was signed by not less than 25 directly affected consumers of the utility, or signed by

the executive officer of a municipality when the complaint is made by a municipality.

(c) An appeal to the commission need not be in any particular form, but shall be in writing and verified, and shall state that the complainant has exhausted his administrative remedies as provided by the rules of the public utility. The commission may prescribe a fee for filing complaints. The commission shall proceed, with or without notice, to make an investigation of the complaint which it considers necessary or convenient. No order affecting a rate, toll, charge, schedule, regulation, practice or act complained of may be entered by the commission without giving the public utility a public hearing.

(d) The public utility may file a complaint as to any matter affecting its own rates or service with the same effect as a consumer or user.

(e) The commission shall not have any jurisdiction over disputed claims for debt between the utility and a customer, or any other billing or collection of a utility rate, charge or tariff.

Comment: The protagonists of commission regulation have insisted that no person outside a city has a forum, but they would have such a forum before the commission. Strangely, S.B. 128 does not provide for any complaints by consumers. Throughout the bill there are numerous references to the commission acting "upon a complaint", but nothing is stated as to how these complaints are to be made. It appears that the commission could act upon an anonymous complaint over the telephone by a person not even a consumer of a utility. Nothing is more fair than to require a person having a complaint to first exhaust his complaint with the utility involved, rather than to engulf the commission with hundreds of disputes. The commission is also entitled to some protection from unwarranted complaints. Complaints as to service should be appealable on an individual basis, but complaints involving rates, charges and other matters of a general application should be substantial enough before commission intervention is necessary. An individual has recourse before the utility, utility board or city council.

54. AS 42.05.691(b) - (d). Delete the subsections, and add new subsection to read:

"(b) The provisions of this chapter do not apply to municipally owned and operated public utilities."

Comment: This act should not apply to municipally owned and operated utilities within or outside the corporate boundaries. A discussion of this amendment is too lengthy to include in this commentary. The intent of the Alaska Constitution is that municipalities should have local authority to the fullest extent possible and that "home rule" means home rule without state interference.

55. Section 5. Delete "certificate" on line 20, page 30. Add new section to read:

> "The existing rates, charges, tariffs, rules and regulations, service and service area of a municipally owned utility shall continue and remain in full force and effect unless otherwise ordered by the commission under the provisions of this Act."

Comment: The deletion is necessary because all certificates are not grandfather certificates. The amended sentence is necessary to protect the cities' rights pending commission action. If a city's application takes two or three years to process through the courts, the city should be permitted to operate without a certificate under its existing policies.

Karl L. Walter, Jr.,
City Attorney,
City of Anchorage, Alaska

KLW:LCM

TRANSMITTAL MEMORANDUM

March 4, 1969

By: Don Hall
Executive Director
Alaska Public Service Commission

Re: SB 128 Comments and Suggestions

Major Policy Decisions

In transmitting my comments on SB 128 I think it is important to inform everyone who is interested in the Bill that the Alaska Public Service Commission did not submit any legislative proposal to extend its jurisdiction in any manner whatsoever. Specifically it did not recommend that gas and oil pipelines or municipally owned and operated utilities be regulated. This does not indicate that the Commission is either for or against the idea. The Commission's reason for taking a neutral position on this important subject is first, because it feels such legislation should properly emanate from other sources and second, because it believe any attempt to suggest legislation in this area would be misinterpreted as a self-serving bureaucratic effort motivated solely by a desire to arrogate additional powers to the Commission.

Chairman Clouse and Commissioners Lounsbury and Zerbetz and I were given an opportunity to review early drafts of the Administration's proposed legislation affecting the APSC. We made numerous suggestions which, for the most part, are embodied in SB 128. I have not commented on the wisdom or need for regulating municipal utilities or pipelines because the Commission feels, as I previously indicated, that this is a matter requiring major policy decisions which already have been decided by the Administration and rightfully should be resolved by the legislative process.

Funding

I have been informed that the Commission's original budget proposal, seeking an appropriation of $347,800, was to be submitted at the time SB 128 was introduced. This budget was designed mainly to enable the Commission to meet the greatest regulatory challenge in its history--that of preparing, in advance, to regulate the purchaser of the Alaska Communication System. Incidentally (although it has nothing to do with SB 128) the ACS Sale bids were opened March 1, 1969 and it is my understanding that I will be designated to represent Governor Miller, and the State of Alaska, in the evaluation of the bids at Scott Air Force Base in Illinois. Arrangements have been made for financial and engineering consultants, specializing

in communications, to assist me. This work will begin March 10, 1969 if present plans can be effectuated.

The Commission's original budget, submitted September 30, 1968 is based upon recommendations of professional consultants engaged to advise the Commission on how it should be organized and staffed. It contains the following statement of significance to the enactment of SB 128:

> "If history repeats itself, legislation will again be introduced to place municipally-owned and operated public utilities under the Commission's regulatory jurisdiction. In the event this should occur this budget, which is based primarily on regulating the ACS purchaser, will also be adequate to regulate the municipals unless new laws are enacted requiring expensive new regulatory programs."

Because our original budget did not provide funding for the regulation of gas and oil pipeline companies I have since informed Commissioner Sharrock of the Commerce Department that the Commission will need an additional $8,500 for this purpose in the event SB 128 becomes law.

It was not possible, under established budgetary procedures, to budget presently established positions at pay ranges equal to those recommended by our consultants. Our vacant position of Utilities Engineer, for example, was budgeted at pay range 20 because we are not permitted to budget it at pay range 23 which our consultants feel is necessary to attract qualified applicants. Since June 30, 1968, we have advertised this position in national trade magazines and in local newspapers, but it is still vacant--which indicates the consultants are right. As I understand it, however, their recommendations cannot be implemented unless the Personnel Department agrees with them.

What I have done, at Commissioner Sharrock's request, is the only thing I could do under the circumstances; namely, submit P-402 forms of the Personnel Department in respect to the six new positions included in our original budget and to up-grade existing positions to the pay ranges recommended by our consultants. In addition, I have submitted detailed figures to Commissioner Sharrock showing the budget increases that will be required for these purposes and to provide $20,000 for the purpose of initially paying hearing officer costs that may be incurred under sec. 42.05.631 of SB 128, and AS 42.05.610 of the present law. These figures show that our original budget will have to increased to $409,700 (or $61,900) to cover the aforementioned costs.

If all of our budget proposals are approved the Commission will wind up with sixteen authorized positions instead of the ten positions it has. It should be apparent, however, that the new positions will remain vacant if the salaries are not adequate. This undoubtedly explains why we still have three vacant positions, and only seven people actually on the job--which makes our staff smaller than any of the other 56 Commissions except the Virgin Islands.

If SB 131, SB 214 and SB 215 are enacted significant additional funding will be required, but since I have not yet seen the last two measures I am unable, at this time, to do anything except direct attention to the fact that they present an additional funding problem which cannot be ignored if they are enacted.

Commission's Minimum Requirements

Experience has demonstrated the fact that the present law under which the Commission operates is deficient in a number of respects. The correction of these deficiencies was the main thrust of the proposed legislation which the Commission submitted to Mr. Walter L. Kubley, the Governor's Legislative Assistant. Most of these proposals are embodied in the following thirteen sections of SB 128:

Section 42.05	Page
.091(b)	3
.121	3-4
.371	16-17
.381	17-18
.391	18
.431	20
.521	23
.621(b)	26
.641	27
.681(2)(B)	28-29

The foregoing should not be taken as a blanket endorsement of the sections listed. To the extent that comments have been made, they should, of course, be considered. In addition to the specific comments relating to the above-listed sections, I feel it is also important that the comments regarding omissions be given consideration. These include my first two comments relating to the title of the Act as well as the two matters discussed under the heading of "Specific Omissions" plus the additional definitions set forth in my comments designated as sections .681(6)(F), .681(7), .681(8), and .681(9).

SB 128 and SB 54 Compared

I find that SB 54 contains 31 sections that are substantially the same as those in SB 128. These comparable sections are shown in the following tabulation:

SB 128 Section*	Section Heading Used in SB 128	Comparable Section in SB 54*
.131	Annual Report	.135
.141	General Powers and Duties of the Commission	.125
.181	Hearing Officers and Agents	.095
.191	Certificates Required	.235
.201	Application	.245
.211	Conditions of Issuance	.255
.231	Modification, Suspension or Revocation of Certificates	.235
.251	Standards of Service and Facilities	.345
.271	Joint Use and Interconnection of Facilities	.355
.281	Failure to Agree upon Joint Use or Interconnection	.365
.291	Standards for Measurement	.385
.301	Testing of Meter Standards	.395
.321	Tariffs; Filing and Inspection	.305
.331	Adherence to Tariffs	.295
.341	Rates to be Just and Reasonable	.275
.351	Discrimination in Rates	.285
.371	Tariff Changes	.315
.381	Suspension of Tariff Filing or Contract	.325
.391	Power of Commission to Fix rates	.335
.461	Subsidiary Business Accounts	.435(b)
.481	Inspection of Books and Records by Commission	.175(a)
.501	Impaired Capital	.465
.511	Distribution of Surplus, Profits and Operating Margins	.475
.521	Effect of Rules, Regulations and Orders	.505
.531	Review and Enforcement	.515
.541	Violation a Misdemeanor	.525
.601	Joinder of Actions	.535
.611	Eminent Domain	.565
.621(b)	Regulation by Municipality	.575
.641	Regulatory Fees	.555

*Sec. 42.05 ommitted preceding sub-sections shown.

Conclusion

Although there will undoubtedly be heated arguments regarding extending the Commission's jurisdiction to industries and operations that are now exempt from regulation, the Commission is hopeful the Legislature will not allow such controversies to overshadow, and perhaps eclipse, the genuine need for constructive legislation which is desperately needed to enable the State of Alaska to effectively regulate the purchaser of the Alaska Communication System. Our Annual Report and our original budget both emphasize this as its primary goal.

The purchaser of the ACS will be selected before the end of the fiscal year and the final transfer of the facilities is now scheduled to occur on July 1, 1970. Public Law 90-135 requires that the purchaser obtain a certificate of public convenience and necessity from the APSC prior to the date of transfer. Consequently, it is imperative that laws be enacted during this session of the legislature which will enable the Commission to certificate and effectively regulate the purchaser. The sections of SB 128 which will enable the Commission to do the job properly have been set forth under the heading of "Commission's Minimum Requirements." Most of these sections are comparable to sections in SB 54. It would be a travesty of justice to deny the Commission this non-controversial legislation because of arguments that may develop over provisions that are controversial.

The eyes of the Nation are on Alaska right now, because of its involvement in the sale of the ACS. We simply cannot afford to fall on our face in meeting the challenge of regulating the purchaser. Yet I am confident this is exactly what will happen if the Commission is not given the laws and financial resources it must have to perform its regulatory functions in a manner that will reflect credit on the State of Alaska.

By Don Hall

March 4, 1969

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COMMENTS OF DON HALL, EXECUTIVE DIRECTOR OF
ALASKA PUBLIC SERVICE COMMISSION, ON SB 128

Sub-section of SB 128	
Title	Almost every other state in the nation has the name of the state as part of the name of its commission (i.e. New York Public Service Commission, California Public Utilities Commission, Washington Utilities and Transportation Commission). Therefore, I strongly urge we officially designate our Commission as the Alaska Public Service Commission.
.010	Not in SB 128, but should be so that name can be changed to Alaska Public Service Commission.
.020(a)	Line 13: Insert "Alaska" after "The" and before "Public".
.020(b)	Line 16: Suggested revision: One of the three members shall be appointed by the Governor to serve as chairman of the Commission during the term of the appointing governor. This is substantially like the wording of the comparable law in Washington State (see RCW 80.01.010). Reason: This will enable each new governor to designate the chairman of the Commission during his term of office and prevent an outgoing governor from saddling the new one with his appointee. Governors like to name the heads of the various agencies of government. Also SB 128 provides $300 additional compensation for the Chairman.
.091	P. 3, Line 1: Don't understand meaning of word "civil". The term should be clarified if its meaning is not common knowledge.
.091(b)	If the state can afford to pay 5 Commissioners $6000 a year (as provided in SB 54) it should certainly be able to afford $6000 for three Commissioners plus $300 more for the Chairman. Consultants engaged by the Commission recommended a salary range of $5000 to $6000.
.141(3)	The way this section now reads, the Commission would have the power to alter and amend "fair and reasonable rates" etc. If a rate is already fair and reasonable there would be no need to alter or amend it. I suggest the following revision.

(3) make and fix just, fair and reasonable rates, classifications, rules, regulations, practices, services and facilities;

(4) alter and amend ~~an fact~~, unfair and unreasonable rates, classifications, rules, regulations, practices, services and facilities.

Re-number secs. (4), (5) and (6) to (5), (6) and (7).

.151(b) Line 21: Add following sentence:
The commission shall apply analogous rules of the superior court in regulating the appearance before it of attorneys not admitted to practice in this state.
Reason: This proposal stems from the attached communication from Mr. Stanley Howitt, Executive Director of the Alaska Bar Association. In all the states I have knowledge of the state public service commission includes in its rules of practice and procedure a section titled "Appearance and Practice Before the Commission" which states who may appear before it in a representative capacity. I know of no other state which prohibits attorneys in other states from appearing before it. However, it is not uncommon for them to require that out-of-state attorneys be qualified and entitled to practice before the highest court of record of their own state.

The APSC is a quasi-judicial agency and should, therefore, be accorded the same right of waiver that a superior court has when it is performing its judicial functions.

The Commission engaged the services of a hearing officer in the so-called "Cook Inlet Telephone Case" (Cause No. U-66-24 et al.) who had the case 679 days during which time there were 8 days of hearings, 12 briefs with an aggregate total of 239 pages, and a hearing transcript of 1312 pages. From the time the first application was filed until the Commission entered its final order, the total elapsed time was 969 days. Much of the delay and resulting expense to the parties was due to the fact that several of them were represented by attorneys who had little or no experience. The hearing officer's bill for his services was $13,310.50 so the State (specifically the Secretary of State) certainly shared in the cost. Were it not for the fact that some of the attorneys were knowledgable in the field of public utility law, the case would have been even more expensive to all concerned.

I can sympathize with the desire of Alaska attorneys to get all the business they can but I can also see why the law gives our superior courts the right to allow out-of-state attorneys to represent those who appear before it. Whatever the reasons may be that superior courts have this privilege, by law, it should apply with equal force to the APSC.

.181(b) Does the term "special agent" include the contractual hiring of an accountant or engineer to make a special investigation of a company such as the Anchorage Natural Gas Company and the Alaska Pipeline Company or engaging the services of an attorney to prepare rules of practice and procedure? If so, would it be possible to appoint them without a contract for personal service which is the way that hearing officers are now appointed? These questions should be clarified in the law if there are any doubts--hopefully in a way that simplifies, rather than complicates.

the procedure that has heretofore been required to engage the services of professional engineers or accountants.

.191(c) The words "appropriate action" leave much to be desired. I suggest the addition of a sentence reading somewhat as follows: Appropriate action shall include, but not be limited to voluntary agreements between competing utilities subject to approval by the commission and compulsory arbitration by order of the commission.

It has been my observation that the problem of competition between utilities and the resulting duplication of facilities is pretty much limited to electric utilities in the cities of Kenai, Fairbanks and Anchorage.

.211 Line 25: After word "may" insert words "or shall".

.221(a) P. 9, Line 3: Strike "unless" and insert "except after".
P. 9, Line 4: Strike first word "the"; change "of" to "by"; and strike word "if".

.221(b) P. 9, Line 15: After "resumed", insert these words "and the resumption is found to be economically feasible".

.311 Consumers should never be permitted to use testing equipment or apparatus. I suggest the following revision of the third sentence: Upon payment of a reasonable fee, as provided in a utility tariff accepted by the commission for filing, a utility customer may demand that a scientific test be conducted as to the accuracy of any equipment or apparatus used by a utility to measure the utility services or commodities it furnishes.

.321 P. 15, Line 2: Change "is" to "a[illegible]".

.371(a) P. 16, Line 25: Change heading to read as follows:
NEW OR REVISED TARIFFS AND CONTRACTS
Reason: This section deals with contracts as well as tariffs; so the fact should be indicated in the heading. The section should also cover new rates, classifications, rules, regulations or practices and new contracts as well as changes in existing tariffs or contracts.

.371(b) P. 17, Line 9: Change as follows:
New tariff and contract rates, classifications, rules, regulations and practices and revisions thereof shall be filed in the manner provided in sec. 321(a) of this chapter.

371(c) P. 17, Line 11: Change as follows:
Upon the filing of a new tariff or contract, or the revision of an existing tariff or contract, the commission, upon complaint or upon its own motion, without notice, may initiate an investigation of the reasonableness and lawfulness thereof.

.401 This section was included at the suggestion of the Assistant Attorney General assigned to the APSC. It is not at all unusual in comparable laws of other states but the need for it is more common in the regulation of transportation companies. Washington State has one like it (RCW 80.04.020) which has been on the books since 1937. I was with that Commission from 7/10/34 to 9/30/67 but cannot recollect that it was ever implemented in respect to a public utility. Several people have already expressed concern about this section. Actually, I doubt that they have good cause to worry about it, but they certainly cannot be blamed for worrying. Consequently, if it should become a major issue I would suggest that it be deleted or amended to make it apply only when a utility charges more than the rates in its effective tariff. After all if a utility charges the rates in its tariff (as required by Sec. 42.05.331 of SB 128) it should not be required to make reparations except to the extent it deviates from its tariff.

.481 P. 22, Line 17: After "employees" insert agents or consultants. Reason: Section 42.05.361(b) provides for the employment of consultants and section 42.05.181 provides for the appointment of agents; so the fact should not be ignored is this section.

.491(a) P. 22: Revise as follows:
The commission may investigate the management of a public utility including but not limited to salaries fixed by the recipient and salaries established in the absence of arms-length bargaining and payments to affiliated interests for services rendered or for the purchase, sale, lease, rental or exchange of any property, right, or thing, or loans to or from affiliated interest, and any practice which may adversely affect the cost or quality of the services or commodities furnished by the utility.

.491(b) Revise as follows:
When any unreasonable managerial practice, payment, or loan is found to exist, the commission may, after providing reasonable notice and an opportunity for hearing, order the public utility to take such corrective action as the commission may require.
Reason: Two of the biggest loopholes in utility regulation relate to self-serving decisions by the management of the utility or by their corporate affiliates. These decisions sometimes include placing holding company officers on the payroll of a utility at high salaries when the services they perform for such salaries are minimal. Closely held corporations, as well as partnerships and individual proprietorships often succumb to the temptation of fixing their own salaries at unreasonably high levels--thus enabling them to virtually control their own rate of return. Holding companies that control local operating companies sometimes charge the local utility an excessive amount for services rendered, for interest on loans, or for the sale, lease or exchange of any property, right or thing. I know, because I administered the affiliated interest law of the Washington Utilities and Transportation Commission for 17 years-- and the above proposed revision contains some of the suggested language I have used (see RCW 80.08.12).

.631 P. 26, Line 20: Strike words "Investigation and" from heading. Reason: the word "investigation" does not appear in this section; so it should be omitted in the heading or else the section should be re-worded so as to clearly include investigations.

This section is the same as AS 42.05.610 of the present law. I seriously question the advisability of including it in SB 128 unless it is revised to require a hearing on the costs prior to entering an order and more realistic and precise criteria are specified for determining the amount assessed the various parties. I say this because I believe it is almost impossible to successfully apply any degree of mathematical precision to the criteria the Commission is now required to consider in assessing hearing costs; namely:

ability to pay
evidence of good faith
other relevant factors
mitigating circumstances

Moreover, there is a need to specify exactly what costs the Commission may include as hearing costs. Does it include the traveling expenses of the Commission and its staff? Does it include the costs of any investigation prior to the hearing? Is it limited to the hearing officer's fees and expenses plus time charges of reporters? Then there is the question of who should apy the costs initially--the Secretary of State (who has been paying them) or the Commission. In the Cook Inlet case the hearing officer's fee was over $13,000 and the Secretary was not funded to pay the bill. I think he had to get it from the Governor's emergency fund. No matter which agency pays the hearing costs initially, it should be funded for it and the law should designate the agency. Judging from past experience, it is estimated that $20,000 will be required to pay hearing officer costs most of which, hopefully, can be recovered. It should be emphasized, however, that the Commission's current budget request does NOT include this $20,000.

P. 26, Line 22: .631 is same as AS 42.05.610 except for omission of words "of the hearing and shall by order apportion" after the word "costs"

For all practical purposes, this section could well be limited to apportioning the fees and expenses of hearing officers. The parties now pay for their own copy of hearing transcripts and the Commission gets one free if any other party orders one. The hourly rate paid for court reporters is not so great that the Commission could not pay it--and, next to the hearing officer's fee, this is the next largest expense of a hearing.

There is a possibility that the State might eventually decide it would be cheaper to hire its own full-time hearing officer.

.641(a) P. 27, Line 7: Insert word "intrastate" between "from" and "operations".

Under the provisions of SB 123 the Alaska Pipeline Company will become subject to regulation. For this reason, I suggest that consideration be given to whether or not it would be fair to collect a regulatory fee from the Pipeline Company on the basis of its sales to Anchorage Natural Gas Corporation and then require ANG to pay a regulatory fee on its gross revenues. This would result in a double regulatory fee on the same gas--which would then be passed on to ANG's customers. Under these circumstances I think it would be wise to add a sentence reading substantially as follows:

"Gross operating revenues from intrastate sales to a utility for resale to its customers shall be excluded from gross operating revenues for the purpose of this section."

Such a provision would relieve the Pipeline Company from paying a regulatory fee on gross revenues represented by sales to ANG but would require a fee on revenues from sales to the military bases and other customers.

.681 P. 28, Line 15: Strike "microwave". Microwave is not a service. It is only one means by which service can be provided.

P. 28, Line 16: Make it communication services instead of communications service.

P. 28, Line 20: If the State really wants to regulate LPG (propane or butane) distribution systems the fact should be made clear.
Reason: Petrolane, in Anchorage, apparently intends to take the position that propane is not a petroleum product. If the APSC is given authority to regulate the Alaska Pipeline Company it should be noted that funds for that purpose have not been included on the Commission's original budget request. Obviously any such request would be improper under the present law. If the Pipeline Company is brought under regulation there will undoubtedly be an immediate demand to investigate it. This will probably necessitate the employment of an accounting consultant at an estimated contractual cost of $8500. In this particular case I feel that independent professional consultants should be engaged for any investigation that is required so that the Commission can at least partially insulate itself against any accusation of bias.

.681(5) There appears to be no question but that this section, when read in conjunction with Sec. 42.05.681(2)(D), would extend the Commission's regulatory jurisdiction to the Alaska Pipeline Company--which, perhaps, may be its primary objective. There is a possibility, however, that it may go much much farther than was actually intended. For example, there is a relatively short natural gas pipeline between the Beluga power plant of Chugach Electric Association and the gas well that supplies the plant. Im my opinion this transmission line would be furnishing natural gas to a "limited portion of the public" and would therefore become a public utility. I doubt that any such thing was intended.

AS 42.05.645 of the present law specifically exempts the following from regulation by the APSC:
A. A person engaged in the production or gathering of natural gas or petroleum, and the plant, pipeline or system used for these purposes.
B. A person engaged in the distribution of natural or manufactured gas, or petroleum or petroleum products "to industrial customers only and not to the public generally" and the "plant, pipeline, or system used for these purposes."
C. Any plant, pipeline, or system used to distribute any concentrate or liquid substance by the owner or operator thereof "used solely for transportation."

The above provisions were enacted into law in 1968. As a result the Commission dismissed a proceeding then in progress to determine the regulatory status of the Kenai Pipeline Company. SB 128 would, in effect, cancel the 1968 amendment.

I also understand there is a pipeline from the Port Dock in Anchorage to the Internation Airport which is used to transport jet fuel. This is presumably a pipeline used to furnish petroleum or petroleum products to a "limited portion of the public" and would therefore be regulated.

There would undoubtedly be other pipelines that would come within the definition of the term "public utility" as defined in SB 128.

In keeping with the Commission's position of neutrality in respect to the extension of its regulatory authority, I would prefer not to express an opinion on this matter. However, I feel obligated to point to the possible ramfication of SB 128 as written and to suggest that the matter be given careful consideration with due regard to the question of whether or not there is an actual need to extend the Commission's jurisdiction to all of the pipelines which would be made subject to regulation under SB 128. If specific exemptions are disired the bill should be amended, or additional funding be provided.

.681(6)(F) New Section to read as follows:
"Any corporation 5% or more of whose voting securities are owned or held, directly or indirectly, by a public utility or by any corporation designated in secs. (A) (B) and (C) of this sub-section.
Reason: To make it clear that the subsidiaries of public utilities are affiliated interests as well as the owners of their voting securities. Subsections (A) (B) and (C) define up-stream affiliates; (F) would take care of down-stream affiliates.

.681(7) "tariff" means any or all rates, charges, tolls, rules or regulations of a utility relating to commodities or services furnished by a utility to the general public for compensation and every map, page, adoption notice, instrument or other document filed with the Commission setting forth the terms and conditions under which utility services or commodities are offered to the public together with instruments of concurrence and all other documents and data setting forth the terms of a utility's business relations with any other utility insofar as they affect the general public either directly or indirectly.

.681(8) "telephone exchange" means an operating unit consisting of one or more central offices together with the associated plant and switching equipment used in furnishing communication services within a defined geographic area embracing a city, town, village or area in which the subscribers served have a general community of interest.

.681(9) "telephone" means the transmission of voice communications, or in some cases, data or signals, by means of wire lines or Hertzian waves, between subscriber stations or central office stations located within one or more telephone exchanges or specified service areas, but excluding transmissions wholly within a radiocommunication system which is not interconnected with a telephone exchange or long lines system or another radiocommunication system.

.691(a) P. 30, Line 3: Place period after word "utility" and strike the rest of the line.

Prepared 2/18/69

SIGNIFICANT OMISSIONS

I

No provision for power of Commission to assess the costs of special investigations against the utilities investigated. The present law gives the Commission this power--but only in connection with proceedings involving the valuation of utility property (see AS 42.05.270). There are 57 regulatory commissions, including the District of Columbia and Puerto Rico. Twenty-four (24) of them have this power, including California, New York, Michigan, Pennsylvania, Washington, Arizona, Wisconsin, Wyoming, etc.

The Washington State law provides as follows:

> .80.20.020. Cost of investigation may be assessed against company. Whenever the commission in any proceeding upon its own motion or upon complaint shall deem it necessary in order to carry out the duties imposed upon it by law to investigate the books, accounts, practices and activities of, or make any valuation or appraisal of the property of any public service company, or to investigate or appraise any phase of its operations, or to render any engineering or accounting service to or in connection with any public service company, and the cost thereof to the commission exceeds in amount the ordinary regulatory fees paid by such public service company during the preceding calendar year or estimated to be paid during the current year, whichever is more, such public service company shall pay the expenses reasonably attributable and allocable to such investigation, valuation, appraisal or services. The commission shall ascertain such expenses, and, after giving notice and an opportunity to be heard, shall render a bill therefor by registered mail to the public service company, either at the conclusion of the investigation, valuation, appraisal or services, or from time to time during its progress. Within thirty days after a bill has been mailed such public service company shall pay to the commission the amount of the bill, and the commission shall transmit such payment to the state treasurer who shall credit it to the public service revolving fund. The total amount which any public service company shall be required to pay under the provisions of this section in any calendar year shall not exceed one percent of the gross operating revenues derived by such public service company from its intrastate operations during the last preceding calendar year. If such company did not operate during all of the preceding year the calculations shall be based upon estimated gross revenues for the current year. [1961 c 14 §80.20.020. Prior: 1939 c 203 §2(a); RRS § 10458-6a(a).]

80.20.030 Interest on unpaid assessment--Action to collect. Amounts so assessed against any public service company not paid within thirty days after mailing of the bill therefor, shall draw interest at the rate of six percent per annum from the date of mailing of the bill. Upon failure of the public service company to pay the bill, the attorney general shall proceed in the name of the state by civil action in the superior court for Thurston county against such public service company to collect the amount due, together with interest and costs of suit. [1961 c 14 § 80.20.030. Prior: 1939 c 203 § 2(b); RRS § 10458-6a(b).]

80.20.040 Commission's determination of necessity as evidence. In such action the commission's determination of the necessity of the investigation, valuation, appraisal or services shall be conclusive evidence of such necessity, and its findings and determination of facts expressed in bills rendered pursuant to RCW 80.20.020 through 80.20.060 or in any proceedings determinative of such bills shall be prima facie evidence of such facts. [1961 c 14 § 80.20.040. Prior: 1939 c 203 § 2(c); RRS § 10458-6a(c).]

80.20.050 Order of commission not subject to review. In view of the civil action provided for in RCW 80.20.020 through 80.20.060 any order made by the commission in determining the amount of such bill shall not be reviewable in court, but the mere absence of such right of review shall not prejudice the rights of defendants in the civil action. [1961 c 14 § 80.20.050. Prior: 1939 c 203 § 2 (d); RRS § 10458-6a(d).]

80.20.060 Limitation on frequency of investigation. Expenses of a complete valuation, rate and service investigation shall not be assessed against a public service company under this chapter if such company shall have been subjected to and paid the expenses of a complete valuation, rate and service investigation during the preceding five years, unless the properties or operations of the company have materially changed or there has been a substantial change in its value for rate making purposes or in other circumstances and conditions affecting rates and services. [1961 c 14 § 80.20.060. Prior 1939 c 203 § 2(e); RRS § 10458-6a(e).]

Please note the provision for an opportunity to be heard and the 5-year limitation on the frequency of a "complete valuation, rate and service investigation."

If it should be decided that SB 128 should be amended to include authority to assess costs of an investigation against the utilities investigated, possibly it could be included as part of sec. 42.05.631.

II

SB 128, as written, provides for APSC investigations, upon complaint, in the following sections: 42.05.221(b), .231, .251(c) and (d), .371(c), .381(a), .401.

I am of the opinion some safeguards should be included in SB 128 to protect utilities and the Commission from needlessly spending time and money to deal with frivolous, unfounded, or harassing complaints. Attached hereto is a Xerox copy of an article in the February 8, 1969 issue of Telephony (p. 44) indicating what Colorado proposes to do to solve the problem. I am not sure I agree with Colorado's proposed solution to the problem, but the article does indicate that, potentially at least, there is a problem. At a recent meeting of Alaska City Managers, which I attended, considerable concern was expressed about the possibility that the cities, if regulated, would be subjected to the expense of defending every single complaint. I agree that they should be concerned and that the law should protect utilities in some manner.

We have a few regulated utilities that have only one customer; so the present Colorado law (and one like it in Washington State) could not be used as a guide since they allow 25 or more customers to file a complaint. It seems to me that the best procedure would be to insert in the law somewhere a provision to the effect that the Commission may in its rules of practice and procedure establish the terms, conditions, and restrictions applicable to the filing of complaints. Since the rules themselves could not be adopted without giving the public a chance to be heard, the Commission presumably could not be arbitrary or unreasonable. Further, if experience should demonstrate the need for a subsequent change, it could be accomplished without revising the law.

No matter give power for informal investigation or in Josephson bill

• FROM PAGE 21

west Tennessee member of the commission. He has been on the Tennessee commission since 1953, and served as chairman in 1957-58 and 1963-64.

North Carolina asks Bell for improvements under raise

The North Carolina State Utilities Commission on Jan. 17 reversed a former decision and ordered Southern Bell Tel & Tel Co. to file a detailed list of service improvements it would institute if a company request for rate charges were approved and put into effect (TELEPHONY, Jan. 11).

In an order of Dec. 18, setting a public hearing on the company's rate request, the commission stated that "the proceeding would not be considered as a general case."

In the order of Jan. 17, it said "such a conclusion was based, at least in part, upon the understanding that the tariff filing was part of Southern Bell's service improvement plan, and was not offered primarily for revenue purposes."

Since the Dec. 18 order, the North Carolina attorney general's office and the North Carolina Consumer Council have raised the question of whether the real reason for the rate request is service improvements or increased profits. Both argued, contending the matter should be considered a general rate case and that the question whether the company's service has improved or declined in recent years also should be a matter for study.

In the Jan. 17 order reversing its former stand, the North Carolina commission said, "In view of the questions raised at the prehearing, the commission is now of the opinion that Southern Bell should specify in a verified pleading whether the tariff filing in question is part of a service improvement plan . . . and if so, should specify in detail the facts and details of such service improvement plan."

The commission asked that the list of service improvements planned be filed by Jan. 24 and if details are not provided by that date, the company's request would be considered solely on the basis of whether it is reasonable as a revenue-generating device, and without regard to promised improvements.

Southern Bell has proposed a 50-cent increase in service charges on private one-party lines, a $2 increase in installation fees and reductions up to $3.50 a month in some zone and mileage charges.

A company spokesman has said the changes would bring in about $2 million in additional revenue during the first year, and that the extra income is needed to carry out the company's planned service improvements.

Colorado bill would erase right to protest rates

A bill aimed at streamlining Colorado's public utility laws would also take away a right of utility customers to protest unreasonable rates, it was reported Jan. 8.

Colorado law now allows 25 or more customers to file a complaint with the Colorado Public Utilities Commission, and the commission is required to consider it. The proposed law, written by an interim study committee, would delete that provision.

Consumers still would be able to complain indirectly about utility rates, it was explained. But in order to get an investigation and hearing, they would first have to convince their city council, county commissioners or the state commission that their complaint had merit.

The 78-page bill, printed for introduction Jan. 8 in the Colorado Senate, is designed generally to modernize the laws dealing with the commission.

Have written for copy of this bill

It repeals obsolete wording of many sections.

It also writes into law the tradition of having both major political parties represented on the three-man commission.

Elimination of the provision for customer complaints was recommended to the study committee by the commission. The commission said under the present law "a single disgruntled customer can very easily obtain not only 25, but a considerable number of signatures, to institute a rate proceeding that could be wholly without merit."

Commissioner Howard Bjelland, starting his second six-year term, said he has no clear recollection of any commission inquiry arising from a consumer complaint. He said he felt the provision ought to be repealed, anyway, to avoid a potential waste of time and money.

It would be "pretty expensive" for a public utility (such as the Public Service Co. of Colorado or Mountain States Tel & Tel Co.) to answer an unfounded complaint in a public hearing, Bjelland said. And in the end, the cost of such a hearing would be paid by consumers, he pointed out.

Chief sponsor of the bill, Sen. George Jackson (R., Colorado Springs) said the committee discussed the possibility of requiring more than 25 customers to sign complaints, but concluded it would be better to repeal the whole thing. An alternative to repealing the provision would be to require a greater number of signatures on customer petitions, Jackson said.

Oklahoma hearings begin on unauthorized Bell charges

Hearings began on Jan. 30 before the Oklahoma Corporation Commission on the joint applications of several business firms,

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February 10, 1969

TO: Donald E. Hall, Executive Director
Public Service Commission
338 Denali
Anchorage, Alaska

Neil Harper, Chairman and
Commissioner of Surface
Alaska Transportation Commission
338 Denali
Anchorage, Alaska

Mr. William Burns
Commissioner of Air Commerce
338 Denali
Anchorage, Alaska

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Department of Highways
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Subject: Unauthorized Practice of Law by Out-of-State Attorneys before Administrative Agencies

Gentlemen:

A number of cases have been reported to the Alaska Bar Association concerning the unauthorized practice of law by out-of-state counsel before administrative agencies such as the Public Service Commission, Alaska Transportation

Commission, Department of Highways-Contract Claims Board and Air Commerce Commission.

This memorandum is to advise you that under the present law, out-of-state attorneys may not appear before administrative agencies even if they are associating with Alaska counsel. Usually however, no attempt has been made by the out-of-state attorney to associate.

The conclusion reached by the Alaska Bar Association on this matter is based upon the fact that there is no provision whatsoever for appearances of out-of-state attorneys before administrative agencies in law, by court rule, or by rule of the Board ofGovernors. The occasional appearance of an out-of-state attorney in the courts of the state is governed by Rule 81, Rules of Civil Procedure, Out-of-state attorneys are allowed to appear in the state courts on a case by case basis. But such appearances are at the discretion of the Court, and the Court may deny such appearances if such action is warranted. This rule was promulgated by the court system itself. There is no similar rule regarding out-of-state attorney appearances before administrative agencies and therefore the statutory provisions would apply. The provision in point is A.S. 08.08.230 which reads as follows:

> "Section 08.08.230. Unlawful Practice a Misdemeanor. Any person not an active member of the Alaska Bar who engages in the private practice of law or represents himself as entitled to engage in the private practice of law in the state other than as permitted by this chapter is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both."

There is no other provision in the chapter 8 of Title 8 of Alaska Statutes to permit the appearances before administrative agencies by outside counsel. Appearances before administrative agencies have been defined as the practice of law by the Alaska Supreme Court in the case of Application of Babcock , 387 P.2d 694 (Alaska 1963) wherein the Court stated at page 697:

> "One is engaged in the practice of law when he, for a valuable consideration, engages in the business of advising persons, firms, associations or corporations as to their rights under the law, or appears in a representative capacity as an advocate in the proceedings pending or prospective, before any court, commissioner, referee, board, body, committee, or commission constituted by law or authorized to settle controversies, and there, in such representative capacity, performs any act or acts for the purpose of obtaining or defending the rights of their [sic] clients under the law. Otherwise stated, one who, in a representative capacity, engages in the business of advising clients as to their rights under the law, or while so engaged, performs any act or acts either in court or outside of court for that purpose, is engaged in the practice of law." (Underlining added).

and the Court further stated that the practice of law is:

> "Not limited to appearing in court, or advising and assisting in the conduct of litigation, but embracing the preparation of pleadings, and other papers incident to actions and special proceedings, conveyancing, the preparation of legal instruments of all kinds, and the giving of all legal advice to clients: State v. Chamberlain, 132 Wash. 520, 232 Pac. 337, 338. It embraces all advice to clients and all actions taken for them in matters connected with the law. Rhode Island Bar Ass'n v. Lesser, 68 R.I. 14, 26 A.2d 6, 7." (Underlining added).

In order to eliminate this area of unauthorized practice of law, you are asked to submit to the Alaska Bar Association

the following information for the years 1967-1968-1969 to date:

1. A list of all out-of-state attorneys who have appeared before your administrative agency at hearings or in any other proceeding.

2. The docket number of the hearing or proceeding.

3. Please indicate if the out-of-state attorney attempted to associate with Alaska counsel.

4. Please state the name of the client who was represented by the out-of-state attorney.

We intend to inform the out-of-state attorneys whose names you submit to us of the fact that they are engaged in the unauthorized practice of law in this state.

We would appreciate your aid and assistance with regard to future hearings and proceedings in which out-of-state counsel attempt to represent clients within this state. Please serve us with a notice of such appearances so that we can raise proper objections. We also request that your agency take action to prevent such unauthorized practice of law from occurring.

We are aware that this matter has been going on for a considerable length of time owing to the fact that the Alaska Bar Association has not previously notified your agency and requested your assistance to eliminate this area of unauthorized practice of law. With the inauguration of a bar office and the employment of a full time staff, this situation is now altered so that the association is in a position to go forward and clarify and define this area of unauthorized practice. Permitting this unauthorized practice to continue over a period of time does not give it any legal status.

It might be mentioned furthermore, that even when an out-of-state attorney attempts to associate with Alaska counsel, at the present time there is no provision to permit this activity and his activities in the proceedings or hearings is still considered unauthorized practice of law.

We would appreciate your immediate assistance in this matter. Should you have any questions, please do not hesitate to inquire.

Very truly yours,

Stanley Howitt

Stanley Howitt,
Executive Director and
State Bar Counsel

SH:sb

cc: Department of Revenue
Pouch S
Juneau, Alaska

G. Kent Edwards
Department of Law
Pouch K
Juneau, Alaska

Board of Governors

HB
497

FORM SA-1B

MEMORANDUM

State of Alaska
DEPARTMENT OF COMMERCE

TO: The Honorable Barry Jackson
Chairman, House Judiciary Committee
State Legislature

DATE : February 20, 1970

Through: W. L. Kubley, Commissioner
Department of Commerce

FROM: John K. Robertson, Director
Division of Banking, Securities,
Small Loans & Corporations
Department of Commerce

SUBJECT: Truth-In-Lending

Attached are copies of a pamphlet issued by the Federal Reserve System concerning their Regulation Z.

It is felt that as you study and prepare this type of legislation for Alaska, that these might be helpful as the national banks in the state are now subject to this regulation as are finance companies. State banks are currently subject to Federal Deposit Insurance Corporation regulations which are basically the same as Regulation Z.

What you ought to know about

FEDERAL RESERVE
REGULATION



Truth In Lending

Consumer Credit Cost Disclosure

EFFECTIVE JULY 1, 1969

This print includes the Amendment and Interpretations issued through September 11, 1969

Consumer Credit Cost Disclosure

About This Pamphlet

If you extend consumer credit, then you must become familiar with Regulation Z on Truth in Lending. You will be responsible, as a creditor, for complying with the Regulation.

This pamphlet tells you how Regulation Z affects your business. It tells you what you must let your customers know when you offer or extend them consumer credit—including agricultural credit and real estate credit.

Here is what you'll find on the following pages:

- List of Federal Agencies that will enforce Regulation Z—as well as give you more information.
- Questions and Answers—answers to some of the questions you may ask. There are six sections: (1) general questions (2) finance charges and annual percentage rate (3) open end credit (4) loans and other types of credit (5) real estate credit and rescission (6) the advertising of credit. At the end of each answer you will find a reference to the section of Regulation Z that applies.
- Model forms to guide you.
- Example of a table.
- Regulation Z and the Law reprinted in its entirety—in center section.

Please note that the outside pamphlet material has been stated as simply and clearly as possible. **However, for exact information on what you must do to comply with the law, you must read thoroughly the applicable sections of Regulation Z.**

This new Regulation comes into effect on July 1, 1969, and covers exactly what you must disclose in writing to your customers and clients when you extend, arrange or just offer them credit.

Its Purpose

The purpose of Regulation Z is to let borrowers and customers know the cost of your credit so that they can compare your costs with those of other credit sources and avoid the uninformed use of credit. Regulation Z does not fix maximum, minimum, or any charges for credit.

Two Important Points to Bear in Mind

The *finance charge* and the *annual percentage rate* are really the two most important disclosures required by this regulation. They tell your customer, at a glance, how much he is paying for his credit and its relative cost in percentage terms.

The Businesses Affected

Regulation Z applies to: banks, savings and loan associations, department stores, credit card issuers, credit unions, automobile dealers, consumer finance companies, residential mortgage brokers, and craftsmen—such as plumbers and electricians. It also applies to doctors, dentists and other professional people, and hospitals. In fact to any individual or organization that extends or arranges credit for which a finance charge is or may be payable or which is repayable in more than four installments.

Material in this pamphlet has been prepared by the Board of Governors of the Federal Reserve System.

Enforcement

Specific responsibilities for enforcement of Regulation Z are divided among nine Federal agencies. A complete list of these agencies and the types of businesses they cover follows this section.

Penalties Under The Truth in Lending Act

If you fail to make disclosures as required under this legislation, your customer may sue you for twice the amount of the finance charge—for a minimum of $100, up to a maximum of $1000—plus court costs and attorney's fees. And if you willfully or knowingly disobey the law or Regulation Z and are convicted you could be fined up to $5000, or be imprisoned for one year, or both.

New Credit Forms and The Ones You Use Now

If you have taken the proper steps to get any needed new credit forms before July 1, 1969, and find they cannot be delivered to you by that date, then you may be able to use your existing forms. But they must show clearly the information a customer must be given under Regulation Z. You may do this by adding to or altering your forms. However, after December 31, 1969, you may no longer do this.

Annual Percentage Rate—Tables

Figuring out the annual percentage rate of the cost of credit on individual transactions can be very complex in some instances. Chart makers can furnish you with specialized tables to meet your business needs. If you do not have special tables, and wish to obtain a set of tables that apply to all creditors you may write to your nearest Federal Reserve Bank or to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551.

From these sets of tables you can determine annual percentage rates or the amount of the finance charge for a given rate. Volume I, which costs $1, provides four tables:

FRB100–M Covering up to 60 monthly payments with rates from 2% to 61.75%

FRB200–M Covering 61 to 120 monthly payments with rates from 2% to 41.75%

FRB300–M Covering 121 to 480 monthly payments with rates from 2% to 21.75%

FRB100–W Covering up to 104 weekly payments with rates from 2% to 61.75%

Volume II, also available at the cost of $1, gives another set of tables with instructions, for use with Volume I above. It will help you work out annual percentage rates on irregular payment or multiple advance transactions.

Further Information

If you want more information or have any questions after studying this pamphlet, including Regulation Z, you can get help from the Federal agencies listed on the next page. You'll find trade associations and Chambers of Commerce helpful, too.

Federal Agencies

From the list that follows, you will be able to tell which Federal Agency covers your particular business. Any questions you have should be directed to that agency. These agencies are also responsible for enforcing Regulation Z.

National Banks

Comptroller of the Currency
United States Treasury Department
Washington, D.C. 20220

State Member Banks

Federal Reserve Bank serving the area in which the State member bank is located.

Nonmember Insured Banks

Federal Deposit Insurance Corporation Supervising Examiner for the District in which the nonmember insured bank is located.

Savings Institutions Insured by the FSLIC and Members of the FHLB System (except for Savings Banks insured by FDIC)

The FHLBB's Supervisory Agent in the Federal Home Loan Bank District in which the institution is located.

Federal Credit Unions

Regional Office of the Bureau of Federal Credit Unions, serving the area in which the Federal Credit Union is located.

Creditors Subject to Civil Aeronautics Board

Director, Bureau of Enforcement
Civil Aeronautics Board
1825 Connecticut Avenue, N.W.
Washington, D.C. 20428

Creditors Subject to Interstate Commerce Commission

Office of Proceedings
Interstate Commerce Commission
Washington, D.C. 20523

Creditors Subject to Packers and Stockyards Act

Nearest Packers and Stockyards Administration area supervisor.

Retail, Department Stores, Consumer Finance Companies, and All Other Creditors

Truth in Lending
Federal Trade Commission
Washington, D.C. 20580

REGULATION

Z

Some general questions and answers

Q: What types of credit are covered under Regulation Z?

A: Generally, credit you extend to people for personal, family, household or agricultural uses, not exceeding $25,000.
(Reg. Z/226.2 (k))
But *ALL* real estate credit transactions for these purposes are covered regardless of the amount.
(Reg. Z/226.3 (c))

Q: What types of credit are not covered?

A: The following are not affected by Regulation Z: (Reg. Z/226.3)

1. Business and commercial credit—except agricultural credit.
2. Credit to Federal, State and local governments. (However, governmental units extending credit to individuals are affected by this law.)
3. Transactions in securities and commodities accounts with a broker dealer registered with the Securities & Exchange Commission.
4. Transactions under certain public utility tariffs.
5. Credit over $25,000—except real estate transactions.

Q: Can a State law be substituted for Regulation Z?

A: Yes it can, provided The Federal Reserve Board makes that determination as provided by law. Any determination made will be published (Reg. Z/226.12). Creditors should be guided by Reg. Z/226.6 (b) and (c) in the meantime.

Q: What happens if I not only follow Regulation Z but also elect to follow inconsistent State law?

A: In these cases the State disclosure may be shown on a separate sheet. They may also be shown on the same statement as the Federal disclosures. But in this event they must appear separately and below the Federal disclosure, clearly marked that they are inconsistent with the Federal disclosures, and separated by a dividing line.
Regulation Z is very specific on these points. (Reg. Z/226.6 (c))

Q: Is any special terminology prescribed?

A: Yes, certain terminology is specified that must be used in making disclosures required by the Regulation.
(Reg. Z/226.6 (a); Reg. Z/226.7 (b) (c);
Reg. Z/226.8 (b) (c) (d); Reg. Z/226.9 (b); Reg. Z/226.11 (c))

Q: Do disclosures have to be made in the order they appear in the Regulation?

A: No, but they must be listed in an order which will be meaningful to your customer. The examples of forms illustrate ways in which this may be done. (See pages 18 to 29 of this pamphlet.) (Reg. Z/226.6 (a))

Q: What terms are used to describe credit transactions in the Regulation?

A: The Regulation divides all consumer credit transactions into two broad categories; open-end credit, and credit other than open-end. These are discussed in subsequent sections of these Questions and Answers.

Q: How long do I have to keep records?

A: You should keep evidence of compliance for two years. (Reg. Z/226.6 (i))

Q: Will anyone inspect my records?

A: If asked by the proper agency you must show your records relating to disclosure and evidence of compliance. (Reg. Z/226.6 (i))

REGULATION

Z

Some questions and answers on the finance charge and annual percentage rate

Q: What is the finance charge?

A: It is the total of all costs which your customer must pay, directly or indirectly for obtaining credit. (Reg. Z/226.4)

Q: What costs are included in the finance charge?

A: Here are some of the more common items that you must include in your finance charge. See Reg. Z/226.4 for others and for qualifications which apply.

1. Interest.
2. Loan fee.
3. Finders fee or similar charge.
4. Time price differential.
5. Amount paid as a discount.
6. Service, transaction or carrying charge.
7. Points.
8. Appraisal fee (except in real estate transactions).
9. Premium for credit life or other insurance, should you make this a condition for giving credit.
10. Investigation or credit report fee (except in real estate transactions).

Q: Are all costs part of the finance charge?

A: No, some costs which would be paid if credit were not employed may be excluded. However, you must itemize and show them to your customer. (Reg. Z/226.4 gives a complete list.) Here are a few examples:

1. Taxes.
2. License fees.
3. Registration fees.
4. Certain title fees and other legal fees.
5. Some real estate closing fees.

Q: In what form is the finance charge to be shown to the customer?

A: It must be clearly typed or written, stating the dollars and cents total and the annual percentage rate. The words "finance charge" and "annual percentage rate" must stand out especially clear. (Reg. Z/226.6 (a))
In the sale of dwellings, the total dollar finance charge need not be stated, although the annual percentage rate must be included.

Q: What is the annual percentage rate?

A: Simply put, it is the relative cost of credit in percentage terms. (Reg. Z/226.5 (e))

Q: Are maximum or minimum rates specified in Regulation Z?

A: No. Regulation Z does not fix maximum, minimum, or any charges for credit. But it requires that you show whatever rate you do charge.

Q: Do you ever have a choice about how you state the annual percentage rate?

A: Before Jan. 1, 1971 you have the option to disclose the annual percentage rate in dollar terms. For example—"$11 finance charge per year per $100 of unpaid balance." However, beginning Jan. 1, 1971, the rate *must* be stated as a percentage. (Reg. Z/226.6 (j))

Q: How accurate must the annual percentage rate be?

A: Accurate to the nearest one quarter of one percent. (Reg. Z/226.5)

Q: How is the annual percentage rate computed?

A: It depends on whether the credit is *open end* (Reg. Z/226.5 (a)) or *other than open end* credit. (Reg. Z/226.5 (b))

REGULATION

Z

Some questions and answers about open end credit

Q: What is open end credit?

A: Typically it covers most credit cards and revolving charge accounts in retail stores, where finance charges are usually made on unpaid amounts each month. (Reg. Z/226.2 (r); Reg. Z/226.7)

Q: What must an open end credit customer be told under this law?

A: If it is a *new* account, then your customer must receive these specific items in writing to the extent applicable: (Reg. Z/226.7 (a))

1. The conditions under which the finance charge may be imposed and the period in which payment can be made without incurring a finance charge.
2. The method used in determining the balance on which the finance charge is to be made.
3. How the actual finance charge is calculated.
4. The periodic rates used and the range of balances to which each applies.
5. The conditions under which additional charges may be made along with details of how they are calculated.
6. Descriptions of any lien which you may acquire on a customer's property.
7. The minimum payment that must be made on each billing.

Q: What about customers who already have open end accounts on July 1, 1969?

A: The same information must be sent to them by July 31 if the account has an unpaid balance on July 1. Where no balance is owed on that date, the same information must be supplied on or before the first billing that

follows use of the account. (Reg. Z/226.7 (f))

Q: Are periodic statements necessary on open end accounts?
A: Yes, but only where there is an unpaid balance over $1 or where a finance charge is made. (Reg. Z/226.7 (b))

Q: What sort of information must accompany a monthly statement?
A: Where applicable, you must give customers this information: (Reg. Z/226.7 (b))

1. The unpaid balance at the start of the billing period.
2. The amount and date of each extension of credit and identification of each item bought.
3. Payments made by a customer and other credits: this includes returns, rebates and adjustments.
4. The finance charge shown in dollars and cents.
5. The rates used in calculating the finance charge plus the range of balances to which they apply.
6. The annual percentage rate.
7. The unpaid balance on which the finance charge was calculated.
8. The closing date of the billing cycle and the unpaid balance at that time.

Q: Where must this information appear?
A: Some items must appear on the actual face of the statement. Others may be shown on the reverse side; or, on a separate form enclosed in the same envelope. (Reg. Z/226.7 (c))

Q: How is the annual percentage rate determined on open end credit?
A: The finance charge is divided by the unpaid balance to which it applies. This gives the rate per month or whatever time period is used. The result is multiplied by 12 or the other number of time periods used by you during the year. (Reg. Z/226.5 (a))

Here's an example:

A typical charge of 1½% is made on an unpaid balance where bills are sent out monthly. The annual percentage rate would be twelve times 1½% or 18%.
Other methods for calculating the annual percentage rate on open end credit are detailed in Reg. Z/226.5 (a) and Reg. Z/226.7 (b) (6).

REGULATION

Z

Some questions and answers about credit other than open end

Q: What types of credit are included?

A: Both loans and sales credit—in every case for a specified period of time where the total amount, number of payments, and due dates are agreed upon by you and your customer. Typically, it is used in buying or financing the purchase of "big ticket" items. A good example is a loan from a finance company to buy an automobile. Another example is credit extended by a store to buy a washing machine, a television set, or other major appliance. It also includes a single payment loan. (Reg. Z/226.8)

Q: What must the credit customer be told in these types of transactions?

A: You must present to your customer in writing the following information as applicable, plus additional information relating to the type of credit extended. (Reg. Z/226.8 (b))

1. The total dollar amount of the finance charge; except in the case of a credit transaction to finance purchase of a dwelling.
2. The date on which the finance charge begins to apply, if this is different from the date of the transaction.
3. The annual percentage rate. (For exception see Reg. Z/226.8 (b) (2) (i) (ii))
4. The number, amounts and due dates of payments.
5. The total payments—except in the case of first mortgages on dwelling purchases.
6. The amount you charge for any default, delinquency, etc. or method you use for calculating that amount.

7. Description of any security you will hold.
8. Description of any penalty charge for prepayment of principal.
9. How the unearned part of the finance charge is calculated in the case of prepayment. Charges deducted from any rebate or refund must be stated.

Q: Are there any other things customers must be told?

A: That depends on the transaction—whether it is a loan or a credit sale:

Q: In the case of a loan, what do I have to tell my customers?

A: In addition to the information given your customer, as previously indicated, you must also provide this information: (Reg. Z/226.8 (d))

1. The amount of credit to be given to your customer. This includes all charges which are part of the amount of credit extended but are not a part of the finance charge. This information must be itemized.
2. Amounts that are deducted as prepaid finance charges and required deposit balances.

Q: Regarding credit sales, what additional information do I give these customers?

A: Again, you must give your customers all the information in the answer to the second question in this section, and the following additional information as applicable: (Reg. Z/226.8 (c))

1. The cash price
2. The down payment, including trade-in
3. The difference between the two
4. All other charges, itemized, that are included in the amount financed but not part of the finance charge
5. The unpaid balance
6. Amounts deducted as prepaid finance charges or required deposit balances
7. The amount financed
8. The total cash price, finance and all other charges. (This does not apply to the sale of a dwelling.)

Q: When must customers receive all this information on loan or credit sales?

A: Before the credit is extended. (Reg. Z/226.8 (a))

Q: Must this information be given to customers in writing?

A: Yes. You must include the information on the face of the note or other instrument evidencing the obligation, or on a separate sheet that identifies the transaction. (Reg. Z/226.8 (a))

Q: Are monthly statements required?

A. No. But if you do send out monthly statements, you must show clearly

the annual percentage rate, and the period in which a payment must be made to avoid late charges. (Reg. Z/226.8 (n))

Q: How is the annual percentage rate calculated on loans or credit other than open end?

A: By the actuarial method—payments are applied first to interest due and any remainder is then applied to reduce principal. (Reg. Z/226.5 (b))

Q. What are examples of the actuarial method?

A: Here are two simple examples:

1. A bank loan of $100 repayable in equal monthly installments over one year is made, at a 6% add-on finance charge. The annual percentage rate would be 11%. The borrower would repay $106 over one year. He would only have use of the full $100 until he made his first payment, and less and less each month as payments are made. The effect is that the actual annual percentage rate is almost twice the add-on percentage rate.
2. Using the same example as above with the 6% finance charge discounted in advance. The annual percentage rate would be 11½% because the customer would only receive $94 and have to repay $100. He would have full use of only $94 of the loan up to the time he makes his first payment.

Q: But isn't the actuarial method very complicated?

A: Yes, it is. Recognizing this, the Federal Reserve Board has prepared tables showing the annual percentage rate based on the finance charge and the number of weekly or monthly payments to be made. These tables are available from the Federal Reserve Board and Federal Reserve Banks at a nominal cost. (Reg. Z/226.5 (c))

Q: Must I use the Board's Annual Percentage Rate tables?

A: No. You may wish to purchase specially prepared tables for your type of business from one of several table or chart publishers. Trade associations and financial institutions can be helpful also. (Reg. Z/226.5 (c) (2))

Q: Must the creditor always show the annual percentage rate?

A: Generally yes, except that on credit other than open end credit, if the finance charge is $5 or less, and applies to credit of $75 or less, it need not be shown. The same exception applies to a finance charge of $7.50 or less on credit of more than $75. (Reg. Z/226.8 (b) (2) (i) & (ii))

REGULATION

Z

Some questions and answ about real estate

Q: Is real estate credit covered under Regulation Z?

A: Yes. All real estate credit *in any amount* is covered under this Regulation when it is to an individual and not for business purposes, unless the business purpose is agriculture.

Q: Does real estate credit cover more than mortgages?

A: Yes, very definitely. Any credit transaction that involves any type of security interest in real estate of a consumer is covered. (Reg. Z/226.2 (w), (x) (y) & (z))

Q: Are there any special provisions that apply to real estate credit?

A: Two basic points:

1. You do not have to show the total dollar amount of the finance charge on a credit sale or first mortgage loan to finance the purchase of the customer's dwelling. (Reg. Z/226.8 (c) (8) and (d) (3))
2. In many instances, your customer has the right to cancel a credit arrangement within three business days if his residence is used as collateral for credit. (Reg. Z/226.9)

Q: Must a creditor inform his customer of the right to cancel?

A: Yes. He must furnish the Notice prescribed by the Regulation. (Reg. Z/226.9 (b))

Q: What must the customer do to cancel a transaction under the Regulation?

A: A customer may cancel a transaction

1. By signing and dating the Notice to customer required by Federal law, which he receives from the creditor, *and* either
   (a) mailing the Notice to the creditor at the address shown on the Notice,

or (b) delivering the Notice to the creditor at the address shown on the Notice either personally or by messenger (or by other agents),

or 2. by sending a telegram to the creditor at the address shown on the Notice. A brief description of the transaction which the customer wishes to cancel should be included in the telegram.

or 3. by preparing a letter (or other writing) which includes a brief description of the transaction which he wishes to cancel, *and* either (a) mailing the letter (or other writing) to the creditor at the address shown on the Notice.

or (b) delivering the letter (or other writing) to the creditor at the address shown on the Notice either personally or by messenger (or by other agents).

Q: What if the customer telephones that he is going to cancel?

A: *A telephone call to the creditor may not be used to cancel a transaction; WRITTEN notice of cancellation is required.* If the customer takes one of the above steps to cancel within the three day period, he has effectively cancelled the transaction.

Q: What if I haven't received the notice of cancellation in three days?

A: You should allow time for a mailed letter or telegram sent within the three day period to be delivered, and determine that your customer has not cancelled the transaction.

Q: Does this right of cancellation apply to a first mortgage on a residence?

A: A first mortgage to finance the purchase of your customer's residence carries no right to cancel. *However,* a first mortgage for any other purpose and a second mortgage on the same residence may be cancelled. (Reg. Z/226.9 (g))

Q: What happens regarding cancellation in the case of a mechanic's lien or similar security interest acquired by a craftsman who works on credit?

A: Take a craftsman, for example, who charges his customers a finance charge or allows payment in more than four installments. His customer does have a right to cancel, but only within three business days. Unless there is an emergency the craftsman should wait three days before starting work. (Reg. Z/226.9 (c))

Q: Suppose a customer needs emergency repairs and cannot wait for three days?

A: A customer may waive his right to cancel a credit agreement if credit is needed to meet a bonafide personal financial emergency and if failure to start repairs would endanger him, his family, or his property. (Reg. Z/226.9 (e))

REGULATION

Z

Some questions and answers about the advertising of credit

Q: Does Regulation Z affect credit advertising?

A: Yes it does. It affects all advertising to aid or promote any extension of consumer credit regardless of who the advertiser may be. An association, for example, which advertises that its members extend consumer credit is subject to the advertising provisions of Regulation Z.

Q: What kinds of advertising are affected?

A: All types of advertising: television, radio, newspapers, magazines, leaflets, flyers, catalogs, public address announcements, direct mail literature, window displays, billboards, etc. (Reg. Z/226.2 (b))

Q: How does Regulation Z affect your advertising as a creditor?

A: Generally, you may not advertise that the down payment, installment plan or amount of credit can be arranged unless you usually arrange terms of this type. (Reg. Z/226.10 (a))

Q: How else is credit advertising affected?

A: If it is open end credit see Reg. Z/226.10 (c). For credit *other* than open end see Reg. Z/226.10 (d). If you advertise in catalogs, see Reg. Z/226.10 (b). But generally you are not permitted to advertise any specific credit term unless all other terms involved are stated clearly and can be easily seen.

Typical formats of disclosures under Regulation Z are shown on the following pages for demonstration only. They are not intended for the requirements of your business. For full information, please refer to the provisions of the Regulation.

EXHIBIT A

Example of a retailer's statement, prepared by a manual billing operation, for an account on which the finance charge is determined by a single periodic rate or a minimum charge of 50 cents applicable to balances under a specific amount. It also assumes that the finance charge is computed on the previous balance before deducting payments and/or credits. Separate slips shall accompany each statement, identifying all charges and credits and showing the dates and amounts thereof.

Any Store U.S.A.

MAIN STREET—ANY CITY, U.S.A.

(Customer's name here)

AMT. PAID $_____

TO INSURE PROPER CREDIT RETURN THIS PORTION WITH YOUR PAYMENT

PREVIOUS BALANCE	FINANCE CHARGE 50 CENT MINIMUM	PAYMENTS	CREDITS	PURCHASES	NEW BALANCE	MINIMUM PAYMENT

FINANCE CHARGE IS COMPUTED BY A "PERIODIC RATE" OF % PER MONTH (OR A MINIMUM CHARGE OF 50 CENTS FOR BALANCES UNDER $) WHICH IS AN ANNUAL PERCENTAGE RATE OF % APPLIED TO THE PREVIOUS BALANCE WITHOUT DEDUCTING CURRENT PAYMENTS AND/OR CREDITS APPEARING ON THIS STATEMENT.

NOTICE

PLEASE SEE ACCOMPANYING STATEMENT(S) FOR IMPORTANT INFORMATION.

PAYMENTS, CREDITS OR CHARGES, RECEIVED AFTER THE DATE SHOWN ABOVE THE ARROW, WHICH IS THE CLOSING DATE OF THIS BILLING CYCLE, WILL APPEAR ON YOUR NEXT STATEMENT. TO AVOID ADDITIONAL FINANCE CHARGES PAY THE "NEW BALANCE" BEFORE THIS DATE NEXT MONTH.

ANY STORE, U.S.A. MAIN STREET, ANY CITY, U.S.A.

This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (c) of §226.7 of Regulation Z for the type of credit extended in this example. This form is intended solely for purposes of demonstration and it is not the only format which will permit a creditor to comply with disclosure requirements of Regulation Z.

ILLUSTRATION OF FEDERAL DISCLOSURES ON A PERIODIC STATEMENT FOR A RETAIL OPEN END CREDIT ACCOUNT

(Section 226.7)

Applicable Disclosures Shown on Exhibit A (opposite page)	Regulation Z **Reference (226.7)**
1. "Previous Balance"	(b) (1) & (c) (1)
2. Purchases	(b) (2) & (c) (1)
3. "Payments"	(b) (3) & (c) (1)
4. "Credits"	(b) (3) & (c) (1)
5. "Finance Charge" (showing minimum charge)	(b) (4) & (c) (1)
6. "Periodic Rate" (showing balance to which applicable)	(b) (5) & (c) (2)
7. "Annual Percentage Rate"	(b) (6) & (c) (1)
8. Balance on which Finance Charge Was Computed (with explanation of how balance was determined)	(b) (8) & (c) (2)
9. Closing Date of the Billing Cycle	(b) (9) & (c) (1)
10. Balance at Closing Date, "New Balance"	(b) (9) & (c) (1)
11. Date or Period for Payment to Avoid Additional Finance Charges	(b) (9) & (c) (1)

Other Disclosures Applicable to Example but not Illustrated on Exhibit A

(These disclosures would be made on separate slips which would accompany statement but which are not illustrated here.)

1. Date of Each Purchase	(b) (2) & (c) (1)
2. Brief Identification of Each Purchase	(b) (2) & Footnote 7
3. Brief Identification of Credits Other Than Payments	(b) (3) & Footnote 8

Other Disclosures Not Applicable to Example Illustrated on Exhibit A

Regulation Z prescribes other disclosures to be made on open end credit account periodic statements which are not applicable to the illustrated example, such as, where there is more than one periodic rate (b)(5), more than one annual percentage rate (b)(6), charges for insurance 226.4 (a)(5) and (6), etc.

EXHIBIT B

Example of a retailer's descriptive statement, prepared by an automated billing operation, for an account on which the finance charge is determined by a single periodic rate or a minimum charge of 50 cents applicable to balances under a specified amount. It also assumes that the finance charge is computed on the previous balance before deducting payments and/or credits.

(FACE OF FORM)

Any Store U.S.A.

MAIN STREET—ANY CITY, U.S.A.

(Customer's name here)

YOUR ACCOUNT NUMBER IS_____

TO INSURE PROPER CREDIT RETURN THIS PORTION WITH PAYMENT

BILLING DATES NEXT MO.	BILLING DATES THIS MO.	To Your PREVIOUS BALANCE	We Added Your FINANCE CHARGE 50¢ MINIMUM	We Deducted Your PAYMENTS	We Deducted Your CREDITS	We Added Your PURCHASES

TRANSACTION NO.	DATE	STORE	DEPT. NO.	DEPARTMENT NAME	CHARGES	PAYMENTS & CREDITS

To Avoid Additional Finance Charges, Pay The "New Balance" Before Your Billing Date Next Month.

This Is Your NEW BALANCE	This Is Your MINIMUM PAYMENT	ANNUAL PERCENTAGE RATE
		%

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

(REVERSE SIDE OF FORM)

PAYMENTS, CREDITS OR CHARGES RECEIVED AFTER YOUR BILLING DATE "THIS MONTH" WILL APPEAR ON YOUR NEXT STATEMENT. YOUR FINANCE CHARGE IS COMPUTED BY A SINGLE PERIODIC RATE OF % (OR A MINIMUM CHARGE OF 50 CENTS FOR BALANCES UNDER $) WHICH IS AN ANNUAL PERCENTAGE RATE OF % APPLIED TO YOUR "PREVIOUS BALANCE" WITHOUT DEDUCTING CURRENT PAYMENTS AND/OR CREDITS APPEARING ON THE FACE OF THIS STATEMENT.

DEPT. NO.	DEPT. NAME	DEPT. NO.	DEPT. NAME	DEPT. NO.	DEPT. NAME
1	MEN'S ACCESSORIES (Shirts, Ties, Socks, etc.)	(In this form of billing, this side of the statement contains a listing of all departments and a brief description of the merchandise sold in each.)			
2	MEN'S CLOTHING (Suits, Sportcoats, Outerwear, etc.)				

ANY STORE, U.S.A., MAIN ST., ANY CITY, U.S.A.

This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (c) of §226.7 of Regulation Z for the type of credit extended in this example. This form is intended solely for purposes of demonstration and it is not the only format which will permit a creditor to comply with disclosure requirements of Regulation Z.

ANOTHER ILLUSTRATION OF FEDERAL DISCLOSURES ON A PERIODIC STATEMENT FOR A RETAIL OPEN END CREDIT ACCOUNT

(Section 226.7)

Applicable Disclosures Shown on Exhibit B (opposite page)	**Regulation Z Reference (226.7)**
1. "Previous Balance"	(b) (1) & (c) (1)
2. Purchases	(b) (2) & (c) (1)
3. "Payments"	(b) (3) & (c) (1)
4. "Credits"	(b) (3) & (c) (1)
5. "Finance Charge" (showing minimum charge)	(b) (4) & (c) (1)
6. "Annual Percentage Rate"	(b) (6) & (c) (1)
7. Balance on Which Finance Charge was Computed	(b) (8) & (c) (2)
8. Closing Date of the Billing Cycle	(b) (9) & (c) (1)
9. Balance at Closing Date, "New Balance"	(b) (9) & (c) (1)
10. Date or Period for Payment to Avoid Additional Finance Charge	(b) (9) & (c) (1)
11. Date of Each Purchase	(b) (2) & (c) (1)
12. Brief Identification of Each Purchase by Symbol Relating to an Identification List Printed on the Reverse Side	(b) (2) & Footnote 7
13. Brief Identification of Credits Other Than Payments by Symbol Relating to an Identification List Printed on the Reverse Side	(b) (3) & Footnote 8

Other Disclosures Applicable to Example Which Appear on Reverse Side of Exhibit B

1. "Periodic Rate" (showing balance to which applicable)	(b) (5) & (c) (2)
2. "Annual Percentage Rate"	(b) (6) & (c) (2)
3. Reference to the Finance Charge (showing minimum charge)	(b) (4) & (c) (2)
4. Reference to the Balance on Which Finance Charge was Computed (with explanation of how balance was determined)	(b) (8) & (c) (2)
5. Identification List to Identify Transactions	(b) (2) and (3)

Other Disclosures Not Applicable to Example Illustrated on Exhibit B

Regulation Z prescribes other disclosures to be made on open end credit account periodic statements which are not applicable to the illustrated example, such as, where there is more than one periodic rate (b) (5), more than one annual percentage rate (b) (6), charges for insurance 226.4 (a) (5) and (6), etc.

EXHIBIT C

Seller's Name: _____ Contract #_____

_____

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT

The undersigned (herein called Purchaser, whether one or more) purchases from _____(seller) and grants to _____ a security interest in, subject to the terms and conditions hereof, the following described property.

QUANTITY	DESCRIPTION	AMOUNT	
Description of Trade-In:			
	Sales Tax		
	Total		

Insurance Agreement

The purchase of insurance coverage is voluntary and not required for credit. (Type of Ins.) insurance coverage is available at a cost of $_____ for the term of credit.

I desire insurance coverage

Signed_____ Date_____

I do not desire insurance coverage

Signed_____ Date_____

PURCHASER'S NAME_____

PURCHASER'S ADDRESS_____

CITY_____STATE_____ZIP_____

1. CASH PRICE $_____
2. LESS: CASH DOWN PAYMENT $_____
3. TRADE-IN _____
4. TOTAL DOWN PAYMENT _____ $_____
5. UNPAID BALANCE OF CASH PRICE $_____
6. OTHER CHARGES:
   _____ $_____
   _____ _____
7. AMOUNT FINANCED $_____
8. FINANCE CHARGE $_____
9. TOTAL OF PAYMENTS $_____
10. DEFERRED PAYMENT PRICE (1+6+8) $_____
11. ANNUAL PERCENTAGE RATE _____%

Purchaser hereby agrees to pay to_____ at their offices shown above the "TOTAL OF PAYMENTS" shown above in _____ monthly installments of $_____(final payment to be $_____) the first installment being payable _____ 19_____, and all subsequent installments on the same day of each consecutive month until paid in full. The finance charge applies from (Date)

Signed_____

Notice to Buyer: You are entitled to a copy of the contract you sign. You have the right to pay in advance the unpaid balance of this contract and obtain a partial refund of the finance charge based on the "Actuarial Method." [Any other method of computation may be so identified, for example, "Rule of 78's," "Sum of the Digits," etc.]

This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (c) of §226.8 of Regulation Z for the type of credit extended in this example. This form is intended solely for purposes of demonstration and it is not the only format which will permit a creditor to comply with disclosure requirements of Regulation Z.

ILLUSTRATIONS OF FEDERAL DISCLOSURES ON A RETAIL INSTALLMENT CONTRACT

(Section 226.8)

Applicable Disclosures Shown on Exhibit C (opposite page)	**Regulation Z Reference (226.8)**
1. "Cash Price"	(c)(1)
2. "Cash Downpayment"	(c)(2)
3. "Trade-In"	(c)(2)
4. "Total Downpayment"	(c)(2)
5. "Unpaid Balance of Cash Price"	(c)(3)
6. Other Charges Individually Itemized (not finance charges)	(c)(4)
7. "Amount Financed"	(c)(7)
8. "Finance Charge"	(c)(8)(i)
9. "Deferred Payment Price"	(c)(8)(ii)
10. Date Finance Charge Begins to Accrue	(b)(1)
11. "Annual Percentage Rate"	(b)(2)
12. Number, Amount, and Due Dates of Payments	(b)(3)
13. "Total of Payments"	(b)(3)
14. Identification of Security Interest	(b)(5)
15. Identification of Property to Which Security Interest Relates	(b)(5)
16. Method of Computing Any Unearned Portion of the Finance Charge	(b)(7)
17. Identification of Creditor	(a)
18. Charges for Credit Life, Accident, Health or Loss of Income Insurance	226.4(a)(5)

Other Disclosures Not Applicable to Example Illustrated on Exhibit C

Regulation Z prescribes other disclosures to be made in connection with credit sales depending on the terms of the transaction and type of security interest taken by the creditor. For example:

	§226.8
"Prepaid Finance Charge"	(c)(6)
"Required Deposit Balance"	(c)(6)
"Balloon Payment"	(b)(3)
Default, Delinquency or Similar Charges	(b)(4)
After Acquired Property	(b)(5)
Security for Future Indebtedness	(b)(5)
Penalty Charge	(b)(6)
Unearned Finance Charge	(b)(7)
Property Insurance	226.4(a)(6)
Real Property Security	226.9

EXHIBIT D

Example of disclosures on a promissory note for non-sale credit for which a finance charge is added to the amount financed and the obligation is repayable in installments.

PROMISSORY NOTE

_____ _____
(City) (State)

_____19____

For value received, undersigned maker(s), jointly and severally, promise to pay to the order of _____ at the above place _____ dollars ($_____) in _____ consecutive monthly payments of $_____, each beginning one month from the date hereof and thereafter on the same date of each subsequent month until paid in full. Any unpaid balance may be paid, at any time, without penalty and any unearned finance charge will be refunded based on the "Rule of 78's". In the event that maker(s) default(s) on any payment, a charge of _____ may be assessed.

1. Proceeds	$_____
2. _____ (Other charges, itemized)	_____
3. Amount financed (1+2)	$_____
4. FINANCE CHARGE	_____
5. Total of payments	$_____
ANNUAL PERCENTAGE RATE	_____ %

Signed _____

_____

_____

This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (d) of §226.8 of Regulation Z for the type of credit extended in this example. This form is intended solely for purposes of demonstration and it is not the only format which will permit a creditor to comply with disclosure requirements of Regulation Z.

ILLUSTRATION OF FEDERAL DISCLOSURES ON A PROMISSORY NOTE FOR A LOAN

(Section 226.8)

Applicable Disclosures Shown on Exhibit D (opposite page)	Regulation Z **Reference (226.8)**
1. "Amount Financed"	(d) (1)
2. Other Charges Individually Itemized (not finance charges)	(d) (1)
3. "Finance Charge"	(d) (3)
4. "Annual Percentage Rate"	(b) (2)
5. Number, Amount, Due Dates of Payments	(b) (3)
6. "Total of Payments"	(b) (3)
7. Charges for Default or Late Payment	(b) (4)
8. Method of Computing Any Unearned Finance Charge	(b) (7)
9. Identification of Creditor	(a)

Other Disclosures Not Applicable to Example Shown in Exhibit D

See comment under similar heading on Page 23.

EXHIBIT E

DISCLOSURE STATEMENT OF LOAN

BORROWERS (NAMES AND ADDRESSES): _____

_____

_____

LENDER: _____ LOAN NO._____ Date_____

_____
(STREET ADDRESS)

_____
(CITY) (STATE) (ZIP)

TOTAL OF PAYMENTS	FINANCE CHARGE	AMOUNT FINANCED	ANNUAL PERCENTAGE RATE:	CREDIT LIFE INSURANCE CHARGE	DISABILITY INSURANCE CHARGE	PROPERTY INSURANCE CHARGE
$	$	$	%	$	$	$

PAYABLE IN: CONSECUTIVE MONTHLY INSTALLMENTS	DUE DATE OF PAYMENTS			AMOUNT OF PAYMENTS			
	FIRST:	OTHERS: SAME DAY OF EACH MONTH	FINAL:	FIRST:	OTHERS:	FINAL:	RECORDING FEE
				$	$	$	$

INSURANCE

PROPERTY INSURANCE, if written in connection with this loan, may be obtained by borrower through any person of his choice. If borrower desires property insurance to be obtained through the creditor, the cost will be $_____ for the term of the credit.

CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan. No charge is made for credit insurance and no credit insurance is provided unless the borrower signs the appropriate statement below:

(a) The cost for Credit Life Insurance alone will be $_____ for the term of the credit.

(b) The cost for Credit Life and Disability Insurance will be $_____ for the term of the credit.

I desire Credit Life and Disability Insurance.	I desire Credit Life Insurance only.	I DO NOT want Credit Life or Disability Insurance.
(Date) _____ (Signature) _____	(Date) _____ (Signature) _____	(Date) _____ (Signature) _____

REBATE FOR PREPAYMENT IN FULL. If the loan contract is prepaid in full by cash, a new loan, refinancing or otherwise before the final installment date, the borrower shall receive a rebate of precomputed interest computed under the Rule of 78's.

DEFAULT CHARGE. [The creditor should set forth the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.]

SECURITY

DESCRIPTION

A. ☐ This Loan is Secured By a Security Agreement of Even Date covering.....

The Security Agreement will secure future or other indebtedness and will cover after-acquired property.

☐ Motor Vehicle(s): Make- ..... Serial No: .....
☐ Household Goods & Appliances of the following description:.....
.....
.....
.....
☐ Other: (Describe) .....

B. ☐ This Loan is Unsecured.

I ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Borrower: .....

Witness: .....

This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (d) of § 226.8 of Regulation Z for the type of credit extended in this example. This form is intended solely for purposes of demonstration and it is not the only format which will permit a creditor to comply with disclosure requirements of Regulation Z.

ILLUSTRATION OF FEDERAL DISCLOSURES ON A SEPARATE STATEMENT FOR A LOAN REPAYABLE IN INSTALLMENTS

(Section 226.8)

Applicable Disclosures Shown on Exhibit E (opposite page)	Regulation Z **Reference (226.8)**
1. Identification of Transaction	(a)
2. "Amount Financed" including itemized charges other than finance charges. (Note §226.4(b))	(d) (1)
3. "Finance Charge"	(d) (3)
4. "Annual Percentage Rate"	(b) (2)
5. Number, Amount, and Due Date of Payments	(b) (3)
6. "Total of Payments"	(b) (3)
7. Default, Delinquency, or Similar Charge	(b) (4)
8. Identification of Security Interest	(b) (5)
9. Identification of Property to Which Security Interest Relates	(b) (5)
10. Method of Computing Any Unearned Portion of the Finance Charge	(b) (7)
11. After-acquired Property Subject to Security Interest	(b) (5)
12. Security for Future Indebtedness	(b) (5)
13. Identification of Creditor	(a)
14. Credit Life, Accident, and Health Insurance	§226.4 (a) (5)
15. Property and Liability Insurance	§226.4 (a) (6)

Other Disclosures Not Applicable to Example Shown in Exhibit E

Regulation Z prescribes other disclosures to be made in connection with loan credit which are not applicable to the illustrated example, such as, prepaid finance charge (d) (2) required deposit balance (d) (2) and balloon payment (b)(3), etc.

EXHIBIT F

NOTICE OF RIGHT OF RESCISSION

The following form is the form of notice of the right to rescind a transaction required to be given to customers under certain circumstances set forth in Section 226.9 of Regulation Z. This exhibit is set in capitals and lower case letters of 12 point bold faced type, the minimum size permissible under Regulation Z.

_____
(Identification of Transaction)

Notice To Customer Required By Federal Law:

You have entered into a transaction on _____ (Date) which may result in a lien, mortgage, or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying

_____
(Name of Creditor)

at _____
(Address of Creditor's Place of Business)

by mail or telegram sent not later than midnight of _____ (Date). You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

_____ _____
(Date) (Customer's signature)

EXHIBIT F

The following paragraph may appear on the face or the reverse side of the notice shown on the opposite page. If it appears on the reverse side of the notice, the face of the notice shall state, "See reverse side for important information about your right of rescission."

EFFECT OF RESCISSION. When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.

EXHIBIT G

SAMPLE PAGE FROM TABLE FOR COMPUTING ANNUAL PERCENTAGE RATE FOR LEVEL MONTHLY PAYMENT PLANS

EXAMPLE

Finance charge = $35.00; Total amount financed = $200; Number of monthly payments = 24.

SOLUTION

Step 1—Divide the finance charge by the total amount financed and multiply by $100. This gives the finance charge per $100 of amount financed. That is, $35.00 ÷ $200 = .1750 x $100 = $17.50.

Step 2—Follow down the left hand column of the table to the line for 24 months. Follow across this line until you find the nearest number to $17.50. In this example $17.51 is closest to $17.50. Reading up the column of figures shows an annual percentage rate of 16%.

NUMBER OF PAYMENTS	ANNUAL PERCENTAGE RATE														
	14.00%	14.25%	14.50%	14.75%	15.00%	15.25%	15.50%	15.75%	16.00%	16.25%	16.50%	16.75%	17.00%	17.25%	17.50%	17.75%
	(FINANCE CHARGE PER $100 OF AMOUNT FINANCED)															
1	1.17	1.19	1.21	1.23	1.25	1.27	1.29	1.31	1.33	1.35	1.37	1.40	1.42	1.44	1.46	1.48
2	1.75	1.78	1.82	1.85	1.88	1.91	1.94	1.97	2.00	2.04	2.07	2.10	2.13	2.16	2.19	2.22
3	2.34	2.38	2.43	2.47	2.51	2.55	2.59	2.64	2.68	2.72	2.76	2.80	2.85	2.89	2.93	2.97
4	2.93	2.99	3.04	3.09	3.14	3.20	3.25	3.30	3.36	3.41	3.46	3.51	3.57	3.62	3.67	3.73
5	3.53	3.59	3.65	3.72	3.78	3.84	3.91	3.97	4.04	4.10	4.16	4.23	4.29	4.35	4.42	4.48
6	4.12	4.20	4.27	4.35	4.42	4.49	4.57	4.64	4.72	4.79	4.87	4.94	5.02	5.09	5.17	5.24
7	4.72	4.81	4.89	4.98	5.06	5.15	5.23	5.32	5.40	5.49	5.58	5.66	5.75	5.83	5.92	6.00
8	5.32	5.42	5.51	5.61	5.71	5.80	5.90	6.00	6.09	6.19	6.29	6.38	6.48	6.58	6.67	6.77
9	5.92	6.03	6.14	6.25	6.35	6.46	6.57	6.68	6.78	6.89	7.00	7.11	7.22	7.32	7.43	7.54
10	6.53	6.65	6.77	6.88	7.00	7.12	7.24	7.36	7.48	7.60	7.72	7.84	7.96	8.08	8.19	8.31
11	7.14	7.27	7.40	7.53	7.66	7.79	7.92	8.05	8.18	8.31	8.44	8.57	8.70	8.83	8.96	9.09
12	7.74	7.89	8.03	8.17	8.31	8.45	8.59	8.74	8.88	9.02	9.16	9.30	9.45	9.59	9.73	9.87
13	8.36	8.51	8.66	8.81	8.97	9.12	9.27	9.43	9.58	9.73	9.89	10.04	10.20	10.35	10.50	10.66
14	8.97	9.13	9.30	9.46	9.63	9.79	9.96	10.12	10.29	10.45	10.62	10.78	10.95	11.11	11.28	11.45
15	9.59	9.76	9.94	10.11	10.29	10.47	10.64	10.82	11.00	11.17	11.35	11.53	11.71	11.88	12.06	12.24
16	10.20	10.39	10.58	10.77	10.95	11.14	11.33	11.52	11.71	11.90	12.09	12.28	12.46	12.65	12.84	13.03
17	10.82	11.02	11.22	11.42	11.62	11.82	12.02	12.22	12.42	12.62	12.83	13.03	13.23	13.43	13.63	13.83
18	11.45	11.66	11.87	12.08	12.29	12.50	12.72	12.93	13.14	13.35	13.57	13.78	13.99	14.21	14.42	14.64
19	12.07	12.30	12.52	12.74	12.97	13.19	13.41	13.64	13.86	14.09	14.31	14.54	14.76	14.99	15.22	15.44
20	12.70	12.93	13.17	13.41	13.64	13.88	14.11	14.35	14.59	14.82	15.06	15.30	15.54	15.77	16.01	16.25
21	13.33	13.58	13.82	14.07	14.32	14.57	14.82	15.06	15.31	15.56	15.81	16.06	16.31	16.56	16.81	17.07
22	13.96	14.22	14.48	14.74	15.00	15.26	15.52	15.78	16.04	16.30	16.57	16.83	17.09	17.36	17.62	17.88
23	14.59	14.87	15.14	15.41	15.68	15.96	16.23	16.50	16.78	17.05	17.32	17.60	17.88	18.15	18.43	18.70
24	15.23	15.51	15.80	16.08	16.37	16.65	16.94	17.22	17.51	17.80	18.09	18.37	18.66	18.95	19.24	19.53
25	15.87	16.17	16.46	16.76	17.06	17.35	17.65	17.95	18.25	18.55	18.85	19.15	19.45	19.75	20.05	20.36
26	16.51	16.82	17.13	17.44	17.75	18.06	18.37	18.68	18.99	19.30	19.62	19.93	20.24	20.56	20.87	21.19
27	17.15	17.47	17.80	18.12	18.44	18.76	19.09	19.41	19.74	20.06	20.39	20.71	21.04	21.37	21.69	22.02
28	17.80	18.13	18.47	18.80	19.14	19.47	19.81	20.15	20.48	20.82	21.16	21.50	21.84	22.18	22.52	22.86
29	18.45	18.79	19.14	19.49	19.83	20.18	20.53	20.88	21.23	21.58	21.94	22.29	22.64	22.99	23.35	23.70
30	19.10	19.45	19.81	20.17	20.54	20.90	21.26	21.62	21.99	22.35	22.72	23.08	23.45	23.81	24.18	24.55
31	19.75	20.12	20.49	20.87	21.24	21.61	21.99	22.37	22.74	23.12	23.50	23.88	24.26	24.64	25.02	25.40
32	20.40	20.79	21.17	21.56	21.95	22.33	22.72	23.11	23.50	23.89	24.28	24.68	25.07	25.46	25.86	26.25
33	21.06	21.46	21.85	22.25	22.65	23.06	23.46	23.86	24.26	24.67	25.07	25.48	25.88	26.29	26.70	27.11
34	21.72	22.13	22.54	22.95	23.37	23.78	24.19	24.61	25.03	25.44	25.86	26.28	26.70	27.12	27.54	27.97
35	22.38	22.80	23.23	23.65	24.08	24.51	24.94	25.36	25.79	26.23	26.66	27.09	27.52	27.96	28.39	28.83
36	23.04	23.48	23.92	24.35	24.80	25.24	25.68	26.12	26.57	27.01	27.46	27.90	28.39	28.80	29.25	29.70
37	23.70	24.16	24.61	25.06	25.51	25.97	26.42	26.88	27.34	27.80	28.26	28.72	29.18	29.64	30.10	30.57
38	24.37	24.84	25.30	25.77	26.24	26.70	27.17	27.64	28.11	28.59	29.06	29.53	30.01	30.49	30.96	31.44
39	25.04	25.52	26.00	26.48	26.96	27.44	27 2	28.41	28.89	29.38	29.87	30.36	30.85	31.34	31.83	32.32
40	25.71	26.20	26.70	27.19	27.69	28.18	28 8	29.18	29.68	30.18	30.68	31.18	31.68	32.19	32.69	33.20
41	26.39	26.89	27.40	27.9	28.41	28.92	29.44	29.95	30.46	30.97	31.49	32.01	32.52	33.04	33.56	34.08
42	27.06	27.58	28.10	28.62	29.15	29.67	30.19	30.72	31.25	31.78	32.31	32.84	33.37	33.90	34.44	34.97
43	27.74	28.27	28.81	29.34	29.88	30.42	30.96	31.50	32.04	32.58	33.13	33.67	34.22	34.76	35.31	35.86
44	28.42	28.97	29.52	30.07	30.62	31.17	31.72	32.28	32.83	33.39	33.95	34.51	35.07	35.63	36.19	36.76
45	29.11	29.67	30.23	30.79	31.36	31.92	32.49	33.06	33.63	34.20	34.77	35.35	35.92	36.50	37.08	37.66
46	29.79	30.36	30.94	31.52	32.10	32.68	33.26	33.84	34.43	35.01	35.60	36.19	36.78	37.37	37.96	38.56
47	30.48	31.07	31.66	32.25	32.84	33.44	34.03	34.61	35.23	35.83	36.43	37.04	37.64	38.25	38.86	39.46
48	31.17	31.77	32.37	32.98	33.59	34.20	34.81	35.42	36.03	36.65	37.27	37.88	38.50	39.13	39.75	40.37
49	31.86	32.48	33.09	33.71	34.34	34.96	35.59	36.21	36.84	37.47	38.10	38.74	39.37	40.01	40.65	41.29
50	32.55	33.18	33.82	34.45	35.09	35.73	36.37	37.01	37.65	38.30	38.94	39.59	40.24	40.89	41.55	42.20
51	33.25	33.89	34.54	35.19	35.84	36.49	37.15	37.81	38.46	39.12	39.79	40.45	41.11	41.78	42.45	43.12
52	33.95	34.61	35.27	35.93	36.60	37.27	37.94	38.61	39.28	39.96	40.63	41.31	41.99	42.67	43.36	44.04
53	34.65	35.32	36.00	36.68	37.36	38.06	38.72	39.41	40.10	40.79	41.48	42.17	42.87	43.57	44.27	44.97
54	35.35	36.04	36.73	37.42	38.12	38.82	39.52	40.22	40.92	41.63	42.33	43.04	43.75	44.47	45.18	45.90
55	36.05	36.76	37.46	38.17	38.88	39.60	40.31	41.01	41.74	42.47	43.19	43.91	44.64	45.37	46.10	46.83
56	36.76	37.48	38.20	38.92	39.65	40.38	41.11	41.84	42.57	43.31	44.05	44.79	45.53	46.27	47.02	47.77
57	37.47	38.20	38.94	39.68	40.42	41.16	41.91	42.65	43.40	44.15	44.91	45.66	46.42	47.18	47.94	48.71
58	38.18	38.91	39.68	40.43	41.19	41.95	42.71	43.47	44.23	45.00	45.77	46.54	47.32	48.09	48.87	49.65
59	38.89	39.64	40.42	41.19	41.96	42.74	43.51	44.29	45.07	45.85	46.64	47.42	48.21	49.01	49.80	50.60
60	39.61	40.39	41.17	41.95	42.74	43.53	44.32	45.11	45.91	46.71	47.51	48.31	49.12	49.92	50.73	51.55

The table shown on the opposite page (Exhibit G) is one page out of the tables compiled by the Federal Reserve Board to assist creditors in figuring out the annual percentage rate of the cost of credit, or the amount of the finance charge for a given rate. These tables are described on page 4 of this pamphlet.

Board of Governors

of the

Federal Reserve System

TRUTH IN LENDING

REGULATION Z

INTERPRETATIONS

As of September 11, 1969, thirty-nine interpretations of Regulation Z have been issued by the Board. Although the interpretations are listed in the table of contents under the main section of the Regulation to which they relate, in some cases an interpretation may be applicable to more than one section. In these cases, cross references are shown in the table of contents.

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TRUTH IN LENDING INTERPRETATIONS OF REGULATION Z

SECTION 226.2

SECTION 226.201—LAY-AWAY PLANS AS EXTENSIONS OF CREDIT

Many vendors offer Lay-Away Plans under which they retain the merchandise for a customer until the cash price is paid in full and the customer has no contractual obligation to make payments and may, at his option, revoke a purchase made under the plan and request and receive prompt refund of any amounts paid toward the cash price of the merchandise.

A purchase under such a Lay-Away Plan shall not be considered an extension of credit subject to the provisions of Regulation Z.

5/5/69

SECTION 226.202—SECURITY INTEREST—CONFESSION OF JUDGMENT—COGNOVIT NOTES

Under § 226.2(z) "security interest" is defined to include confessed liens whether or not recorded and, in general, to include any interest in property which secures payment or performance of an obligation. In certain transactions involving a security interest, under § 226.9 the customer has a right of rescission.

In some of the States, confession of judgment clauses or cognovit provisions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment.

Since confession of judgment clauses and cognovit provisions in such States have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding *before* judgment may be entered or recorded against him, such clauses and provisions in those States are security interests under § 226.2(z) and for the purposes of § 226.7 (a)(7), § 226.8(b)(5), and § 226.9. This is the case even if the judgment cannot be entered until after a default by the obligor.

Confession of judgment clauses and cognovit provisions which, by their terms, exclude a lien on all real property which is used or is expected to be used as the principal residence of the customer, would not bring a transaction under the provisions of § 226.9.

5/26/69

SECTION 226.203—OPEN END CREDIT DISTINGUISHED FROM OTHER CREDIT

The fundamental qualification for "open end credit" under § 226.2(r) is that consumer credit be extended on an account pursuant to a plan under which (1) the creditor may permit the customer to make purchases or obtain loans from time to time directly or indirectly from the creditor, as the plan may provide; (2) the customer has the privilege of paying the balance in full or in installments; and (3) a finance charge may be computed by the creditor from time to time on an outstanding unpaid balance. Under an open end credit account plan, it is contemplated that there will or may be repetitive transactions on a revolving basis.

In certain cases, a form of contract or note relating to a single transaction provides that the finance charge be computed from time to time by application of a rate to the unpaid balance and stipulates required minimum periodic payments. However, the obligor has the privilege of making larger and more frequent payments than stipulated or paying the obligation in full at any time without penalty. The question arises as to whether the creditor should make disclosures in such circumstances under § 226.7 for open end credit accounts or under § 226.8 for credit other than open end.

Although the terms of such a contract or note meet the second and third requirements for such a plan, they do not meet the first of such requirements nor the basic qualification that consumer credit be extended on an account pursuant to a plan. Therefore, disclosures in this case are required to be made under § 226.8.

5/26/69

SECTION 226.3

SECTION 226.301—AGRICULTURAL PURPOSES—WHEN EXEMPT FROM THE REGULATION

Under § 226.3(a), the Regulation does not apply to "Extensions of credit to organizations, including governments, or for business or commercial purposes, other than agricultural purposes." The definition of "organization" in § 226.2(s)

includes a corporation trust, estate, partnership, cooperative, or association as well as governmental entities. The question arises as to whether the Regulation applies to extensions of credit to organizations, including governments, for agricultural purposes.

Extensions of credit to organizations, including governments, for agricultural purposes are exempt from the Regulation.

5/26/69

SECTION 226.4

SECTION 226.401—SERVICE CHARGES ON ACCOUNTS NOT PAID WITHIN A GIVEN PERIOD OF TIME

Some vendors bill their customers for property or services purchased under the terms of a credit plan which requires that the full amount of each billing be paid within a stipulated period after billing, with no privilege of paying in instalments. If a bill is not paid within that stipulated period of time, the vendor imposes a service charge periodically on the unpaid balance until the account is paid in full. The question arises as to whether Regulation Z applies to such transactions.

When in the ordinary course of business a vendor's billings are not paid in full within that stipulated period of time, and under such circumstances the vendor does not, in fact, regard such accounts in default, but continues or will continue to extend credit and impose charges periodically for delaying payment of such accounts from time to time until paid, the charge so imposed comes within the definitions of a "finance charge" [§ 226.2(q)] applicable in each case to the amount of the unpaid balance of the account. Under such circumstances the credit so extended comes within the "open end credit" in § 226.2(r), the vendor is a creditor as defined in § 226.2(m), and the disclosures required for open end credit accounts under § 226.7 shall be made.

4/22/69

SECTION 226.402—TERM OF INSURANCE COVERAGE

Under § 226.4(a)(5) and (6) certain disclosures of insurance premium costs, if applicable, are required. The question arises as to whether such amounts of cost disclosed must include the cost of insurance for the full term of the transaction.

Under § 226.4(h) the cost of insurance for the full period of insurance coverage which the creditor will require shall be disclosed if the cost of the insurance premium is required to be included in the finance charge. However, if the cost of insurance is not required to be included in the finance charge, the cost to be disclosed need only be the cost of premiums for the term of the initial policy or policies written in connection with the transaction, accompanied by a statement of the type of insurance and the term thereof.

5/5/69

SECTION 226.403—DISCLOSURE OF COST OF PROPERTY INSURANCE WHEN NOT OBTAINABLE FROM OR THROUGH THE CREDITOR

In many cases a creditor requires insurance against loss or damage to property or liability arising out of its use but such insurance is not obtainable from or through him. The question arises under § 226.4(a)(6) as to whether such a creditor must make any disclosures to avoid having to include the insurance premium in the finance charge.

Irrespective of whether such insurance may be obtained from or through the creditor, if the creditor requires property insurance and wishes to exclude the cost from the finance charge, he is required to state clearly and conspicuously to the customer that he may choose the person through which the insurance is to be obtained. However, if the insurance is not obtainable from or through the creditor, he is not required to disclose the cost of that insurance, unless, of course, the premiums are included in the "amount financed, in which case it would have to be disclosed under § 226.8 (c)(4) or (d)(1), as the case may be.

5/26/69

SECTION 226.404—PREMIUMS FOR VENDOR'S SINGLE INTEREST INSURANCE REQUIRED BY CREDITOR

Under § 226.4(a)(6), charges or premiums for insurance, written in connection with credit transaction, against loss of or damage to property may be excluded from the finance charge if the creditor makes the disclosures required under that subparagraph. Under § 226.4(a)(7), a premium or other charge for any other guarantee or insurance protecting the creditor against the customer's default or other credit loss is included in the finance charge. The question arises as to whether Vendor's Single Interest (V.S.I.) coverage, when required by the creditor to be written in connection with a transaction, is insurance of the type described in § 226.4(a)(6) or in § 226.4(a)(7).

V.S.I. coverage is written only in connection with a credit transaction and indemnifies the creditor against, among other perils, conversion, em-

bezzlement, and secretion of the collateral by the customer; and amounts payable on account of loss are payable only to the creditor; and the amount of any indemnity payable under the policy is directly related to the amount of the credit loss, in that such indemnity can never exceed the amount of the unpaid principal balance of the debt. The insurer has no liability under a V.S.I. policy unless, at the time the policy was written, no payment was more than a specified number of days past due, and a claim under the policy is not valid unless the customer has defaulted in payment. Additionally, many V.S.I. policies indemnify the creditor against expense incurred in transporting the collateral to the creditor from the place of repossession.

V.S.I. coverage is, therefore, insurance which protects the creditor against the customer's default or other credit loss, and when required by the creditor to be written in connection with any transactions, the premium therefor is included in the finance charge under § 226.4(a)(7).

8/1/69

SECTION 226.405—PROPERTY INSURANCE WRITTEN IN CONNECTION WITH A TRANSACTION—OBTAINED FROM OR THROUGH THE CREDITOR

Footnote 4 to § 226.4(a)(6) specifies that a policy of insurance against loss or damage to property or liability arising out of its use is not considered to be "written in connection with" a transaction when it ". . . was not purchased by the customer for the purpose of being used in connection with that extension of credit." Therefore, whenever such a policy is purchased by the customer for the purpose of being used in connection with a specific extension of credit, it is insurance "written in connection with" that transaction.

If the customer elects to purchase such insurance otherwise than from or through the creditor, the creditor is not required to disclose the cost of the insurance or include the premium in the finance charge. However, if the cost of such insurance is to be financed through the creditor, the premiums must be included in the "amount financed" and disclosed under § 226.8(c)(4) or (d)(1), as the case may be.

9/11/69

SECTION 226.5

SECTION 226.501—USE OF RANGES OR BRACKETS TO DETERMINE PERIODIC RATE OF FINANCE CHARGE ON OPEN-END ACCOUNTS

Section 226.5( ) of Regulation Z, in effect, gives a creditor the option in certain circumstances of stating (1) two or more separate annual percentage rates (e.g., the rate on a $700 balance might be stated as 18% on balance to $500 and 12% on balance over $500), or (2) a single annual percentage rate determined by the "quotient method" resulting from applying the rates to a total balance (e.g., in the example above, an annual percentage rate of 16¼% on a $700 balance).

Section 226.5(a)(2), which relates to the use of ranges or brackets to compute periodic finance charges, does not prevent a creditor who uses such brackets from exercising the options referred to in section 226.5(a)(1).

4/2/69

SECTION 226.502—ANNUAL PERCENTAGE RATE ON SINGLE ADD-ON RATE TRANSACTIONS

The application of a single add-on rate to transactions of varying maturities, when converted to an annual percentage rate determined by the actuarial method, results in minor variations. Such annual percentage rate variations on maturities up to 60 months are so insignificant that separate computations are unwarranted.

The question arises as to whether a creditor may disclose a single annual percentage rate on all such transactions based upon the highest rate which will arise from the application of the same single add-on rate to each of such transactions.

When the same add-on rate is applied to all transactions within a range of maturities up to 60 months, and provided that all payments on each transaction are equal in amount and due at equal intervals of time within the limits provided by § 226.5(d), a single annual percentage rate may be disclosed, in which case it shall be the highest annual percentage rate that may be applicable to any such transactions.

5/26/69

SECTION 226.503—MINOR IRREGULARITIES—MAXIMUM IRREGULAR PERIOD LIMITS

Section 226.5(d) specifies certain minimums in determining what minor irregularities in first payment periods may be disregarded in determining the annual percentage rate. The question arises

as to what maximum limits for such periods would still permit the irregular periods to be considered regular in computing the annual percentage rate.

If the period from the date on which the finance charge begins to accrue and the date the final payment is due is not less than three months in the case of weekly payments, six months in the case of biweekly or semimonthly payments, or one year in the case of monthly payments, the maximum interval of time from the date the finance charge begins to accrue to the date the first payment is due is as follows:

(1) in the case of weekly payments, 12 days;
(2) in the case of biweekly or semimonthly payments, 25 days;
(3) in the case of monthly payments, 50 days

If the period from the date on which the finance charge begins to accrue and the date the final payment is due is less than three months in the case of weekly payments, six months in the case of biweekly or semimonthly payments, or one year in the case of monthly payments, the maximum interval of time from the date the finance charge begins to accrue to the date of the first payment is due is as follows:

(1) in the case of weekly payments, 10 days;
(2) in the case of biweekly or semimonthly payments, 21 days;
(3) in the case of monthly payments, 42 days.

6/10/69

SECTION 226.504—TREATMENT OF "PICK-UP PAYMENT" IN AN INSTALMENT CONTRACT

In some instances involving an instalment contract arising from a credit sale, the purchaser may not pay the full amount of the required downpayment at the time he signs the contract or otherwise enters into the credit transaction. In such cases, the creditor may include in the instalment contract or accept a separate obligation for the unpaid portion of the downpayment, commonly called a "pick-up payment," the amount of which usually carries no finance charge and is to be paid on or before a specified date independent of the other scheduled payments.

The question arises whether the "pick-up payment" must be treated as part of the "amount financed" for purposes of disclosure and determination of the "annual percentage rate" or whether it may be treated as a deferred portion of the downpayment.

In determining the "amount financed" the creditor may exclude the amount of the "pick-up payment" provided that:

(1) The amount of the finance charge applicable to the transaction does not exceed the amount that would have been imposed had the required down payment been paid in full upon consummation of the transaction; and

(2) The due date of the "pick-up payment" is not later than the due date of the second payment otherwise scheduled.

In making the disclosures required under § 226.8 (b) (3), if such "pick-up payment" is more than twice the amount of an otherwise regularly scheduled equal payment, the creditor shall state the conditions, if any, under which such "pick-up payment" may be refinanced if not paid when due; and such "pick-up payment" may be identified using that term or the term "balloon payment."

9/11/69

226.505—APPLICATION OF THE MINOR IRREGULARITIES PROVISIONS IN DETERMINING THE AMOUNT OF THE FINANCE CHARGE

Some creditors calculate finance charges in a credit transaction on the basis of predetermined percentage rate or rates, e.g., 1% per month on the unpaid balances. Determination of the amount of the finance charge is fairly routine for these creditors if the contracts are written for regular payments at regular intervals. However, many times the first payment may be irregular either in amount or payment period, or both, especially in those instances where creditors require payments to fall due on fixed dates or those who are paid by means of payroll deductions. The minor irregularities provisions of § 226.5(d) of the Regulation and § 226.503 of the interpretations to Regulation Z, which pertain to the determination of the annual percentage rate, also apply to the determination of the finance charge. For convenient reference, the applicable provisions of § 226.5(d) and § 226.503 as they apply to the determination of the finance charge are set forth below.

In determining the finance charge, a creditor may, at his option, consider the payment irregularities set forth below in subparagraphs (1) and (2) as if they were regular in amount or time, as applicable, provided that the transaction to which they relate is otherwise payable in equal instalments scheduled at equal intervals.

(1) If the period from the date on which the finance charge begins to accrue and the date the final payment is due is not less than 3 months in the case of weekly payments, 6 months in the case of biweekly or semimonthly payments, or 1 year in the case of monthly payments either or both of the following:

(i) The amount of 1 payment other than any downpayment is not more than 50 per cent greater nor 50 per cent less than the amount of a regular payment; or

(ii) The interval between the date on which the finance charge begins to accrue and the date the first payment is due is not less than 5 nor more than 12 days for an obligation otherwise payable in weekly instalments, not less than 10 nor more than 25 days for an obligation otherwise payable in biweekly or semimonthly instalments, or not less than 20 nor more than 50 days for an obligation otherwise payable in monthly instalments.

(2) If the period from the date on which the finance charge begins to accrue and the date the final payment is due is less than 3 months in the case of weekly payments, 6 months in the case of biweekly or semimonthly payments, or 1 year in the case of monthly payments, either or both of the following:

(i) The amount of 1 payment other than any downpayment is not more than 25 per cent greater nor 25 per cent less than the amount of a regular payment; or

(ii) The interval between the date on which the finance charge begins to accrue and the date the first payment is due is not less than 6 nor more than 10 days for an obligation otherwise payable in weekly instalments, not less than 12 nor more than 21 days for an obligation otherwise payable in biweekly or semimonthly instalments, or not less than 25 nor more than 42 days for an obligation otherwise payable in monthly instalments.

For the purposes of § 226.8(b)(3) in disclosing the number, amount and due dates or periods of payments scheduled to repay the indebtedness and the "total of payments," the creditor may treat such irregular payments or payment periods, or both, as if they were regular. If the creditor so elects, he may indicate the exact amount or payment period involved in the minor irregularity.

9/11/69

SECTION 226.6

SECTION 226.601—OVERSTATEMENT OF ANNUAL PERCENTAGE RATE

Section 226.6(h) of Regulation Z provides that in certain circumstances the disclosure of an annual percentage rate which is greater than that required to be disclosed under the Regulation does not in itself constitute a violation of the Regulation. Under this section may a disclosure regarding an annual percentage rate (e.g. "the annual percentage rate does not exceed 18%") be preprinted on a contract or periodic statement and comply with disclosure requirements when the actual rate will at times be lower (e.g. 15%) for some transactions?

Section 226.5 specifies the methods which shall be employed in determining annual percentage rates. Section 226.6(h) is not intended to provide an alternative to these requirements, but is merely to provide appropriate relief to a creditor who overstates accidentally. Any disclosure of an annual percentage rate whether preprinted or otherwise which overstates the annual percentage rate determined in accordance with section 226.5 other than through inadvertence does not comply with requirements.

4/2/69

SECTION 226.602—TRANSITION PERIOD—USING EXISTING FORMS, SUITABLY ALTERED OR SUPPLEMENTED

Section 226.6(k) of Regulation Z provides that, in some circumstances, if a creditor has been unable to obtain needed new printed forms by July 1, 1969, he may use existing forms until new ones are obtained, but not later than December 31, 1969. In such instances, the existing forms must be suitably altered or supplemented to make necessary disclosures clearly and conspicuously. The requirement that existing forms be supplemented is met by attachments or enclosures.

Also in some instances, creditors encounter unavoidable delays in obtaining necessary equipment or computer programs needed to utilize new printed forms. Such delays can produce problems comparable to those involved in delays in obtaining printed forms. In such a situation, a creditor, under § 226.6(k), may continue to use existing forms until the means of utilizing the new forms are available, but in no event later than December 31, 1969, and subject, of course, to the conditions applicable under § 226.6(k): namely, that the creditor must have taken *bona fide* steps prior to July 1, 1969, to obtain the

necessary equipment or computer programs, and the existing forms must be "altered or supplemented as necessary to assure that all of the items of information the creditor is required to disclose are set forth clearly and conspicuously."

4/2/69

SECTION 226.603—DISCLOSURES IN TRANSACTION INVOLVING MULTIPLE CUSTOMERS

Section 226.6(e) states the general rule that, except in the case of a rescindable transaction under § 226.9, where there are multiple customers in a transaction, the creditor is only required to make disclosures to one of them. However, in determining which customer shall receive disclosures, the creditor may not select a customer who is secondarily liable, such as an endorser, comaker (when designated as surety), guarantor, or a similar party. This does not prohibit the creditor from also furnishing disclosures to such persons who are secondarily liable.

4/2/69

SECTION 226.604—INCONSISTENT STATE REQUIREMENTS

Section 226.6(5) of Regulation Z indicates types of State law requirements that are inconsistent with Regulation Z, and § 226.6(c) indicates the methods of dealing with such inconsistent requirements of State law.

Whether State laws are inconsistent with Regulation Z necessarily depends on the nature of the State laws. Section 226.6(b) (1) provides that State law is inconsistent to the extent that it "requires a creditor to make disclosures different from the requirements of this part with respect to form, content, terminology, or time of delivery." This refers to disclosures of the kinds of information covered by Regulation Z, and *not* to other or collateral information such as a statement telling the customer that he should read the contract carefully, or that there should be no blanks in the contract. Similarly, it does not refer to headings that State law may require on a contract such as "Retail Installment Contract." Similarly, a specification in a State law that certain size type must be used is not necessarily inconsistent with the requirements of Regulation Z.

4/22/69

SECTION 226.605—RATE CHARTS AND TABLES UNAVAILABLE

Subject to certain conditions, § 226.6(f) of Regulation Z permits a creditor to use an estimate or approximation of information when the information is "unknown or not available to the creditor, and the creditor has made a reasonable effort to ascertain it."

It appears that some creditors who require special charts or tables in order to operate with necessary efficiency in compliance with Regulation Z, and who have placed orders for such charts or tables with suppliers of them, may be unable to obtain such charts or tables by July 1, 1969, the effective date of Regulation Z.

In the circumstances indicated, when the necessary charts or tables have been ordered prior to July 1 1969, and are temporarily unavailable to a creditor who has thus made a reasonable effort to obtain them, § 226.6(f) permits the creditor to use an estimate or approximation of the annual percentage rate and other information during the interim until they become available, subject, of course, to the other requirements of that paragraph.

6/20/69

SECTION 226.7

SECTION 226.701—PERIODIC STATEMENTS—FINANCE CHARGE RESULTING FROM MORE THAN ONE PERIODIC RATE

Section 226.7(b) (4) of Regulation Z requires that a periodic statement for open end credit show the amount of any finance charge, and that the statement also itemize and identify that portion of the finance charge that is due to application of one or more periodic rates and that portion due to any other charge such as minimum, fixed, check service, transaction, activity, or similar charge.

This does not require the statement to state separately the portions of a finance charge due to application of two or more periodic rates. For example, if a creditor charges 1½% per month on the first $500 of a balance and 1% per month on amounts over $500, the monthly charge on a $600 balance would be $8.50, which must be shown. However, it would not be necessary to itemize the two components ($7.50 and $1.00) of the $8.50 charge. Under section 226.7(b) (5), the periodic rates that may apply to the account, and the applicable range of balances must, of course, be shown, but this could be preprinted.

4/2/69

SECTION 226.702—LOCATION OF STATEMENT OF HOW THE BALANCE WAS DETERMINED

Section 226.7(b)(8) requires the creditor of an open end credit account to disclose on the periodic statement, "the balance on which the finance charge was computed, and a statement of how that balance was determined." Under § 226.7(c) which relates to the location of disclosures there is no specific reference to the placement of the "statement of how that balance was determined" when separated from the balance to which it relates. The question arises as to where, under such circumstances, this required statement shall appear on the periodic statement.

If separated from the balance to which it relates, the required statement of how the balance was determined may be placed on the face of the periodic statement, the reverse side of the periodic statement, or on an enclosed supplement; however, where such statement and balance do not appear together, the statement shall make clear the balance to which it refers.

4/22/69

SECTION 226.703—FINANCE CHARGE BASED ON AVERAGE DAILY BALANCE IN OPEN END CREDIT ACCOUNTS

Section 226.7(b)(8) requires that periodic statements for open end accounts shall disclose, among other things, "The balance on which the finance charge was computed, and a statement of how that balance was determined." In some instances, creditors compute a finance charge on the average daily balance by application of a monthly periodic rate. In such case, this information is adequately disclosed if the statement gives the amount of the average daily balance on which the finance charge was computed, and also states how the balance is determined. In other instances, the finance charge is computed on the balance each day by application of a daily periodic rate and such charges are accumulated and debited to the account in a single amount for the billing cycle. The question arises whether the periodic statement must show for each day of the billing cycle a balance on which a finance charge was computed.

If a daily periodic rate is used, the balance to which it is applicable shall be stated as follows:

(1) A balance for each day in the billing cycle; or

(2) The sum of the daily balances during the billing cycle, or

(3) The average daily balance during the billing cycle in which case the creditor shall state on the face of the periodic statement, its reverse side, or on an enclosed supplement that the average daily balance is multiplied by the number of days in the billing cycle and the periodic rate applied to the product to determine the amount of the finance charge.

In each case the annual percentage rate shall be determined and disclosed by multiplying the daily periodic rate by 365.

5/5/69

SECTION 226.704—ANNUAL PERCENTAGE RATE COMPUTATION WHERE TRANSACTION CHARGES ARE IMPOSED ON OPEN END CREDIT ACCOUNTS

Section 226.7(b)(6) prescribes the method by which an annual percentage rate is computed where the creditor of the open end credit account imposes finance charges with respect to specific transactions during the billing cycle.

In determining the denominator of the fraction under § 226.7(b)(6), no amount will be used more than once when adding the sum of the balances to which periodic rates apply to the sum of the amounts financed to which specific transaction charges apply. In every case the full amount of transactions to which specific transaction charges apply shall be included in the denominator. Other balances or parts of balances shall be included according to the manner in which a periodic rate is applied, as illustrated in the following examples of accounts on monthly billing cycles:

1. Previous balance—none

   A specific transaction of $100 occurs on first day of the billing cycle.

   The average daily balance is $100.

   A specific transaction charge of 3% is applicable to the specific transactions.

   The periodic rate is 1½% applicable to the average daily balance.

   The numerator is the amount of the finance charge, which is $4.50.

   The denominator is the amount of the transaction (which is $100), plus the amount by which the balance to which the periodic rate applies exceeds the amount of specific transactions (such excess in this case is 0), totaling $100.

The annual percentage rate is the quotient (which is 4.5%) multiplied by 12 (the number of months in a year), i.e. 54%.

2. Previous balance—$100
   A specific transaction of $100 occurs at midpoint of the billing cycle.
   The average daily balance is $150.
   A specific transaction charge of 3% is applicable to the specific transaction.
   The periodic rate is 1½% applicable to the average daily balance.
   The numerator is the amount of finance charge, which is $5.25.
   The denominator is the amount of the transaction (which is $100), plus the amount by which the balance to which the periodic rate applies exceeds the amounts of specific transactions (such excess in this case is $50), totaling $150.
   As explained in example 1, the annual percentage rate is 3.5% x 12 = 42%.

3. If, in example 2, the periodic rate applies only to the previous balance, the numerator is $4.50 and the denominator is $200 (the amount of the transaction, $100, plus the balance to which only the periodic rate is applicable, the $100 previous balance).
   As explained in example 1, the annual percentage rate is 2.25% x 12 = 27%.

4. If, in example 2, the periodic rate applies only to an adjusted balance (previous balance less payments and credit) and the customer made a payment of $50 at midpoint of billing cycle, the numerator is $3.75 and the denominator is $150 (the amount of the transaction, $100 plus the balance to which only the periodic rate is applicable, the $50 adjusted balance). As explained in example 1, the annual percentage rate is 2.5% x 12 = 30%.

5. Previous balance—$100
   A specific transaction (check) of $100 occurs at the midpoint of the billing cycle.
   The average daily balance is $150.
   The specific transaction charge is 25 cents per check. The periodic rate is 1½% applied to the average daily balance. The numerator is the amount of the finance charge, which is $2.50, and includes the 25 cents check charge and the $2.25 resulting from the application of the periodic rate. The denominator is the full amount of the specific transaction (which is $100) plus the amount by which the average daily balance exceeds the amount of the specific transaction (which in this case is $50), totaling $150. As explained in example 1, the annual percentage rate would be 1⅔% x 12 = 20%.

Regardless of such method of computation, the annual percentage rate to be disclosed shall be not less than the periodic rate multiplied by the number of periods in a year or the rate as may otherwise be determined under § 226.5(a).

5/5/69

SECTION 226.8

SECTION 226.801—LOCATION OF DISCLOSURES WHEN CONTRACT, SECURITY AGREEMENT, AND EVIDENCE OF TRANSACTION ARE COMBINED IN A SINGLE DOCUMENT

Some creditors incorporate the terms of a contract, a security agreement, and evidence of a transaction in a single document. These documents are designed for processing by mechanical and electronic equipment. If all of the required disclosures under § 226.8 should be placed on the face of such a document, the creditor will be unable to utilize conventional accounting and record keeping equipment because of the size of the resulting document. The question arises as to whether required disclosures may be made on the face and the reverse side of such a document.

Where a creditor elects to combine disclosures with the contract, security agreement, and evidence of a transaction in a single document, the disclosures required under § 226.8 shall, in accordance with § 226.6, be made on the face of that document, on its reverse side, or on both sides, provided that the amount of the finance charge and the annual percentage rate shall appear on the face of the document, and, if the reverse side is used, the printing on both sides of the document shall be equally clear and conspicuous, both sides shall contain the statement, "NOTICE: See other side for important information," and the place for the customer's signature shall be provided following the full content of the document.

4/22/69

SECTION 226.802—DISCLOSURES ON MAIL OR TELEPHONE ORDERS

Under § 226.8(g), disclosures may be made at any time not later than the date the first payment

is due under certain conditions. The question arises as to when disclosures shall be made on mail or telephone orders where the information outlined in § 226.8(g)(1) and (2) is not available to the customer or prospective customer.

Under the circumstances set forth in the above question, the creditor shall make the disclosures required under Regulation Z as follows:

1. With respect to credit sales, not later than at the time of delivery of the property or first performance of service ordered.
2. With respect to loans, not later than at the time proceeds of the loan are disbursed.
3. Except that if the transaction is subject to the provisions of § 226.9, the disclosures shall be made before the transaction is consummated.

5/5/69

SECTION 226.803—DISCLOSURES WHEN DISCOUNTS APPLY FOR PROMPT PAYMENT

Under § 226.8(o), disclosures shall be made on the billing statement whereas under § 226.8(a) disclosures shall be made before the transaction is consummated. The question arises as to which provision prevails.

The provisions of § 226.8(o) prevail under the conditions set forth in that paragraph unless the transaction is also subject to the provisions of § 226.9 in which event the disclosures shall be made before the transaction is consummated.

5/5/69

SECTION 226.804—SERIES OF SALES—CONTENT OF AGREEMENT

Under § 226.8(h), if a credit sale is one of a series of transactions made under an agreement providing for the addition of a current sale to an existing outstanding balance and the customer has approved in writing the annual percentage rate or rates and certain other requirements are met, disclosures may be made at any time not later than the date the first payment for that sale is due.

The question arises as to how the annual percentage rate or rates should be shown in an agreement where, for example, an 18% annual percentage rate applies to the first $500 of balance, a 12% annual percentage rate applies to all balances over $500, and the mix of the two rates on transactions over $500 will produce a gradually decreasing annual percentage rate as the amount of balance over $500 increases.

In addition to meeting the other requirements of § 226.8(h), if two or more annual percentage rates apply to ranges of balances, the agreement need only state each annual percentage rate and the range of balances to which it applies. However, the disclosures which must be made not later than the date the first payment is due must include the actual annual percentage rate applicable to that sale.

5/5/69

SECTION 226.805—SERIES OF SALES AS DISTINGUISHED FROM REFINANCING, CONSOLIDATING, OR INCREASING

The question arises as to the distinction between the provisions of § 226.8(h), series of sales, and the provisions of § 226.8(j), refinancing, consolidating, or increasing.

Section 226.8(h) is applicable *only* when a credit sale is made pursuant to an agreement which provides for the addition of a current (or new) sale to an existing outstanding balance. In such cases, and provided that all of the requirements of § 226.8(h)(1) and (2) are met, the disclosures may be made at any time not later than the date the first payment for that sale is due.

If there is no agreement, or if the agreement does *not* meet all of the requirements of § 226.8(h), the disclosures required in connection with any subsequent sale, which is added to a previously outstanding balance shall be made under the provisions of § 226.8(j). For example, the fact that an agreement provides a method of computing an unearned portion of the finance charge in the event of prepayment, but does not otherwise meet the requirements of § 226.8(h), will not qualify transactions made pursuant to that agreement for disclosure under the terms of § 226.8(h).

5/26/69

SECTION 226.806—DEPOSIT BALANCES APPLIED TOWARD SATISFACTION OF CUSTOMER'S OBLIGATION

Section 226.8(e)(2) provides that required deposit balances must be deducted under § 226.8(e)(6) and excluded under § 226.8(d)(1) in determining the amount financed. Subdivision (ii) of § 226.8(e)(2) provides an exception in the case of Morris Plan type transactions in which payments in the transaction are made and accumulated in a deposit account which is then wholly applied to satisfy the obligation.

Unless the deposit balance account is created for the sole purpose of accumulating payments and then being applied toward satisfaction of the customer's obligation in the transaction, such deposit balance does not fall within the exception provided in subdivision (ii).

In any case in which a deposit balance qualifies for this exception, each deposit made into the account shall be considered the same as a payment on the obligation for the purpose of computations and disclosures.

5/26/69

SECTION 226.807—ASSUMPTION OF AN OBLIGATION—DISCLOSURES

The question arises as to which disclosures are required to be made under § 226.8(k).

For the purposes of § 226.8(k), an "assumption" occurs only when, by written agreement entered into between a subsequent customer and the creditor, that subsequent customer is or will be accepted by that creditor as an obligor on an existing evidence of debt. In such circumstances, disclosures shall be made as follows:

(1) If the finance charge originally imposed on the existing evidence of debt was an add-on or discount type finance charge, the creditor need only disclose:

(i) The unpaid balance of the obligation assumed;

(ii) The total amount of the charges imposed by the creditor, individually itemized, in connection with the assumption;

(iii) The number, amount, and due dates of remaining payments to be made after assumption, the total of such payments, and any other applicable information required under § 226.8(b)(3);

(iv) Identification of the type of security interest, if any, retained or to be acquired in any property of the assuming customer and a brief identification of that property;

(v) The information required to be disclosed under § 226.8(b)(4), (6) and (7);

(vi) If applicable in connection with the assumption, the disclosures required under § 226.4(a)(5) and (6); and

(vii) If that obligation was entered into on or after July 1, 1969, the annual percentage rate originally disclosed on the existing obligation.

(2) If the existing evidence of debt is subject to a finance charge computed from time to time by application of a percentage rate to an unpaid balance, the creditor shall make the disclosures required under § 226.8(b) and (d) and, if applicable in connection with the assumption, the disclosures required under § 226.4(a) (5) and (6), except that in determining the amount of the finance charge and the annual percentage rate to be disclosed to the customer who assumes the obligation, the creditor may disregard any prepaid finance charges paid by the original customer, but shall include in the finance charge as as "prepaid finance charge" the total amount of the charges imposed by the creditor, individually itemized, in connection with the assumption.

6/10/69

SECTION 226.808—DISCLOSURE OF AMOUNT OF SCHEDULED PAYMENTS

Section 226.8(b)(3) requires the creditor to disclose the "amount . . . of payments scheduled to repay the indebtedness." In certain transactions each payment consists of an equal amount to apply on principal and a finance charge which is determined by application of a rate to the decreasing unpaid balance. In such cases no two payments are equal in amount. The question arises as to whether it is necessary to list the respective dollar amount of each such payment to comply with this requirement of § 226.8(b)(3), or whether an optional disclosure is permitted.

In any transaction in which the amount of each regularly scheduled payment (other than a first or last payment) includes an equal amount to be applied on principal and a finance charge computed by application of a rate to the decreasing unpaid balance, at the creditor's option the requirement of § 226.8(b)(3) with respect to the amount of each payment may be met by disclosing the following information:

(1) The amount of each payment to be applied on principal, and an identification of that amount as payment on principal;

(2) The respective amount of finance charge included in the first and last scheduled payments so described;

If this option is utilized, the exceptions provided under paragraphs (b)(3), and (c)(8) and (d)(3) of § 226.8 shall not apply.

6/10/69

SECTION 226.809—DISCLOSURES FOR CERTAIN STUDENT LOANS

Footnotes 10 and 11 to Regulation Z provide an exception from specified disclosure requirements for interim student loans under certain Federally insured student loan programs. These exceptions are applicable to other student loans of the same type including those made to students under Federally supported loan programs or programs of loan guarantee, administered by or under agreement with the U.S. Department of Health, Education, and Welfare. In all of such cases, however, all disclosures must be made prior to the time the final note is executed or repayment schedule is agreed upon.

6/10/69

SECTION 226.810—DISCLOSURES—VARIABLE INTEREST RATES

In some cases a note, contract, or other instrument evidencing an obligation provides for prospective changes in the annual percentage rate or otherwise provides for prospective variation in the rate. The question arises as to what disclosures must be made under these circumstances when it is not known at the time of consummation of the transaction whether such change will occur or the date or amount of change.

In such cases, the creditor shall make all disclosures on the basis of the rate in effect at the time of consummation of the transaction and shall also disclose the variable feature.

If disclosure is made prior to the consummation of the transaction that the annual percentage rate is prospectively subject to change, the conditions under which such rate may be changed, and, if applicable, the maximum and minimum limits of such rate stipulated in the note, contract, or other instrument evidencing the obligation, such subsequent change in the annual percentage rate in accordance with the foregoing disclosures is a subsequent occurrence under § 226.6(g) and is not a new transaction.

6/20/69

SECTION 226.811—RENEWALS OF NOTES BY MAIL

Under paragraph (j) of § 226.8, renewals of notes with new maturity dates constitute refinancings and are consequently new transactions. A common practice is for creditors to permit renewal of such notes by mail. In many such instances the creditor does not know whether the customer will reduce his original obligation by a payment on principal or, if reduced, the amount of that reduction. The question arises as to what disclosures should be made by mail to the customer in these circumstances.

If the creditor knows the amount of the principal payment, all disclosures should be made on the basis of the resulting new amount financed. If, however, the creditor does not know whether the customer will reduce his original obligation, or if so, by how much, he should disclose on the assumption that there will be no reduction. In such circumstances he may make one or more additional disclosures based on one or more examples of graduated principal reduction. For example, if a single payment note was for $1,000 at 8% for 3 months, in addition to the other required disclosures, the creditor should disclose an amount financed of $1,000 with a finance charge of $20, and may, in addition, disclose that with a principal payment of $300 the amount financed would be $700 with a finance charge of $14, and with a principal payment of $500 the amount financed would be $500 with a finance charge of $10.

8/1/69

SECTION 226.9

SECTION 226.901—WAIVER OF SECURITY INTERESTS—EFFECT ON THE RIGHT OF RESCISSION

Section 226.9(a) provides for a right of rescission "in the case of any [consumer] credit transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer." Under § 226.2(z) security interests include mechanic's and materialmen's liens. If a creditor effectively waives his right to retain, or to acquire such a lien, he has not retained or acquired such security interest. The question arises, however, of whether waiver of a creditor's lien rights is effective to remove a transaction from the scope of rescission when lien rights which are not waived arise in favor of subcontractors, workmen, or others who are not creditors in the transaction.

The fact that the creditor waives his lien rights does not, in itself, determine whether or not the

transaction is rescindable. If *all* security interests are effectively waived, the transaction is not rescindable. On the other hand, if as a result of the transaction, a security interest is or will be retained or acquired by a subcontractor, workman, or other person, the transaction is rescindable. In the latter case the creditor would be responsible for delivering the rescission notice as well as other applicable disclosures, delaying performance as provided under § 226.9(c), and identifying himself as the creditor on the rescission notice. The subcontractors, workmen, and others would not be responsible for delivering rescission notices to the customer.

5/26/69

SECTION 226.902—"CUSTOMERS" AND JOINT OWNERS OF PROPERTY UNDER THE RIGHT OF RESCISSION

Section 226.9(f) provides that, for the purpose of the right of rescission, "customer" shall include two or more customers where joint ownership is involved. The question arises of whether this means that all joint owners of record, regardless of whether or not they are parties to the transaction, are customers for this purpose, and whether each of such owners of record (1) must receive disclosures and a notice of the right of rescission, (2) may exercise the right of rescission, and (3) must join in signing a waiver if one is appropriately taken by the creditor.

Under § 226.9(f) where there are joint owners the right to receive disclosures and notice of the right of rescission, the right to rescind, and the need to sign a waiver of such right, apply only to those joint owners who are parties to the transaction.

5/26/69

SECTION 226.903—REFINANCING AND INCREASING—DISCLOSURES AND EFFECTS ON THE RIGHT OF RESCISSION

In some cases the creditor of an obligation will refinance that obligation at the request of a customer by permitting the customer to execute a new note, contract, or other document evidencing the transaction under the terms of which one or more of the original credit terms, including the maturity date of the obligation, are changed. Although such refinancing constitutes a new transaction, and all disclosures required under § 226.8 must be made, the question arises as to whether that transaction is subject to the right of rescission under § 226.9 where the obligation is already secured by a security interest in real property which is used or expected to be used as the principal residence of that customer.

If the amount of such new transaction does not exceed the amount of the unpaid balance plus any accrued and unpaid finance charge on the existing obligation, § 226.9 does not apply to the transaction.

If, however, such new transaction is for an increased amount, that is, for an amount in excess of the amount of the unpaid balance plus any accrued and unpaid finance charge on the existing obligation, § 226.9 applies to the transaction. However, such right of rescission applies only to such excess and does not affect the existing obligation (or related security interest) for the unpaid balance plus accrued unpaid finance charge.

If a transaction is refinanced by a creditor other than the creditor of the existing obligation, the entire transaction is subject to § 226.9.

6/20/69

SECTION 226.10

SECTION 226.1001—ADVERTISING OF CREDIT TERMS IN OTHER THAN OPEN END CREDIT

The statement of certain credit terms in advertisements such as "no downpayment", the amount of any instalment payments, dollar amount of finance charge, number of payments, etc., as provided in § 226.10(d)(2), requires that certain other terms also be stated in the same advertisement. The question arises as to how a creditor may advertise credit terms in a meaningful way when all of his credit sales or loans are not made on the same basis.

The advertising of credit terms may be made by giving one or more examples of typical extensions of credit and stating all of the terms applicable to each example. In any such case, the advertiser shall set forth one or more examples which are, in fact, typical of the type of credit and terms usually and customarily made available by the creditor to present and prospective customers and each shall be clearly and conspicuously identified as examples of typical transactions.

4/22/69

SECTION 226.1002—CATALOGS—TABLES OR SCHEDULES OF CREDIT TERMS

Under § 226.10(b) in order that a catalog may qualify as a single advertisement, among other things, it must include a table or schedule of credit terms. It has been the practice of catalog houses to include such tables in catalogs; however, such tables generally state amounts of purchases, amounts of finance charges, and number and amount of payments for brackets up to a certain level and then contain an instruction to include a specified dollar amount in computing the finance charge by application of a percentage rate on any purchase in excess of that level. Tables to show the actual terms including annual percentage rates for all purchases into thousands of dollars would be unwieldy, present a formidable appearance, and may be more confusing than helpful to the user. The question arises as to whether a creditor who publishes a catalog is required to include tables in detailed amounts from the minimum up to, for example, $5,000, his highest priced cataloged merchandise.

Tables or schedules of terms in catalogs must include all amounts up to a level of the more commonly sold higher priced property or services which are offered for sale, but in no event greater than $1,000 unless the creditor elects to do so. If the creditor offers property or service for sale at prices higher than the uppermost level covered by his table, he shall state the method by which the finance charge is computed on larger amounts, how the amount of payments and the number and periods of payments are determined and state, for each representative amount in increments of not more than $500 up to the highest priced property or service offered, the annual percentage rate. Any catalog which contains such a table or schedule of credit terms will comply with requirements of § 226.10(b) provided all other requirements are met and such catalog shall be considered adequate for the purpose of § 226.8(g)(1).

4/22/69

[Interpretations available from Publications Services, Division of Administrative Services, Board of Governors of the Federal Reserve System, Washington, D.C. 20551.]

BOARD OF GOVERNORS

of the

FEDERAL RESERVE SYSTEM

TRUTH IN LENDING

REGULATION



(12 CFR 226)
Effective July 1, 1969

Amended August 11, 1969

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REGULATION

Z

(12 CFR 226)
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TRUTH IN LENDING

REGULATION *

SECTION 226.1—AUTHORITY, SCOPE, PURPOSE, ETC.

(a) **Authority, scope, and purpose.** (1) This Part comprises the regulations issued by the Board of Governors of the Federal Reserve System pursuant to Title I (Truth in Lending Act) and Title V (General Provisions) of the Consumer Credit Protection Act (Public Law 90-321; 82 Stat. 146 et seq.) Except as otherwise provided herein, this Part applies to all persons who in the ordinary course of business regularly extend, or offer to extend, or arrange, or offer to arrange, for the extension of consumer credit as defined in paragraph (k) of § 226.2.

(2) This Part implements the Act, the purpose of which is to assure that every customer who has need for consumer credit is given meaningful information with respect to the cost of that credit which, in most cases, must be expressed in the dollar amount of finance charge, and as an annual percentage rate computed on the unpaid balance of the amount financed. Other relevant credit information must also be disclosed so that the customer may readily compare the various credit terms available to him from different sources and avoid the uninformed use of credit. This Part also implements the provision of the Act under which a customer has a right in certain circumstances to cancel a credit transaction which involves a lien on his residence. Advertising of consumer credit terms must comply with specific requirements, and certain credit terms may not be advertised unless the creditor usually and customarily extends such terms. Neither the Act nor this Part is intended to control charges for consumer credit, or interfere with trade practices except to the extent that such practices may be inconsistent with the purpose of the Act.

(b) **Administrative enforcement.** (1) As set forth more fully in section 108 of the Act, administrative enforcement of the Act and this part with respect to certain creditors is assigned to the Comptroller of the Currency, Board of Directors of the Federal Deposit Insurance Corporation, Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), Director of the Bureau of Federal Credit Unions, Interstate Commerce Commission, Civil Aeronautics Board, Secretary of Agriculture, and Board of Governors of the Federal Reserve System.

(2) Except to the extent that administrative enforcement is specifically committed to other authorities, compliance with the requirements imposed under the Act and this part will be enforced by the Federal Trade Commission.

* This text corresponds to the Code of Federal Regulations, Title 12, Chapter II, Part 226, cited as 12 CFR 226. The words "this Part", as used herein, mean Regulation Z.

(c) **Penalties and liabilities.** Section 112 of the Act provides for criminal liability for willful and knowing failure to comply with any requirement imposed under the Act and this Part, and section 130 of the Act provides for civil liability on the part of any creditor who fails to disclose any information required under Chapter 2 of the Act and under the corresponding provisions of this Part. Pursuant to section 108 of the Act, violations of the Act or this Part constitute violations of other Federal laws which may provide further penalties.

SECTION 226.2—DEFINITIONS AND RULES OF CONSTRUCTION

For the purposes of this Part, unless the context indicates otherwise, the following definitions and rules of construction apply:

(a) **"Act"** refers to the Truth in Lending Act (Title I of the Consumer Credit Protection Act).

(b) **"Advertisement"** means any commercial message in any newspaper, magazine, leaflet, flyer or catalog, on radio, television or public address system, in direct mail literature or other printed material, on any interior or exterior sign or display, in any window display, in any point-of-transaction literature or price tag which is delivered or made available to a customer or prospective customer in any manner whatsoever.

(c) **"Agricultural purpose"** means a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products. "Agricultural products" includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(d) **"Amount financed"** means the amount of credit of which the customer will have the actual use determined in accordance with paragraphs (c)(7) and (d)(1) of § 226.8.

(e) **"Annual percentage rate"** means the annual percentage rate of finance charge determined in accordance with § 226.5.

(f) **"Arrange for the extension of credit"** means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service or has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit. It does not include honoring a credit card or similar device where no finance charge is imposed at the time of that transaction.

(g) **"Billing cycle"** means the time interval between regular periodic billing statement dates. Such intervals may be considered equal intervals of time unless a billing date varies more than 4 days from the regular date.

(h) **"Board"** refers to the Board of Governors of the Federal Reserve System.

(i) **"Cash price"** means the price at which the creditor offers, in the ordinary course of business, to sell for cash the property or services which are the subject of a consumer credit transaction. It may include the cash price of accessories or services related to the sale such as delivery, installation, alterations, modifications, and improvements, and may include taxes to the extent imposed on the cash sale, but shall not include any other charges of the types described in § 226.4.

(j) **"Comparative Index of Credit Cost"** means the relative measure of the cost of credit under an open end credit account, computed in accordance with § 226.11, and is the expression of the "average effective annual percentage rate of return" and the "projected rate of return" which appear in section 127(a)(5) of the Act.

(k) **"Consumer credit"** means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which, pursuant to an agreement, is or may be payable in more than 4 instalments. "Consumer loan" is one type of "consumer credit."

(l) **"Credit"** means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (bb) of this section.)

(m) **"Creditor"** means a person who in the ordinary course of business regularly extends or

arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

(n) **"Credit sale"** means any sale with respect to which consumer credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(o) **"Customer"** means a natural person to whom consumer credit is offered or to whom it is or will be extended, and includes a comaker, endorser, guarantor, or surety for such natural person who is or may be obligated to repay the extension of consumer credit.

(p) **"Dwelling"** means a residential-type structure which is real property and contains one or more family housing units, or a residential condominium unit wherever situated.

(q) **"Finance charge"** means the cost of credit determined in accordance with § 226.4.

(r) **"Open end credit"** means consumer credit extended on an account pursuant to a plan under which (1) the creditor may permit the customer to make purchases or obtain loans, from time to time, directly from the creditor or indirectly by use of a credit card, check, or other device, as the plan may provide; (2) the customer has the privilege of paying the balance in full or in instalments; and (3) a finance charge may be computed by the creditor from time to time on an outstanding unpaid balance. The term does not include negotiated advances under an open end real estate mortgage or a letter of credit.

(s) **"Organization"** means a corporation, trust, estate, partnership, cooperative, association, government, or governmental subdivision, agency, or instrumentality.

(t) **"Period"** means a day, week, month, or other subdivision of a year.

(u) **"Periodic rate"** means a percentage rate of finance charge which, under an open end credit plan, is or may be imposed by a creditor against a balance for a period. (See also § 226.5(a)(3).)

(v) **"Person"** means a natural person or an organization.

(w) **"Real property"** means property which is real property under the law of the State in which it is located.

(x) **"Real property transaction"** means an extension of credit in connection with which a security interest in real property is or will be retained or acquired.

(y) **"Residence"** means any real property in which the customer resides or expects to reside. The term includes a parcel of land on which the customer resides or expects to reside.

(z) **"Security interest"** and **"security"** mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

(aa) **"State"** means any State, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(bb) Unless the context indicates otherwise, "credit" shall be construed to mean "consumer credit," "loan" to mean "consumer loan," and "transaction" to mean "consumer credit transaction."

(cc) A transaction shall be considered consummated at the time a contractual relationship is created between a creditor and a customer irrespective of the time of performance of either party.

(dd) Captions and catchlines are intended solely as aids to convenient reference, and no inference as to the intent of any provision of this part may be drawn from them.

SECTION 226.3—EXEMPTED TRANSACTIONS

This Part does not apply to the following:

(a) **Business or governmental credit.** Extensions of credit to organizations, including governments, or for business or commercial purposes, other than agricultural purposes.

(b) **Certain transactions in security or commodities accounts.** Transactions in securities or commodities accounts with a broker-dealer registered with the Securities and Exchange Commission.

(c) **Non-real property credit over $25,000.** Credit transactions, other than real property transactions, in which the amount financed [1] exceeds $25,000, or in which the transaction is pursuant to an express written commitment by the creditor to extend credit in excess of $25,000.

(d) **Certain public utility bills.** Transactions under public utility tariffs involving services provided through pipe, wire, or other connected facilities, if the charges for such public utility services, the charges for delayed payment, and any discount allowed for early payment are filed with, reviewed by, or regulated by an agency of the Federal Government, a State, or a political subdivision thereof.

SECTION 226.4—DETERMINATION OF FINANCE CHARGE

(a) **General rule.** Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:

(1) Interest, time price differential, and any amount payable under a discount or other system of additional charges.

(2) Service, transaction, activity, or carrying charge.[2]

(3) Loan fee, points, finder's fee, or similar charge.

(4) Fee for an appraisal, investigation, or credit report.

(5) Charges or premiums for credit life, accident, health, or loss of income insurance, written in connection with [3] any credit transaction unless

(i) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and

(ii) any customer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance.

(6) Charges or premiums for insurance, written in connection with [4] any credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, unless a clear, conspicuous, and specific statement in writing is furnished by the creditor to the customer setting forth the cost of the insurance if obtained from or through the creditor and stating that the customer may choose the person through which the insurance is to be obtained.[5]

(7) Premium or other charge for any other guarantee or insurance protecting the creditor against the customer's default or other credit loss.

(8) Any charge imposed by a creditor upon another creditor for purchasing or accepting an obligation of a customer if the customer is required to pay any part of that charge in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation.

(b) **Itemized charges excludable.** If itemized and disclosed to the customer, any charges of the following types need not be included in the finance charge:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

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[1] For this purpose, the amount financed is the amount which is required to be disclosed under § 226.8 (c)(7), or (d)(1), as applicable, or would be so required if the transaction were subject to this Part.

[2] These charges include any charges imposed by the creditor in connection with a checking account to the extent that such charges exceed any charges the customer is required to pay in connection with such an account when it is not being used to extend credit.

[3] A policy of insurance owned by the customer, which is assigned to the creditor or otherwise made payable to the creditor to satisfy a requirement imposed by the creditor, is not insurance "written in connection with" a credit transaction if the policy was not purchased by the customer for the purpose of being used in connection with that extension of credit.

[4] A policy of insurance owned by the customer, which is assigned to the creditor or otherwise made payable to the creditor to satisfy a requirement imposed by the creditor, is not insurance "written in connection with" a credit transaction if the policy was not purchased by the customer for the purpose of being used in connection with that extension of credit.

[5] A creditor's reservation or exercise of the right to refuse to accept an insurer offered by the customer, for reasonable cause, does not require inclusion of the premium in the finance charge.

(2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in subparagraph (1) of this paragraph which would otherwise be payable.

(3) Taxes not included in the cash price.

(4) License, certificate of title, and registration fees imposed by law.

(c) **Late payment, delinquency, default, and reinstatement charges.** A late payment, delinquency, default, reinstatement, or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default or other such occurrence.

(d) **Overdraft charges.** A charge imposed by a bank for paying checks which overdraw or increase an overdraft in a checking account is not a finance charge unless the payment of such checks and the imposition of such finance charge were previously agreed upon in writing.

(e) **Excludable charges, real property transactions.** The following charges in connection with any real property transaction, provided they are bona fide, reasonable in amount, and not for the purpose of circumvention or evasion of this Part, shall not be included in the finance charge with respect to that transaction:

(1) Fees or premiums for title examination, abstract of title, title insurance, or similar purposes and for required related property surveys.

(2) Fees for preparation of deeds, settlement statements, or other documents.

(3) Amounts required to be placed or paid into an escrow or trustee account for future payments of taxes, insurance, and water, sewer, and land rents.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fees.

(6) Credit reports.

(f) **Prohibited offsets.** Interest, dividends, or other income received or to be received by the customer on deposits or on investments in real or personal property in which a creditor holds a security interest shall not be deducted from the amount of the finance charge or taken into consideration in computing the annual percentage rate.

(g) **Demand obligations.** Obligations other than those debited to an open end credit account which are payable on demand shall be considered to have a maturity of one-half year for the purpose of computing the amount of the finance charge and the annual percentage rate, except that where such an obligation is alternatively payable upon a stated maturity, the stated maturity shall be used for the purpose of such computations.

(h) **Computation of insurance premiums.** If any insurance premium is required to be included as a part of the finance charge, the amount to be included shall be the premium for coverage extending over the period of time the creditor will require the customer to maintain such insurance. For this purpose, rates and classifications applicable at the time the credit is extended shall be applied over the full time during which coverage is required, unless the creditor knows or has reason to know that other rates or classifications will be applicable, in which case such other rates or classifications shall be used to the extent appropriate.

SECTION 226.5—DETERMINATION OF ANNUAL PERCENTAGE RATE

(a) **General rule—open end credit accounts.** The annual percentage rates for open end credit accounts shall be computed so as to permit disclosure with an accuracy at least to the nearest quarter of 1 per cent. Such rate or rates shall be determined in accordance with § 226.7(a)(4) for purposes of disclosure before opening an account, § 226.10(c)(4) for purposes of advertising, and in the following manner for purposes of disclosure on periodic statements:

(1) Where the finance charge is exclusively the product of the application of one or more periodic rates

(i) by multiplying each periodic rate by the number of periods in a year; or

(ii) at the creditor's option, if the finance charge is the result of the application of two or more periodic rates, by dividing the total finance charge for the billing cycle by the sum of the balances to which the periodic rates were applied and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year.

(2) Where the creditor imposes all periodic finance charges in amounts based on specified ranges or brackets of balances, the periodic rate

shall be determined by dividing the amount of the finance charge for the period by the amount of the median balance within the range or bracket of balances to which it is applicable, and the annual percentage rate shall be determined by multiplying that periodic rate (expressed as a percentage) by the number of periods in a year. Such ranges or brackets of balances shall be subject to the limitations prescribed in subdivision (iv) of paragraph (c)(2) of this section.

(3) Where the finance charge is or includes a minimum, fixed, or other charge not due to the application of a periodic rate, and

(i) exceeds 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, by dividing the total finance charge for the billing cycle by the amount of the balance to which applicable and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year; or

(ii) does not exceed 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, by multiplying each applicable periodic rate by the number of periods in a year, irrespective of the imposition of such minimum, fixed, or other charge.

(b) **General rule—other credit.** Except as otherwise provided in this section, the annual percentage rate applicable to any extension of credit, other than open end credit, shall be that nominal annual percentage rate determined as follows:

(1) In accordance with the actuarial method of computation so that it may be disclosed with an accuracy at least to the nearest quarter of 1 per cent. The mathematical equation and technical instructions for determining the annual percentage rate in accordance with the requirements of this paragraph are set forth in Supplement I to Regulation Z which is incorporated in this Part by reference. Supplement I to Regulation Z may be obtained from any Federal Reserve Bank or from the Board in Washington D.C., 20551, upon written request.

(2) At the option of the creditor, by application of the United States Rule so that it may be disclosed with an accuracy at least to the nearest quarter of 1 per cent. Under this rule, the finance charge is computed on the unpaid balance for the actual time the balance remains unpaid and if the amount of a payment is insufficient to pay the accumulated finance charge, the unpaid accumulated finance charge continues to accumulate to be paid from the proceeds of subsequent payments and is not added to the amount financed.

(c) **Charts and tables.** (1) The Regulation Z Annual Percentage Rate Tables produced by the Board may be used to determine the annual percentage rate, and any such rate determined from these tables in accordance with instructions contained therein will comply with the requirements of this section. Volume I contains table FRB—100-M covering 1 to 60 monthly payments, table FRB—200-M covering 61 to 120 monthly payments, table FRB—300-M covering 121 to 480 monthly payments, and table FRB—100-W covering 1 to 104 weekly payments. Volume I also contains instructions for use of the tables in regular transactions and most irregular transactions which involve only odd first and final payments and odd first payment periods. Volume II contains factor tables and instructions for their use in connection with the tables in Volume I in the computation of annual percentage rates in any type of irregular payment or payment period transaction and in transactions involving multiple advances. Each volume is available from the Board in Washington, D.C., 20551, and the Federal Reserve Banks.

(2) Any chart or table other than the Board's Regulation Z Annual Percentage Rate Tables also may be utilized for the purpose of determining the annual percentage rate provided:

(i) It is prepared in accordance with the general rule set forth in paragraph (b) (1) or (2) of this section;

(ii) It bears the name and address of the person responsible for its production, an identification number assigned to it by that person which shall be the same for each chart or table so produced with like numerical content and configuration and, if prepared for use in connection with irregular transactions, an identification of the method of computation ("Actuarial" or "U.S. Rule");

(iii) Except as provided in subdivision (iv) of this subparagraph, it permits determination of the annual percentage rate to the nearest one-quarter of 1 per cent for the range of rates covered by the chart or table; and

(iv) If applicable to ranges or brackets of balances, it discloses the amount of the finance

charge and the annual percentage rate on the median balance within each range or bracket of balances where a creditor imposes the same finance charge for all balances within a specified range or bracket of balances, and provided further that if the annual percentage rate determined on the median balance understates the annual percentage rate determined on the lowest balance in that range or bracket by more than 8 per cent of the rate on the lowest balance, then the annual percentage rate for that range or bracket shall be computed upon any balance lower than the median balance within that range so that any understatement will not exceed 8 per cent of the rate on the lowest balance within that range or bracket of balances.

(3) In the event an error in disclosure of the amount of a finance charge or an annual percentage rate occurs because of a corresponding error in a chart or table acquired or produced in good faith by the creditor, that error in disclosure shall not, in itself, be considered a violation of this Part provided that upon discovery of the error, that creditor makes no further disclosure based on that chart or table and promptly notifies the Board or a Federal Reserve Bank in writing of the error and identifies the inaccurate chart or table by giving the name and address of the person responsible for its production and its identification number.

(d) **Minor irregularities.** In determining the annual percentage rate a creditor may, at his option, consider the payment irregularities set forth in this paragraph as if they were regular in amount or time, as applicable, provided that the transaction to which they relate is otherwise payable in equal instalments scheduled at equal intervals.

(1) If the period from the date on which the finance charge begins to accrue and the date the final payment is due is not less than 3 months in the case of weekly payments, 6 months in the case of biweekly or semimonthly payments, or 1 year in the case of monthly payments, either or both of the following:

(i) The amount of 1 payment other than any downpayment is not more than 50 per cent greater nor 50 per cent less than the amount of a regular payment; or

(ii) The interval between the date on which the finance charge begins to accrue and the date the first payment is due is not less than 5 days for an obligation otherwise payable in weekly instalments, not less than 10 days for an obligation otherwise payable in biweekly or semimonthly instalments, or not less than 20 days for an obligation otherwise payable in monthly instalments.

(2) If the period from the date on which the finance charge begins to accrue and the date the final payment is due is less than 3 months in the case of weekly payments, 6 months in the case of biweekly or semimonthly payments, or 1 year in the case of monthly payments, either or both of the following:

(i) The amount of 1 payment other than any downpayment is not more than 25 per cent greater nor 25 per cent less than the amount of a regular payment; or

(ii) The interval between the date on which the finance charge begins to accrue and the date the first payment is due is not less than 6 days for an obligation otherwise payable in weekly instalments, not less than 12 days for an obligation otherwise payable in biweekly or semimonthly instalments, or not less than 25 days for an obligation otherwise payable in monthly instalments.

(e) **Approximation of annual percentage rate—other credit.** In an exceptional instance when circumstances may leave a creditor with no alternative but to determine an annual percentage rate applicable to an extension of credit other than open end credit by a method other than those prescribed in paragraphs (b) or (c) of this section, the creditor may utilize the constant ratio method of computation provided such use is limited to the exceptional instance and is not for the purpose of circumvention or evasion of the requirements of this Part. Any provision of State law authorizing or requiring the use of the constant ratio method or any method of computing a percentage rate other than those prescribed in paragraphs (b) and (c) of this section does not justify failure of the creditor to comply with the provisions of those paragraphs, as applicable.

SECTION 226.6—GENERAL DISCLOSURE REQUIREMENTS

(a) **Disclosures; general rule.** The disclosures required to be given by this Part shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology

prescribed in applicable sections. Where the terms "finance charge" and "annual percentage rate" are required to be used, they shall be printed more conspicuously than other terminology required by this Part. Except with respect to the requirements of § 226.10, all numerical amounts and percentages shall be stated in figures and shall be printed in not less than the equivalent of 10 point type, .075 inch computer type, or elite size typewritten numerals, or shall be legibly handwritten.

(b) **Inconsistent State requirements.** With respect to disclosures required by this Part, State law is inconsistent with the requirements of the Act and this Part, within the meaning of section 111(a) of the Act, to the extent that it

(1) Requires a creditor to make disclosures different from the requirements of this Part with respect to form, content, terminology, or time of delivery;

(2) Requires disclosure of the amount of the finance charge determined in any manner other than that prescribed in § 226.4; or

(3) Requires disclosure of the annual percentage rate of the finance charge determined in any manner other than that prescribed in § 226.5.

(c) **Additional information.** At the creditor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or confuse the customer or contradict, obscure, or detract attention from the information required by this Part to be disclosed. Any creditor who elects to make disclosures specified in any provision of State law which, under paragraph (b) of this section, is inconsistent with the requirements of the Act and this Part may

(1) Make such inconsistent disclosures on a separate paper apart from the disclosures made pursuant to this Part, or

(2) Make such inconsistent disclosures on the same statement on which disclosures required by this Part are made; provided:

(i) All disclosures required by this Part appear separately and above any other disclosures,

(ii) Disclosures required by this Part are identified by a clear and conspicuous heading indicating that they are made in compliance with Federal law, and

(iii) All inconsistent disclosures appear separately and below a conspicuous demarcation line, and are identified by a clear and conspicuous heading indicating that the statements made thereafter are inconsistent with the disclosure requirements of the Federal Truth in Lending Act.

(d) **Multiple creditors; joint disclosure.** If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. The disclosures required under paragraphs (b) and (c) of § 226.8 shall be made by the seller if he extends or arranges for the extension of credit. Otherwise disclosures shall be made as required under paragraphs (b) and (d) of § 226.8.

(e) **Multiple customers; disclosure to one.** In any transaction other than a transaction which may be rescinded under the provisions of § 226.9, if there is more than one customer, the creditor need furnish a statement of disclosures required by this Part to only one of them other than an endorser, comaker, guarantor, or a similar party.

(f) **Unknown information estimate.** If at the time disclosures must be made, an amount or other item of information required to be disclosed, or needed to determine a required disclosure, is unknown or not available to the creditor, and the creditor has made a reasonable effort to ascertain it, the creditor may use an estimated amount or an approximation of the information, provided the estimate or approximation is clearly identified as such, is reasonable, is based on the best information available to the creditor, and is not used for the purpose of circumventing or evading the disclosure requirements of this Part.

(g) **Effect of subsequent occurrence.** If information disclosed in accordance with this Part is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this Part.[8]

[8] Such acts, occurrences, or agreements include the failure of the customer to perform his obligations under the contract and such actions by the creditor as may be proper to protect his interests in such circumstances. Such failure may result in the liability of the customer to pay delinquency charges, collection costs, or expenses of the creditor for perfection or acquisition of any security interest or amounts advanced by the creditor on behalf of the customer in connection with insurance, repairs to or preservation of collateral.

(h) **Overstatement.** The disclosure of the amount of the finance charge or a percentage which is greater than the amount of the finance charge or percentage required to be disclosed under this Part does not in itself constitute a violation of this Part: *Provided,* That the overstatement is not for the purpose of circumvention or evasion of disclosure requirements.

(i) **Preservation and inspection of evidence of compliance.** Evidence of compliance with the requirements imposed under this Part, other than advertising requirements under § 226.10, shall be preserved by the creditor for a period of not less than 2 years after the date each disclosure is required to be made. Each creditor shall, when directed by the appropriate administrative enforcement authority designated in section 108 of the Act, permit that authority or its duly authorized representative to inspect its relevant records and evidence of compliance with this Part.

(j) **Percentage rate as dollars per hundred.** Prior to January 1, 1971, any rate required under this Part to be disclosed as a percentage rate may, at the option of the creditor, be expressed in the form of the corresponding ratio of dollars per hundred dollars using the term "dollars finance charge per year per $100 of unpaid balance." (For example, an add-on finance charge of 4 per cent per year on an obligation payable in 36 equal monthly instalments is equivalent to an annual percentage rate, rounded to the nearest quarter of 1 per cent, of 7.50 per cent which may be stated as "$7.50 finance charge per year per $100 of unpaid balance.")

(k) **Transition period.** Any creditor who can demonstrate that he has taken bona fide steps, prior to July 1, 1969, to obtain printed forms which are necessary to comply with requirements of this Part may, until such forms are received but in no event later than December 31, 1969, utilize existing supplies of printed forms for the purpose of complying with the disclosure requirements of this Part, other than the requirements of paragraph (b) of § 226.9: *Provided,* That such forms are altered or supplemented as necessary to assure that all of the items of information the creditor is required to disclose to the customer are set forth clearly and conspicuously.

SECTION 226.7—OPEN END CREDIT ACCOUNTS—SPECIFIC DISCLOSURES

(a) **Opening new account.** Before the first transaction is made on any open end credit account, the creditor shall disclose to the customer in a single written statement, which the customer may retain, in terminology consistent with the requirements of paragraph (b) of this section, each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including an explanation of the time period, if any, within which any credit extended may be paid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge may be imposed.

(3) The method of determining the amount of the finance charge, including the method of determining any minimum, fixed, check service, transaction, activity, or similar charge, which may be imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) If the creditor so elects, the Comparative Index of Credit Cost in accordance with § 226.11.

(6) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(7) The conditions under which the creditor may retain or acquire any security interest in any property to secure the payment of any credit extended on the account, and a description or identification of the type of the interest or interests which may be so retained or acquired.

(8) The minimum periodic payment required.

(b) **Periodic statements required.** Except in the case of an account which the creditor deems to be uncollectable or with respect to which delinquency collection procedures have been instituted, the creditor of any open end credit account shall mail or deliver to the customer, for each billing cycle at the end of which there is an outstanding debit balance in excess of $1 in that account or with respect to which a finance charge is imposed, a statement or statements which the customer may retain, setting forth in accordance with paragraph (c) of this section each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the billing cycle, using the term "previous balance."

(2) The amount and date of each extension of credit or the date such extension of credit is debited to the account during the billing cycle and, unless previously furnished, a brief identification [7] of any goods or services purchased or other extension of credit.

(3) The amounts credited to the account during the billing cycle for payments, using the term "payments," and for other credits including returns, rebates of finance charges, and adjustments, using the term "credits," and unless previously furnished, a brief identification [8] of each of the items included in such other credits.

(4) The amount of any finance charge, using the term "finance charge," debited to the account during the billing cycle, itemized and identified to show the amounts, if any, due to the application of periodic rates and the amount of any other charge included in the finance charge, such as a minimum, fixed, check service, transaction, activity, or similar charge,[9] using appropriate descriptive terminology.

(5) Each periodic rate, using the term "periodic rate" (or "rates"), that may be used to compute the finance charge (whether or not applied during the billing cycle), and the range of balances to which it is applicable.

(6) The annual percentage rate or rates determined under § 226.5(a), using the term "annual percentage rate" (or "rates"), and, where there is more than one rate, the amount of the balance to which each rate is applicable. Where the creditor of the open end credit account imposes finance charges with respect to specific transactions during the billing cycle, such charges shall be combined with all other finance charges imposed during the billing cycle, and the annual percentage rate to be disclosed shall be determined by:

(i) Dividing the sum of all of the finance charges imposed during the billing cycle by the sum of the balances to which the periodic rates apply (or by the average of daily balances if a daily periodic rate is used), plus the sum of the amounts financed to which the specific transaction charges apply, and

(ii) Multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year.

(7) If the creditor so elects, the Comparative Index of Credit Cost in accordance with § 226.11.

(8) The balance on which the finance charge was computed, and a statement of how that balance was determined. If the balance is determined without first deducting all credits during the billing cycle, that fact and the amount of such credits shall also be disclosed.

(9) The closing date of the billing cycle and the outstanding balance in the account on that date, using the term "new balance," accompanied by the statement of the date by which, or the period, if any, within which, payment must be made to avoid additional finance charges.

(c) **Location of disclosures.** The disclosures required by paragraph (b) of this section shall be made on the face of the periodic statement, on its reverse side, or on the periodic statement supplemented by separate statement forms provided they are enclosed together and delivered to the customer at the same time, and further provided that

(1) The disclosure required by paragraph (b)(1) of this section, the amounts or respective totals of the amounts required to be disclosed under paragraph (b)(2), (3), and (4) of this section, and the disclosure required under paragraph (b)(6) and (9) of this section shall appear on the face of the periodic statement. If the amounts and dates of the charges and credits required to be disclosed under paragraph (b)(2) and (3) of this section are not itemized on the face or reverse side of the periodic statement, they shall be disclosed on a separate statement or separate slips which shall accompany the periodic statement and identify each charge and credit and show the date and amount thereof. If the disclosures required under paragraph (b)(4) are not itemized on the face or reverse side of the periodic statement, they shall be disclosed on a separate statement which shall accompany the periodic statement.

(2) The disclosures required by paragraph (b)(5)

[7] Identification may be made on an accompanying slip or by symbol relating to an identification list printed on the statement.

[8] Identification may be made on an accompanying slip or by symbol relating to an identification list printed on the statement.

[9] These charges include any charges imposed by the creditor for the issuance, payment, or handling of checks, for account maintenance or otherwise, to the extent that such charges exceed any similar charges the customer is required to pay when an account is not being used to extend credit.

and (6) of this section and a reference to the amounts required to be disclosed under paragraph (b)(4) and (8) of this section, if not disclosed together on the face or the reverse side of the periodic statement, shall appear together on the face of a single supplemental statement which shall accompany the periodic statement.

(3) The face of the periodic statement shall contain one of the following notices, as applicable: "NOTICE: See reverse side for important information" or "NOTICE: See accompanying statement(s) for important information" or "NOTICE: See reverse side and accompanying statement(s) for important information;" and

(4) The disclosures shall not be separated so as to confuse or mislead the customer or obscure or detract attention from the information required to be disclosed.

(d) **Finance charge imposed at time of transaction.** Any creditor, other than the creditor of the open end credit account, who imposes a finance charge at the time of honoring a customer's credit card, any other device, or form of identification for a purchase of property or services or for a cash advance to be debited to the customer's open end credit account shall make the disclosures required under paragraphs (b)(2) and (d) of § 226.8, *Credit other than open end—specific disclosures*, at the time of that transaction, and the annual percentage rate to be disclosed shall be determined by dividing the amount of the finance charge by the amount financed and multiplying the quotient (expressed as a percentage) by 12. If disclosure is made under this paragraph, the creditor of the open end credit account need make no further disclosure with respect to the finance charge on that transaction.

(e) **Change in terms.** If any change is to be made in terms of an open end credit account plan previously disclosed to the customer, the creditor shall mail or deliver to the customer written disclosure of such proposed change not less than 30 days prior to the effective date of such change or 30 days prior to the beginning of the billing cycle within which such change will become effective, whichever is the earlier date.

(f) **Open end credit accounts existing on July 1, 1969.** In the case of any open end credit account in existence and in which a balance remains unpaid on July 1, 1969, and which balance is deemed to be collectible and not subject to delinquency collection procedures, the items described in paragraph (a) of this section, to the extent applicable, shall be disclosed in a notice mailed or delivered to the customer not later than July 31, 1969. If a customer subsequently utilizes such an account in existence on July 1, 1969, in which no balance remained unpaid on that date, and a notice required by paragraph (a) of this section has not previously been furnished that customer, then such notice shall be mailed or delivered to that customer before or with the next billing or that account.

SECTION 226.8—CREDIT OTHER THAN OPEN END—SPECIFIC DISCLOSURES

(a) **General rule.** Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as provided in paragraphs (g) and (h) of this section, such disclosures shall be made before the transaction is consummated. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. All of the disclosures shall be made together on either

(1) The note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or

(2) One side of a separate statement which identifies the transaction.

(b) **Disclosures in sale and nonsale credit.** In any transaction subject to this section, the following items, as applicable, shall be disclosed:

(1) The date on which the finance charge begins to accrue if different from the date of the transaction.

(2) The finance charge expressed as an annual percentage rate, using the term "annual percentage rate," except in the case of a finance charge

(i) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(ii) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate, nor may any other percentage rate be disclosed if none

is stated in reliance upon subdivisions (i) or (ii) of this subparagraph.

(3) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness and, except in the case of a loan secured by a first lien or equivalent security interest on a dwelling made to finance the purchase of that dwelling and except in the case of a sale of a dwelling, the sum of such payments using the term, "total of payments."[10] If any payment is more than twice the amount of an otherwise regularly scheduled equal payment, the creditor shall identify the amount of such payment by the term "balloon payment" and shall state the conditions, if any, under which that payment may be refinanced if not paid when due.

(4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.

(5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

(6) A description of any penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation (such as a real estate mortgage) with an explanation of the method of computation of such penalty and the conditions under which it may be imposed.

(7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer.

(c) **Credit sales.** In the case of a credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The cash price of the property or service purchased, using the term "cash price."

(2) The amount of the downpayment itemized, as applicable, as downpayment in money, using the term "cash downpayment," downpayment in property, using the term "trade-in" and the sum, using the term "total downpayment."

(3) The difference between the amounts described in subparagraphs (1) and (2) of this paragraph, using the term "unpaid balance of cash price."

(4) All other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge.

(5) The sum of the amounts determined under subparagraphs (3) and (4) of this paragraph, using the term "unpaid balance."

(6) Any amounts required to be deducted under paragraph (c) of this section using, as applicable, the terms "prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term "total prepaid finance charge and required deposit balance."

(7) The difference between the amounts determined under subparagraphs (5) and (6) of this paragraph, using the term "amount financed."

(8) Except in the case of a sale of a dwelling:

(i) The total amount of the finance charge, with description of each amount included, using the term "finance charge," and

(ii) The sum of the amounts determined under subparagraphs (1), (4), and (8)(i) of this paragraph, using the term "deferred payment price."

(d) **Loans and other nonsale credit.** In the case of a loan or extension of credit which is not a

[10] The disclosures required by this sentence need not be made with respect to interim student loans made pursuant to federally insured student loan programs under Public Law 89-329, Title IV Part B of the Higher Education Act of 1965, as amended.

credit sale, in addition to the items required to be disclosed under paragraph (b) of this section, the following items, as applicable, shall be disclosed:

(1) The amount of credit, excluding items set forth in paragraph (e) of this section, which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed."

(2) Any amount referred to in paragraph (e) of this section required to be excluded from the amount in subparagraph (1) of this paragraph, using, as applicable, the terms "prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term, "total prepaid finance charge and required deposit balance."

(3) Except in the case of a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling, the total amount of the finance charge,[11] with description of each amount included, using the term "finance charge."

(e) **Finance charge payable separately or withheld; required deposit balances.** The following amounts shall be disclosed and deducted in a credit sale in accordance with paragraph (c)(6) of this section, and in other extensions of credit shall be excluded from the amount disclosed under paragraph (d)(1) of this section, and shall be disclosed in accordance with paragraph (d)(2) of this section:

(1) Any finance charge paid separately, in cash or otherwise, directly or indirectly to the creditor or with the creditor's knowledge to another person, or withheld by the creditor from the proceeds of the credit extended.[12]

(2) Any deposit balance or any investment which the creditor requires the customer to make, maintain, or increase in a specified amount or proportion as a condition to the extension of credit except:

(i) An escrow account under paragraph (e)(3) of § 226.4,

(ii) A deposit balance which will be wholly applied toward satisfaction of the customer's obligation in the transaction,

(iii) A deposit balance or investment which was in existence prior to the extension of credit and which is offered by the customer as security for that extension of credit, and

(iv) A deposit balance or investment which was acquired or established from the proceeds of an extension of credit made for that purpose upon written request of the customer.

(f) **First lien to finance construction of dwelling.** In any case where a first lien or equivalent security interest in real property is retained or acquired by a creditor in connection with the financing of the initial construction of a dwelling, or in connection with a loan to satisfy that construction loan and provide permanent financing of that dwelling, whether or not the customer previously owned the land on which that dwelling is to be constructed, such security interest shall be considered a first lien against that dwelling to finance the purchase of that dwelling.

(g) **Orders by mail or telephone.** If a creditor receives a purchase order or a request for an extension of credit by mail, telephone, or written communication without personal solicitation, the disclosures required under this section may be made any time not later than the date the first payment is due, provided:

(1) In the case of credit sales, the cash price, the downpayment, the finance charge, the deferred payment price, the annual percentage rate, and the number, frequency, and amount of payments are set forth in or are determinable from the creditor's catalog or other printed material distributed to the public; or

(2) In the case of loans or other extensions of credit, the amount of the loan, the finance charge, the total scheduled payments, the number, frequency, and amount of payments, and the annual percentage rate for representative amounts or ranges of credit are set forth in or are determinable from the creditor's printed material distributed to the public, in the contract of loan, or in other printed material delivered or made available to the customer.

(h) **Series of sales.** If a credit sale is one of a series of transactions made pursuant to an agree-

[11] The disclosure required by this subparagraph need not be made with respect to interim student loans made pursuant to federally insured student loan programs under Public Law 89-329, Title IV Part B of the Higher Education Act of 1965, as amended.

[12] Finance charges deducted or excluded as provided by this paragraph shall, nevertheless, be included in determining the finance charge under § 226.4.

ment providing for the addition of the amount financed plus the finance charge for the current sale to an existing outstanding balance, then the disclosures required under this section for the current sale may be made at any time not later than the date the first payment for that sale is due, provided:

(1) The customer has approved in writing both the annual percentage rate or rates and the method of treating any unearned finance charge on an existing outstanding balance in computing the finance charge or charges; and

(2) The creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sale price including any finance charges attributable thereto. For the purposes of this subparagraph, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest priced shall be deemed first paid for.

(i) **Advances under loan commitments.** If a loan is one of a series of advances made pursuant to a written agreement under which a creditor is or may be committed to extend credit to a customer up to a specified amount, and the customer has approved in writing the annual percentage rate or rates, the method of computing the finance charge or charges, and any other terms, the agreement shall be considered a single transaction, and the disclosures required under this section at the creditor's option need be made only at the time the agreement is executed.

(j) **Refinancing, consolidating, or increasing.** If any existing extension of credit is refinanced, or two or more existing extensions of credit are consolidated, or an existing obligation is increased, such transaction shall be considered a new transaction subject to the disclosure requirements of this Part. For the purpose of such disclosure, any unearned portion of the finance charge which is not credited to the existing obligation shall be added to the new finance charge and shall not be included in the new amount financed. Any increase in an existing obligation to reimburse the creditor for undertaking the customer's obligation in perfecting, protecting or preserving the security shall not be considered a new transaction subject to this Part. Any advance for agricultural purposes made under an open end real estate mortgage or similar lien shall not be considered a new transaction subject to the disclosure requirements of this section, provided:

(1) The maturity of the advance does not exceed 2 years;

(2) No increase is made in the annual percentage rate previously disclosed; and

(3) All disclosures required by this Part were made at the time the security interest was acquired by the creditor or at any time prior to the first advance made on or following the effective date of this part.

(k) **Assumption of an obligation.** Any creditor who accepts a subsequent customer as an obligor under an existing obligation shall make the disclosures required by this part to that customer before he becomes so obligated. If the obligation so assumed is secured by a first lien or equivalent security interest on a dwelling, and the assumption is made for the subsequent customer to acquire that dwelling, that obligation shall be considered a loan made to finance the purchase of that dwelling.

(l) **Deferrals or extensions.** In the case of an obligation other than an obligation upon which the amount of the finance charge is determined by the application of a percentage rate to the unpaid balance, if the creditor imposes a charge or fee for deferral or extension, the creditor shall disclose to the customer

(1) The amount deferred or extended;

(2) The date to which, or the time period for which payment is deferred or extended; and

(3) The amount of the charge or fee for the deferral or extension.

(m) **Series of single payment obligations.** Any extension of credit involving a series of single payment obligations shall be considered a single transaction subject to the disclosure requirements of this Part.

(n) **Permissible periodic statements.** If a creditor transmits a periodic billing statement [13] other than a delinquency notice, payment coupon book, or payment passbook, or a statement, billing, or advice relating exclusively to amounts to be paid by the customer as escrows for payment of taxes, insurance, and water, sewer, and land rents, it shall be in a form which the customer may retain and shall set forth

[13] Any statement, notice, or reminder of payment due on any transaction payable in instalments which is mailed or delivered periodically to the customer in advance of the due date of the instalment shall be a periodic billing statement for the purpose of this paragraph.

(1) The annual percentage rate or rates; and

(2) The date by which, or the period, if any, within which payment must be made in order to avoid late payment or delinquency charges.

*(o) **Discount for prompt payment of sales transactions.** (1) For the purposes of this paragraph, a "transaction subject to § 226.8(o)" is a credit sale transaction which is not exempt under § 226.3 and which is subject to a discount for payment on or before a specified date (e.g. 2% discount if paid within 10 days) or to a charge for delaying payment after a specified date (e.g. $98 cash, $100 if paid in 30 days). Both such a discount and such a charge are referred to in this paragraph as a "discount." In the case of any transaction subject to § 226.8(o), notwithstanding the provisions of the last sentence of paragraph (a) of this section, the creditor shall disclose on the invoice or other evidence of such sale, as applicable:

(i) The date of the sale or invoice.

(ii) The rate of discount, the date by which or period within which the discount may be taken, and the date by which or period within which the full amount of the obligation is due and payable. (For example, "2%/10 days, net 30 days"; or "$1 per ton/10 days, net 30 days.")

(iii) The information required under § 226.8 (b)(4) and (5).

(iv) The amount of the discount, designated as a "finance charge," using that term.

(v) If the discount shown for prompt payment exceeds 5% of the obligation to which the discount relates, the "annual percentage rate," using that term, computed in accordance with subparagraph (2) of this paragraph, but subject to the exceptions provided under § 226.8 (b)(2).

(2) For the purposes of subparagraph (1)(v) of this paragraph, the annual percentage rate shall be determined by dividing the amount of the finance charge by the least amount payable in satisfaction of the obligation and multiplying the (quotient expressed as a percentage) by a fraction in which the numerator is 12, and the denominator is the number of whole months (but not less than 1) between the first day of the monthly billing cycle in which the transaction is consummated and the first day of the monthly billing cycle in which the obligation becomes due.[18a]

(3) In a transaction with multiple discount rates (for example 6%/10 days, 4%/20 days, net 30 days), the largest discount shall be used for purposes of disclosing the amount of the finance charge under subparagraph (1)(iv) of this paragraph and the annual percentage rate under subparagraph (1)(v) of this paragraph.[18b]

(4) In order to determine the applicability of subparagraph (1)(v) of this paragraph and to facilitate disclosure of an annual percentage rate, if the amount of the discount for prompt payment is related, pursuant to usual business practice, to weight, quantity, or other physical measure (e.g. $1 per ton or 1¢ per gallon) rather than expressed as a percentage of discount, that discount may be converted to an approximate discount rate and, under subparagraph (2) of this paragraph, a reasonably accurate approximation of the annual percentage rate by using approximate or projected prices per physical unit determined on the basis of past experience, current information, or projected analysis.[18c]

(5) If by its terms a transaction subject to § 226.8(o) is payable in a single payment and no finance charge other than a discount is or may be imposed, and such discount is not utilized for the purpose of circumvention or evasion of disclosure requirements, the disclosure required by subparagraph (1) of this paragraph shall constitute compliance with the requirements of § 226.8 and under § 226.9(a) shall constitute "all other material disclosures required under this Part."

(6) If a transaction subject to § 226.8(o) is debited to an open end credit account, disclosures shall be made as specified in subparagraph (1) of

* Amended in its present form August 11, 1969

[18a] For example, a $1,000 purchase of feed subject to terms of 6%/10 days, net 30 days (or 6%/10 days, net E.O.M.; or 6%/10 days, net 10th of the following month; or 6%/20 days, net 30 days; or 6%/30 days, net 30 days; or 6% discount for cash, net 30 days) results in a finance charge of $60, a least amount payable of $940, and an annual percentage rate of 76.56%, which may be rounded to 76.50% or 76½%. Terms of 6%/20 days, net September 29 applied to an April purchase, assuming a calendar month billing cycle, result in an annual percentage rate of 15.31% (i.e. 6/94 x 12/5) which may be rounded to 15.25% or 15¼%. In this example the 29 days in September are ignored and the denominator (5) is determined by the number of whole months in the period.

[18b] For example, terms of 6%/10 days, 4%/20 days, net 30 days would be treated like terms of 6%/10 days, net 30 days, which would represent an annual percentage rate of 76½%.

[18c] For example, if terms of $3 discount per ton/10 days, net 30 days are offered on fertilizer that is expected to sell in a range of about $48 to $52 per ton, the annual percentage rate could be approximated for preprinting as if it were 6% (i.e. $3 on $50)/10 days, net 30 days, that is, 76½%.

this paragraph and also as specified in § 226.7. The full amount of the obligation including the amount of the discount may be debited to the open end credit account, under § 226.7(b)(2), and the amount of any finance charge representing the discount need not be added to any other finance charge for the purpose of computing and disclosing the total amount of finance charge and the annual percentage rate under § 226.5(a) and § 226.7.[18d]

(7) If a transaction subject to § 226.8(o) is not debited to an open end credit account, but either is subject to an additional finance charge or is payable by its terms in more than one payment, disclosures shall be made as specified in subparagraph (1) of this paragraph and also as specified in paragraphs (b) and (c) of this section. In such a case, if the transaction is payable in more than one payment, the amount of the discount shall be deducted for the purpose of computing and disclosing the cash price under paragraph (c)(1) of this section and shall be added to any other finance charge for the purpose of computing and disclosing the amount of the finance charge under paragraph (c)(8)(i) of this section and the annual percentage rate under paragraph (b)(2) of this section.[18e] If the transaction is payable in a single payment, the discount may be disregarded in computing and disclosing such cash price, finance charge, and annual percentage rate.[18f]

(8) Notwithstanding the provisions of the second sentence of paragraph (a) of this section, the disclosures required under subparagraph (1) of this paragraph made on the invoice or other evidence of sale may be delivered subsequent to consummation of the transaction.

(9) Amended paragraph (o) of § 226.8 shall become effective August 11, 1969, but until March 1, 1970, any creditor may at his option use any printed forms which were prepared before such effective date in accordance with paragraph (o) of § 226.8 in effect at the time of such preparation.

[18d] For example, if a $1,000 sale on terms of 2%/10 days, net 30 days, is debited to an open end account on which 1% per month is charged, the periodic statement under § 226.7(b) (assuming no other transactions in the account) would show a previous balance of $1,000, a finance charge of $10, and an annual percentage rate of 12%.

[18e] For example, if a $1,000 sale on terms of 2%/10 days, net 30 days is subject to an add-on finance charge of $100 and is payable in instalments, the disclosures under § 226.8(b) and (c) would include a cash price of $980 and a finance charge of $120.

[18f] For example, if a $1,000 sale on August 2 not under an open end account is subject to terms of 2%/10 days, net 30 days, thereafter 8% per annum until December 1, the disclosures under § 226.8(b) and (c) would include a cash price of $1,000, a finance charge of $19.95, and an annual percentage rate of 8.00%.

SECTION 226.9—RIGHT TO RESCIND CERTAIN TRANSACTIONS

(a) **General rule.** Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the third business day [19] following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this Part, whichever is later, by notifying the creditor by mail, telegram, or other writing of his intention to do so. Notification by mail shall be considered given at the time mailed; notification by telegram shall be considered given at the time filed for transmission; and notification by other writing shall be considered given at the time delivered to the creditor's designated place of business.

(b) **Notice of opportunity to rescind.** Whenever a customer has the right to rescind a transaction under paragraph (a) of this section, the creditor shall give notice of that fact to the customer by furnishing the customer with two copies of the notice set out below, one of which may be used by the customer to cancel the transaction. Such notice shall be printed in capital and lower case letters of not less than 12 point bold-faced type on one side of a separate statement which identifies the transaction to which it relates. Such statement shall also set forth the entire paragraph (d) of this section, "Effect of rescission." If such paragraph appears on the reverse side of the statement, the face of the statement shall state: "See reverse side for important information about your right of rescission." Before furnishing copies of the notice to the customer, the creditor shall complete both copies with the name of the creditor, the address of the creditor's place of business, the

[19] For the purposes of this section, a business day is any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving, and Christmas.

date of consummation of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the customer may give notice of cancellation.

Notice to customer required by Federal law:

You have entered into a transaction on (date) **which may result in a lien, mortgage, or other security interest on your home. You have a legal right under Federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying**

(Name of creditor)

at (Address of creditor's place of business) **by mail or telegram sent not later than midnight of** (date) **. You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.**

I hereby cancel this transaction.

(date) (customer's signature)

(c) **Delay of performance.** Except as provided in paragraph (e) of this section, the creditor in any transaction subject to this section shall not perform, or cause or permit the performance of, any of the following actions until after the rescission period has expired and he has reasonably satisfied himself that the customer has not exercised his right of rescission:

(1) Disburse any money other than in escrow;

(2) Make any physical changes in the property of the customer;

(3) Perform any work or service for the customer; or

(4) Make any deliveries to the residence of the customer if the creditor has retained or will acquire a security interest other than one arising by operation of law.

(d) **Effect of rescission.** When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.

(e) **Waiver of right of rescission.** A customer may modify or waive his right to rescind a transaction subject to the provisions of this section provided:

(1) The extension of credit is needed in order to meet a bona fide immediate personal financial emergency of the customer;

(2) The customer has determined that a delay of 3 business days in performance of the creditor's obligation under the transaction will jeopardize the welfare, health or safety of natural persons or endanger property which the customer owns or for which he is responsible; and

(3) The customer furnishes the creditor with a separate dated and signed personal statement describing the situation requiring immediate remedy and modifying or waiving his right of rescission. The use of printed forms for this purpose is prohibited.

(f) **Joint ownership.** For the purpose of this

section, "customer" shall include two or more customers where joint ownership is involved, and the following shall apply:

(1) The right of rescission of the transaction may be exercised by any one of them, in which case the effect of rescission in accordance with paragraph (d) of this section applies to all of them; and

(2) Any waiver of the right of rescission provided in paragraph (e) of this section is invalid unless signed by all of them.

(g) **Exceptions to general rule.** This section does not apply to:

(1) The creation, retention, or assumption of a first lien or equivalent security interest to finance the acquisition of a dwelling in which the customer resides or expects to reside.

(2) A security interest which is a first lien retained or acquired by a creditor in connection with the financing of the initial construction of the residence of the customer, or in connection with a loan committed prior to completion of the construction of that residence to satisfy that construction loan and provide permanent financing of that residence, whether or not the customer previously owned the land on which that residence is to be constructed.

(3) Any lien by reason of its subordination at any time subsequent to its creation, if that lien was exempt from the provisions of this section when it was originally created.

(4) Any advance for agricultural purposes made pursuant to paragraph (j) of § 226.8 under an open end real estate mortgage or similar lien, provided the disclosure required under paragraph (b) of this section was made at the time the security interest was acquired by the creditor or at any time prior to the first advance made on or following the effective date of this Part.

SECTION 226.10—ADVERTISING CREDIT TERMS

(a) **General rule.** No advertisement to aid, promote, or assist directly or indirectly any extension of credit may state

(1) That a specific amount of credit or instalment amount can be arranged unless the creditor usually and customarily arranges or will arrange credit amounts or instalments for that period and in that amount; or

(2) That no downpayment or that a specified downpayment will be accepted in connection with any extension of credit, unless the creditor usually and customarily accepts or will accept downpayments in that amount.

(b) **Catalogs and multi-page advertisements.** If a catalog or other multiple-page advertisement sets forth or gives information in sufficient detail to permit determination of the disclosures required by this section in a table or schedule of credit terms, such catalog or multiple-page advertisement shall be considered a single advertisement provided:

(1) The table or schedule and the disclosures made therein are set forth clearly and conspicuously, and

(2) Any statement of credit terms appearing in any place other than in that table or schedule of credit terms clearly and conspicuously refers to the page or pages on which that table or schedule appears, unless that statement discloses all of the credit terms required to be stated under this section. For the purpose of this subparagraph, cash price is not a credit term.

(c) **Advertising of open end credit.** No advertisement to aid, promote, or assist directly or indirectly the extension of open end credit may set forth any of the terms described in paragraph (a) of § 226.7, the Comparative Index of Credit Cost, or that no downpayment, a specified downpayment, or a specified periodic payment is required or any of the following items unless it also clearly and conspicuously sets forth all the following items in terminology prescribed under paragraph (b) of §226.7.:

(1) An explanation of the time period, if any, within which any credit extended may be paid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge may be imposed.

(3) The method of determining the amount of the finance charge, including the determination of any minimum, fixed, check service, transaction, activity, or similar charge, which may be imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(6) The minimum periodic payment required.

(d) **Advertising of credit other than open end.** No advertisement to aid, promote, or assist directly or indirectly any credit sale including the sale of residential real estate, loan, or other extension of credit, other than open end credit, subject to the provisions of this Part, shall state

(1) The rate of a finance charge unless it states the rate of that charge expressed as an "annual percentage rate," using that term;

(2) The amount of the downpayment required or that no downpayment is required, the amount of any instalment payment, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless it states all of the following items in terminology prescribed under § 226.8:

(i) the cash price or the amount of the loan, as applicable.

(ii) the amount of the downpayment required or that no downpayment is required as applicable.

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended.

(iv) the amount of the finance charge expressed as an annual percentage rate. The exemptions from disclosure of an annual percentage rate permitted in paragraph (b)(2) of § 226.8 shall not apply to this subdivision.

(v) Except in the case of the sale of a dwelling or a loan secured by a first lien on a dwelling to purchase that dwelling, the deferred payment price or the sum of the payments, as applicable.

SECTION 226.11—COMPARATIVE INDEX OF CREDIT COST FOR OPEN END CREDIT

(a) **General rule.** Any creditor who elects to disclose the Comparative Index of Credit Cost on open end credit accounts

(1) Shall compute the Comparative Index of Credit Cost in accordance with paragraph (b) of this section.

(2) Shall recompute the Comparative Index of Credit Cost in accordance with paragraph (b) of this section based upon any new open end credit account terms to be adopted and shall disclose the new Comparative Index of Credit Cost in accordance with paragraph (c)(2) of this section concurrently with the notice required under paragraph (e) of § 226.7.

(3) Shall, when making such disclosure under the provisions of subparagraphs (a)(5) and (b)(7) of § 226.7, make the disclosure to all open end credit account customers; and

(4) Shall not utilize such disclosure so as to mislead, or confuse the customer or contradict, obscure, or detract attention from the required disclosures.

(b) **Computation of Comparative Index of Credit Cost.** The Comparative Index of Credit Cost for each open end credit plan shall be computed by applying the creditor's terms of that plan to the following hypothetical factors:

(1) A single transaction in the amount of $100 is debited on the first day of a billing cycle to an open end credit account having no previous balance.

(2) The creditor imposes all finance charges including periodic, fixed, minimum or other charges applicable to such account in amounts and on dates consistent with his policy of imposing such charges upon open end credit accounts.

(3) The exact amount of the required minimum periodic payment is paid on the last day of each subsequent and successive billing cycle until the amount of the single transaction, together with applicable finance charges, is paid in full.

(4) The Comparative Index of Credit Cost shall be expressed and disclosed as a percentage accurate to the nearest quarter of 1 per cent and shall be determined by dividing the total amount of the finance charges imposed by the sum of the daily balances and multiplying the quotient so obtained (expressed as a percentage) by 365.

(c) **Form of disclosure.** Any creditor who elects to disclose the Comparative Index of Credit Cost shall:

(1) Make the disclosure in the form of the following statement: "Our Comparative Index of Credit Cost under the terms of our open end credit account plan is ___% per year, computed on the basis of a single transaction of $100 debited on the first day of a billing cycle to an account having no previous balance, and paid in required minimum consecutive instalments on the last day

of each succeeding billing cycle until the transaction and all finance charges are paid in full. The actual percentage cost of credit on your account may be higher or lower depending on the dates and amounts of charges and payments."

(2) Disclose any newly computed Comparative Index of Credit Cost in the form of the statement prescribed in subparagraph (1) of this paragraph, except that the statement shall be preceded by the words "Effective as of (date) ," and the words "will be" shall be substituted for the word "is" in the second line of the statement.

SECTION 226.12—EXEMPTION OF CERTAIN STATE REGULATED TRANSACTIONS

(a) **Exemption for State regulated transactions.** In accordance with the provisions of Supplement II to Regulation Z (§ 226.12—Supplement), any State may make application to the Board for exemption of any class of transactions within that State from the requirements of Chapter 2 of the Act and the corresponding provisions of this Part: *Provided*, That

(1) Under the law of that State, that class of transactions is subject to requirements substantially similar to those imposed under Chapter 2 of the Act and the corresponding provisions of this Part; and

(2) There is adequate provision for enforcement.

(b) **Procedures and criteria.** On or before July 1, 1969, the Board will promulgate and publish Supplement II to Regulation Z (§ 262.12—Supplement) in which will be set forth, as established by the Board, the procedures and criteria under which any State may apply for the determination provided for in paragraph (a) of this section. Upon publication of Supplement II of Regulation Z application may be made to the Board for such determination.

(j) The term "State" refers to any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(k) Any reference to any requirement imposed under this title or any provision thereof includes reference to the regulations of the Board under this title or the provision thereof in question.

(l) The disclosure of an amount or percentage which is greater than the amount or percentage required to be disclosed under this title does not in itself constitute a violation of this title.

§ 104. Exempted transactions

This title does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes, or to government or governmental agencies or instrumentalities, or to organizations.

(2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.

(3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds $25,000.

(4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

§ 105. Regulations

The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

§ 106. Determination of finance charge

(a) Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

(b) Charges or premiums for credit life, accident, or health insurance written in connection with any consumer credit transaction shall be included in the finance charge unless

(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and

(2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.

(c) Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained.

(d) If any of the following items is itemized and disclosed in accordance with the regulations of the Board in connection with any transaction, then the creditor need not include that item in the computation of the finance charge with respect to that transaction:

(1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.

(2) The premium payable for any insur-

STATUTORY APPENDIX

Titles I and V of Act of May 29, 1968

§ 1. Short title of entire Act

This Act may be cited as the Consumer Credit Protection Act.

TITLE I—CONSUMER CREDIT COST DISCLOSURE

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CHAPTER 1—GENERAL PROVISIONS

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§ 101. Short title

This title may be cited as the Truth in Lending Act.

§ 102. Findings and declaration of purpose

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

§ 103. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this title.

(b) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(c) The term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(d) The term "person" means a natural person or an organization.

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this title apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

(i) The term "open end credit plan" refers to a plan prescribing the terms of credit transactions which may be made thereunder from time to time and under the terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder.

ance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in paragraph (1) which would otherwise be payable.

(3) Taxes.

(4) Any other type of charge which is not for credit and the exclusion of which from the finance charge is approved by the Board by regulation.

(e) The following items, when charged in connection with any extension of credit secured by an interest in real property, shall not be included in the computation of the finance charge with respect to that transaction:

(1) Fees or premiums for title examination, title insurance, or similar purposes.

(2) Fees for preparation of a deed, settlement statement, or other documents.

(3) Escrows for future payments of taxes and insurance.

(4) Fees for notarizing deeds and other documents.

(5) Appraisal fees.

(6) Credit reports.

§ 107. Determination of annual percentage rate

(a) The annual percentage rate applicable to any extension of consumer credit shall be determined, in accordance with the regulations of the Board,

(1) in the case of any extension of credit other than under an open end credit plan, as

(A) that nominal annual percentage rate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed, calculated according to the actuarial method of allocating payments made on a debt between the amount financed and the amount of the finance charge, pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed; or

(B) the rate determined by any method prescribed by the Board as a method which materially simplifies computation while retaining reasonable accuracy as compared with the rate determined under subparagraph (A).

(2) in the case of any extension of credit under an open end credit plan, as the quotient (expressed as a percentage) of the total finance charge for the period to which it relates divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year.

(b) Where a creditor imposes the same finance charge for balances within a specified range, the annual percentage rate shall be computed on the median balance within the range, except that if the Board determines that a rate so computed would not be meaningful, or would be materially misleading, the annual percentage rate shall be computed on such other basis as the Board may by regulation require.

(c) The annual percentage rate may be rounded to the nearest quarter of 1 per centum for credit transactions payable in substantially equal installments when a creditor determines the total finance charge on the basis of a single add-on, discount, periodic, or other rate, and the rate is converted into an annual percentage rate under procedures prescribed by the Board.

(d) The Board may authorize the use of rate tables or charts which may provide for the disclosure of annual percentage rates which vary from the rate determined in accordance with subsection (a)(1)(A) by not more than such tolerances as the Board may allow. The Board may not allow a tolerance greater than 8 per centum of that rate except to simplify compliance where irregular payments are involved.

(e) In the case of creditors determining the annual percentage rate in a manner other than as described in subsection (c) or (d), the Board may authorize other reasonable tolerances.

(f) Prior to January 1, 1971, any rate required under this title to be disclosed as a percentage rate may, at the option of the creditor, be expressed in the form of the corresponding ratio of dollars per hundred dollars.

§ 108. Administrative enforcement

(a) Compliance with the requirements imposed under this title shall be enforced under

(1) section 8 of the Federal Deposit Insurance Act, in the case of

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Re-

serve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 5(d) of the Home Owners' Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) the Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

(b) For the purpose of the exercise by any agency referred to in subsection (a) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this title shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this title, any other authority conferred on it by law.

(c) Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under subsection (a), the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

(d) The authority of the Board to issue regulations under this title does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this title.

§ 109. Views of other agencies

In the exercise of its functions under this title, the Board may obtain upon request the views of any other Federal agency which, in the judgment of the Board, exercises regulatory or supervisory functions with respect to any class of creditors subject to this title.

§ 110. Advisory committee

The Board shall establish an advisory committee to advise and consult with it in the exercise of its functions under this title. In appointing the members of the committee, the Board shall seek to achieve a fair representation of the interests of sellers of merchandise on credit, lenders, and the public. The committee shall meet from time to time at the call of the Board, and members thereof shall be paid transportation expenses and not to exceed $100 per diem.

§ 111. Effect on other laws

(a) This title does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title or regulations thereunder, and then only to the extent of the inconsistency.

(b) This title does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this

title extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.

(c) In any action or proceeding in any court involving a consumer credit sale, the disclosure of the annual percentage rate as required under this title in connection with that sale may not be received as evidence that the sale was a loan or any type of transaction other than a credit sale.

(d) Except as specified in sections 125 and 130, this title and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

§ 112. Criminal liability for willful and knowing violation

Whoever willfully and knowingly

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this title or any regulation issued thereunder,

(2) uses any chart or table authorized by the Board under section 107 in such a manner as to consistently understate the annual percentage rate determined under section 107 (a)(1)(A), or

(3) otherwise fails to comply with any requirement imposed under this title,

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

§ 113. Penalties inapplicable to governmental agencies

No civil or criminal penalty provided under this title for any violation thereof may be imposed upon the United States or any agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision.

§ 114. Reports by Board and Attorney General

Not later than January 3 of each year after 1969, the Board and the Attorney General shall, respectively, make reports to the Congress concerning the administration of their functions under this title, including such recommendations as the Board and the Attorney General, respectively, deem necessary or appropriate. In addition, each report of the Board shall include its assessment of the extent to which compliance with the requirements imposed under this title is being achieved.

[U.S.C., title 15, sec. 1601-1613.]

CHAPTER 2—CREDIT TRANSACTIONS

Sec.

121. General requirement of disclosure.
122. Form of disclosure; additional information.
123. Exemption for State-regulated transactions.
124. Effect of subsequent occurrence.
125. Right of rescission as to certain transactions.
126. Content of periodic statements.
127. Open end consumer credit plans.
128. Sales not under open end credit plans.
129. Consumer loans not under open end credit plans.
130. Civil liability.
131. Written acknowledgment as proof of receipt.

§ 121. General requirement of disclosure

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this chapter.

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this chapter to more than one of them.

§ 122. Form of disclosure; additional information

(a) Regulations of the Board need not require that disclosures pursuant to this chapter be made in the order set forth in this chapter, and may permit the use of terminology different from that employed in this chapter if it conveys substantially the same meaning.

(b) Any creditor may supply additional information or explanations with any disclosures required under this chapter.

§ 123. Exemption for State-regulated transactions

The Board shall by regulation exempt from the requirements of this chapter any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this chapter, and that there is adequate provision for enforcement.

§ 124. Effect of subsequent occurrence

If information disclosed in accordance with this chapter is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this chapter.

§ 125. Right of rescission as to certain transactions

(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this chapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

(b) When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

(c) Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this title by a person to whom a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) This section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling.

§ 126. Content of periodic statements

If a creditor transmits periodic statements in connection with any extension of consumer credit other than under an open end consumer credit plan, then each of those statements shall set forth each of the following items:

(1) The annual percentage rate of the total finance charge.

(2) The date by which, or the period (if any) within which, payment must be made in order to avoid additional finance charges or other charges.

(3) Such of the items set forth in section 127(b) as the Board may by regulation require as appropriate to the terms and conditions under which the extension of credit in question is made.

§ 127. Open end consumer credit plans

(a) Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including the time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) If the creditor so elects,

(A) the average effective annual percentage rate of return received from accounts under the plan for a representative period of time; or

(B) whenever circumstances are such that the computation of a rate under subparagraph (A) would not be feasible or practical, or would be misleading or meaningless, a projected rate of return to be received from accounts under the plan.

The Board shall prescribe regulations, consistent with commonly accepted standards for accounting or statistical procedures, to carry out the purposes of this paragraph.

(6) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(7) The conditions under which the creditor may retain or acquire any security interest in any property to secure the payment of any credit extended under the plan, and a description of the interest or interests which may be so retained or acquired.

(b) The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the statement period.

(2) The amount and date of each extension of credit during the period, and, if a purchase was involved, a brief identification (unless previously furnished) of the goods or services purchased.

(3) The total amount credited to the account during the period.

(4) The amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge.

(5) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and, unless the annual percentage rate (determined under section 107(a)(2)) is required to be disclosed pursuant to paragraph (6), the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(6) Where the total finance charge exceeds 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, the total finance charge expressed as an annual percentage rate (determined under section 107(a)(2)), except that if the finance charge is the sum of two or more products of a rate times a portion of the balance, the creditor may, in lieu of disclosing a single rate for the total charge, disclose each such rate expressed as an annual percentage rate, and the part of the balance to which it is applicable.

(7) At the election of the creditor, the average effective annual percentage rate of return (or the projected rate) under the plan as prescribed in subsection (a)(5).

(8) The balance on which the finance charge was computed and a statement of how the balance was determined. If the balance is determined without first deducting all credits during the period, that fact and the amount of such payments shall also be disclosed.

(9) The outstanding balance in the account at the end of the period.

(10) The date by which, or the period (if any) within which, payment must be made to avoid additional finance charges.

(c) In the case of any open end consumer credit plan in existence on the effective date of this subsection, the items described in subsection (a), to the extent applicable, shall be disclosed in a notice mailed or delivered to the obligor not later than thirty days after that date.

§ 128. Sales not under open end credit plans

(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount re-

ferred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

(b) Except as otherwise provided in this chapter, the disclosures required under subsection (a) shall be made before the credit is extended, and may be made by disclosing the information in the contract or other evidence of indebtedness to be signed by the purchaser.

(c) If a creditor receives a purchase order by mail or telephone without personal solicitation, and the cash price and the deferred payment price and the terms of financing, including the annual percentage rate, are set forth in the creditor's catalog or other printed material distributed to the public, then the disclosures required under subsection (a) may be made at any time not later than the date the first payment is due.

(d) If a consumer credit sale is one of a series of consumer credit sales transactions made pursuant to an agreement providing for the addition of the deferred payment price of that sale to an existing outstanding balance, and the person to whom the credit is extended has approved in writing both the annual percentage rate or rates and the method of computing the finance charge or charges, and the creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sales price including any finance charges attributable thereto, then the disclosure required under subsection (a) for the particular sale may be made at any time not later than the date the first payment for that sale is due. For the purposes of this subsection, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest priced shall be deemed first paid for.

§ 129. Consumer loans not under open end credit plans

(a) Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

(1) The amount of credit of which the obligor will have the actual use, or which is or will be paid to him or for his account or to another person on his behalf.

(2) All charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge.

(3) The total amount to be financed (the sum of the amounts referred to in paragraph (1) plus the amounts referred to in paragraph (2)).

(4) Except in the case of a loan secured by a first lien on a dwelling and made to finance the purchase of that dwelling, the amount of the finance charge.

(5) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an extension of consumer

credit not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an extension of consumer credit exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(6) The number, amount, and the due dates or periods of payments scheduled to repay the indebtedness.

(7) The default, delinquency, or similar charges payable in the event of late payments.

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

(b) Except as otherwise provided in this chapter, the disclosures required by subsection (a) shall be made before the credit is extended, and may be made by disclosing the information in the note or other evidence of indebtedness to be signed by the obligor.

(c) If a creditor receives a request for an extension of credit by mail or telephone without personal solicitation and the terms of financing, including the annual percentage rate for representative amounts of credit, are set forth in the creditor's printed material distributed to the public, or in the contract of loan or other printed material delivered to the obligor, then the disclosures required under subsection (a) may be made at any time not later than the date the first payment is due.

§ 130. Civil liability

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

(b) A creditor has no liability under this section if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed.

(c) A creditor may not be held liable in any action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Any action which may be brought under this section against the original creditor in any credit transaction involving a security interest in real property may be maintained against any subsequent assignee of the original creditor where the assignee, its subsidiaries, or affiliates were in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment, unless the assignment was involuntary, or the assignee shows by a preponderance of evidence that it did not have reasonable grounds to believe that the original creditor was engaged in violations of this chapter, and that it maintained procedures reasonably adapted to apprise it of the existence of any such violations.

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

§ 131. Written acknowledgment as proof of receipt

Except as provided in section 125(c) and except in the case of actions brought under section 130(d), in any action or proceeding by or against any subsequent assignee of the original creditor without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to this title shall be conclusive proof of the delivery thereof and, unless the violation is apparent on the face of the statement, of compliance with this chapter. This section does not affect the rights of the obligor in any action against the original creditor.

[U.S.C., title 15, sec. 1631-1641.]

CHAPTER 3—CREDIT ADVERTISING

Sec.
141. Catalogs and multiple-page advertisements.
142. Advertising of downpayments and installments.
143. Advertising of open end credit plans.
144. Advertising of credit other than open end plans.
145. Nonliability of media.

§ 141. Catalogs and multiple-page advertisements

For the purposes of this chapter, a catalog or other multiple-page advertisement shall be considerd a single advertisement if it clearly and conspicuously displays a credit terms table on which the information required to be stated under this chapter is clearly set forth.

§ 142. Advertising of downpayments and installments

No advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit may state

(1) that a specific periodic consumer credit amount or installment amount can be arranged, unless the creditor usually and customarily arranges credit payments or installments for that period and in that amount.

(2) that a specified downpayment is required in connection with any extension of consumer credit, unless the creditor usually and customarily arranges downpayments in that amount.

§ 143. Advertising of open end credit plans

No advertisement to aid, promote, or assist directly or indirectly the extension of consumer credit under an open end credit plan may set forth any of the specific terms of that plan or the appropriate rate determined under section 127(a)(5) unless it also clearly and conspicuously sets forth all of the following items:

(1) The time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where periodic rates may be used to compute the finance charge, the periodic rates expressed as annual percentage rates.

(5) Such other or additional information for the advertising of open end credit plans as the Board may by regulation require to provide for adequate comparison of credit costs as between different types of open end credit plans.

§ 144. Advertising of credit other than open end plans

(a) Except as provided in subsection (b), this section applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit sale, loan, or other extension of credit subject to the provisions of this title, other than an open end credit plan.

(b) The provisions of this section do not apply to advertisements of residential real estate except to the extent that the Board may by regulation require.

(c) If any advertisement to which this section applies states the rate of a finance charge, the advertisement shall state the rate of that charge expressed as an annual percentage rate.

(d) If any advertisement to which this section applies states the amount of the downpayment, if any, the amount of any installment payment, the dollar amount of any finance charge, or the number of installments or the period of repayment, then the advertisement shall state all of the following items:

(1) The cash price or the amount of the loan as applicable.

(2) The downpayment, if any.

(3) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended.

(4) The rate of the finance charge expressed as an annual percentage rate.

§ 145. Nonliability of media

There is no liability under this chapter on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated.

[U.S.C., title 15, sec. 1661-1665.]

* * *

TITLE V—GENERAL PROVISIONS

Sec.
501. Severability.
502. Captions and catchlines for reference only.
503. Grammatical usages.
504. Effective dates.

§ 501. Severability

If a provision enacted by this Act is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision enacted by this Act is held invalid in one more of its applications, the provision remains in effect in all valid applications that are severable from the invalid application or applications.

§ 502. Captions and catchlines for reference only

Captions and catchlines are intended solely as aids to convenient reference, and no inference as to the legislative intent with respect to any provision enacted by this Act may be drawn from them.

§ 503. Grammatical usages

In this Act:

(1) The word "may" is used to indicate that an action either is authorized or is permitted.

(2) The word "shall" is used to indicate that an action is both authorized and required.

(3) The phrase "may not" is used to indicate that an action is both unauthorized and forbidden.

(4) Rules of law are stated in the indicative mood.

§ 504. Effective dates

(a) Except as otherwise specified, the provisions of this Act take effect upon enactment.

(b) Chapters 2 and 3 of title I take effect on July 1, 1969.

(c) Title III takes effect on July 1, 1970.

[U.S.C., title 15, sec. 1601 note.]

NOTES

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NOTES

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

COMMENTS MADE AT HEARING OF
HB 497
4:00 P.M. February 23, 1970
By Richard T. Hall

In developing the bank credit card for Alaska, we did so because we were constantly asked for such a program by the consumer over the past three to four years. Bank credit cards became prevelant throughout the lower 48 states and have such wide acceptability that both the existing citizens of the state and the new comers are desiring such a card. In addition, the merchants throughout the state were extremely desirous of the bank credit card in order to offer their customers the choice of a credit or cash sale. We did not feel that our bank could initiate a program statewide that would be able to reach a great enough market to make it pay. However, after a thorough and extensive survey and study, we felt a program could be initiated statewide that would reach a break-even point sometime approximately two years after inception of the program.

We developed the program as it is today using BankAmericard, which we feel is the finest bank credit card system in the world today. It offers the complete spectrum of a credit card program with its various facets to the people to Alaska and their tremendous endorsement of the program speaks for their acceptance.

At the present time, Alaska BankAmericard has over 22,000 cardholders. These are adults, responsible citizens of the state, that were picked on strict criteria based on their ability to handle credits. Following Alaska law, we did not mail unsolicited cards, but rather wrote letters to people we felt were qualified to receive the cards, asking them to directly solicit a card from us. The response was terrific. At this point, I should mention too, that one of the major objections voiced elsewhere on bank credit cards has been the fact the potential cardholder assumes a liability if his card is lost or stolen. However, Alaska BankAmericard does not either imply or in practice create any liability to the cardholder for a lost or stolen card.

Another criticism voiced recently about credit cards in the south 48 is that they tend to have an inflationary effect. I can only say that our research indicates that this is not so. The recent speach by Mr. Andrew Brimer, a member of the Federal Reserve Board, which made an extensive survey of all bank credit cards, indicates that their findings do not lead them to believe that bank credit cards are inflationary. The report indicates that bank credit cards are creating a shifting of credit from one type to another.

1. This bill presumes that all merchants on a credit card program change their prices to absorb the cost of the credit card program. This is not a valid argument for the following reasons:

a) If merchants changed their price they would no longer be competetive.

b) The merchant pays for and gets a full credit card program through the bank at a rate much less than the cost of major retail department store credit operations. According to a 1968 study of the National Retail Merchants Association, the cost of major retail department store credit operations was set at 7.77% of the total credit sales.

2. A person asking for the cash discount from the merchant assumes that all persons will be carrying a bank credit card and all customers will have the choice of purchasing either with cash or with a bank credit card. In actuallity, statistics show that even after several years of a successful credit card operation, a merchant can only expect 30% of his sales to be credit sales.

3. House Bill 497 also assumes that a retail merchant will have sold the same volume of sales with or without the bank credit card. In actuallity, the bank credit card allows the small retail merchant to expand his sales by offering a credit option to his customers. It allows him for once, particularly in Alaska, to compete favorably with the large retail merchants who have their owen credit programs. To pass this bill would put the small merchant back in the same position he has always had in Alaska and that is not being able to offer a credit program to his customers and not being able to effectively compete with the larger retail outlets.

In addition, there is proof that bank credit cards are sought by the merchant to expand sales [redacted] many times, and this is true in Alaska. We have signed merchants that already have and have retained their own credit operation after signing with BankAmericard. They have signed because they recognize that BankAmericard in Alaska can expand their sales. It is therefore, then, the expansion of the sales that allows them to absorb the cost of the credit card program.

4. Now let's take a look at the merits of the program to the merchant that offset the merchant discounts.

a) Immediately can turn his receivables into cash.

b) He can offer a complete credit card program to his customers with no liability of loss to himself.

5. Let's take a look at the merits of the program from the consumer standpoint.

a) Since BankAmericard in Alaska allows the cardholder the option of properly budgeting his monthly expenses rather than having to suffer a month of high expenses, the cardholder can more effectively budget his income.

b) For reasons mentioned above, the customer does not pay additional for his merchandise by the use of his card.

c) Not only is this card usable within the State of Alaska but it gives the cardholder the option of shopping at over 1,000,000 outlets on a world wide basis.

d) The cardholder, as stated in the original agreement form, is not liable should his card be lost or stolen. This is not always true of other credit cards.

6. Proof of the pudding - have the merchants and consumers of Alaska accepted the program?

a) As of February 2, 1970 there were over 22,000 cardholders in Alaska. Also it should be remembered that these people had to ask for the card and most had to send back a legal acceptance card as prescribed by Alaska statute 06.05.209.

b) Over 825 merchants have signed up for the program and the number continues to grow daily.

c) Are the card holders using the card? As of February 12, there was over $1,400,000.00 outstanding on the system.

d) It should also be remembered that all banks in Alaska were asked to join the program. Seven out of 10 banks in Alaska chose the program. This program is designed to provide credit to the small credit user or consumer who previously did not have such credit available.

7. What would be the effect of passage of House Bill #497?

Passage of house bill #497 would gut the BankAmericard program in Alaska. Obviously no merchant could afford to discount over half of his sales that were made on the basis of cash. This means that we would go back to being the only state not having the availability of an international credit card program such as provided by the BankAmericard program.

Also, other forms of credit cards would be prohibited from operating within Alaska. This would include Carte Blanche, American Express, Diner's Club, Select and others. I do not believe that the people of Alaska desire to be discriminated against by the careless passage of such a bill.

M E M O R A N D U M

TEM February 20, 1970.

Re: Credit Card Bill Pending
Before Alaska Legislature

I understand that there is a bill pending in the Alaska Legislature which would require a merchant who honors a credit card and sells the underlying obligation to a credit card issuer at a discount to sell, with respect to a similar transaction involving a non-credit card purchase, the goods or services at a price equal to the net proceeds received by the merchant in the credit card transaction. For example, if an item sells for $100, and if the discount is 3%, the net proceeds to the merchant in a credit card sale involving that item equals $97, and the proposed legislation would require the merchant to offer that item for sale in a non-credit card sale at a price of $97. Passage of this legislation would create significant problems for merchants under the Truth in Lending Act and Regulation Z.

Section 226.2(i) of the Regulation defines "cash price" as "the price at which the creditor offers, in the ordinary course of business, to sell for cash the property or services which are the subject of a consumer credit transaction." Under the proposed legislation, in the context of the example given above, the cash price would appear to be $97. The price paid by the credit card holder would, however, be $100. Under Section 226.4(a) of the Regulation, the

extra $3 which the credit card holder pays would be classified as a finance charge.

Under Section 226.2(f) to "arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service or has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit." This section further specifically provides that it does not include honoring a credit card or similar device where no finance charge is imposed at the time of that transaction. Because, as set forth above, the merchant in the example given will have imposed a finance charge, the merchant does not come within the exclusion. Therefore, the merchant is a person who "arranges for the extension of credit." This makes the merchant a "creditor" under the Regulation because under Section 226.2(m) thereof, the term "creditor" is defined as "a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit."

Under the definitions of "consumer credit" and "credit" set forth in Section 226.2 of the Regulation, since the merchant is a creditor, the sales transaction becomes a consumer credit

transaction. Therefore, the merchant would be required under the Regulation to give a Truth in Lending Disclosure Statement. This would be in addition to the open-end credit disclosure statement that would have been given by the credit card issuer to the cardholder prior to the use of the credit card.

The form of required disclosure is set forth in Section 226.8(d) of the Regulation. Basically, the form of disclosure is a loan disclosure under Section 226.8(d). The annual percentage rate to be disclosed would be determined by dividing the amount of finance charge by the amount financed and multiplying the quotient (expressed as a percentage) by 12. In the example given above, the rate would be approximately 37%.

In addition, since it is clear that both the credit card issuer and the merchant are "creditors" as defined in the Regulation, Section 226.6(d) of the Regulation, which deals with multiple creditors, would be applicable.

The application of the Regulation as a whole to this type of hybrid transaction is extremely difficult to clearly ascertain. The risks of non-compliance with Regulation Z are enormous.

It is open to question whether any kind of compliance with Regulation Z would be possible in cases involving a merchant who accepted various types of credit cards under plans involving different discounts. Regulation Z provides no clue as how the "cash price" would be determined in such a situation.

This memorandum is not intended to be a detailed analysis of the problems involved because time does not permit. The problems are, however, overwhelming.

Thomas E. Montgomery
Counsel

BANK OF AMERICA NATIONAL TRUST AND
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NEW HORIZONS IN CREDIT CARD BANKING

Remarks By

Andrew F. Brimmer
Member
Board of Governors of the
Federal Reserve System

Before the

Seattle Clearing House Association

At the

Rainier Club
Seattle, Washington

September 23, 1969

NEW HORIZONS IN CREDIT CARD BANKING

by

Andrew F. Brimmer*

In the summer of 1968, the Federal Reserve Board published a comprehensive assessment of bank credit cards. Since then, the expansion of bank credit card programs has continued at a rapid pace. Even so, some features of credit card banking that were of concern during the period prior to the System study are still attracting considerable attention, not only in the nation's press, but also among members of Congress and within Government regulatory agencies.

The System Task Force that was established by the Federal Reserve Board in the Spring of 1967 -- and whose report was released just over a year ago -- explored quite thoroughly the implications of the growth of bank credit cards for consumers, merchants, the banking system, bank supervision, and the management of monetary policy. I was the Board member most closely identified with that study.

We have just completed a review of the bank credit card situation to determine whether recent developments warrant any change in the earlier assessment. This review has included an analysis of recent trends in credit card banking, a survey by the Federal Reserve Banks of the mailing procedures used in the launching of new credit card plans and an analysis of bank

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*Member, Board of Governors of the Federal Reserve System. I am grateful to a large number of persons in the Federal Reserve System for assistance in the preparation of these remarks. I am particularly indebted to the following members of the Board's staff: Tynan Smith, Brenton C. Leavitt, David Hull, Katharyne Reil, and N. Edwin Demoney, Jr. Jerome W. Shay helped with the discussion of antitrust implications of bank credit cards.

examination reports over the last year to determine the extent to which State member banks are following the guidelines on credit card operations suggested by the Board as a result of our earlier study. Our review has also had the benefit of the preliminary results of the Federal Reserve Board's Survey of Consumer Awareness of Credit Costs. The BankAmericard and Interbank organizations provided recent information relating to their respective plans.

On the basis of this review, it appears that developments in credit card banking in recent months do not call for a change in the basic conclusion of our earlier study: that credit card programs are legitimate and useful services provided by banks to their consumer and merchant customers. Furthermore, there appears to be no reason to change the Board's position that the System has adequate supervisory powers governing the development of bank credit card programs and does not see any necessity for special legislation to limit or control bank credit cards.

At the present time, however, the principal questions regarding bank practices in issuing credit cards are virtually the same as they were two years ago. There is still considerable concern that the mailing of unsolicited credit cards imposes a burden upon consumers who have to destroy or return unwanted cards. Also, there is the fear that some consumers may have their credit standing jeopardized as a result of misuse of cards lost or stolen in the mails, or at least might be subject to litigation to prove their lack of liability for such misuse. Credit cards are also being blamed for encouraging some consumers to overextend their

use of credit, thus contributing to personal bankruptcies. It has been alleged that credit cards are adding to inflationary pressures.

In the last few months, it has become even more clear that two large, nation-wide systems are playing a dominant role in credit card banking. So far, this development is posing no problems in terms of competition, but the trend may raise a range of questions of public policy in the future.

Before examining these issues in more detail it might be helpful to provide perspective by highlighting recent trends in bank credit card programs.

Recent Trends in Credit Card Banking

On June 30 of this year, 699 banks were offering credit card plans, and they had $1.7 billion of credit outstanding. (See Table 1, attached). Thus, in the first six months of 1969, the number of banks with credit card plans rose by 189 (37 per cent) and the amount outstanding climbed by $393 million (30 per cent). In addition to these nearly seven hundred banks with credit balances outstanding under credit card programs, several thousand agency banks were participating in credit card plans but did not hold receivables.

The share of total credit card balances held by each class of bank has changed little during the last two years. National banks continue to hold more than three-quarters of the total while another one-sixth is held by Federal Reserve State member banks. Although the amount of credit outstanding at nonmember banks under credit card plans remains small,

the number of such banks with credit card plans has been increasing more rapidly than for any other class of bank. At the end of last June, these banks represented more than one-third of all credit card banks.

Large banks (those with deposits of $1 billion and over) held more than two-fifths of the total amount outstanding on credit card plans at the end of 1968, about the same proportion as in September 1967 (when the Federal Reserve Board began to collect data on such plans). However, these banks have not kept pace with the small and medium-sized institutions going into the credit card field -- dropping from 9 per cent of the total number to 5 per cent in the 15-month period. Banks with total deposits of less than $25 million have shown a faster rate of entry than other size groups. Yet, although they represented more than two-fifths of all credit card banks, they held less than two per cent of total receivables at the end of last year. Most of the outstanding indebtedness on credit cards continues to be in the hands of banks in the $100 million and over deposit class. Many of these banks had plans in operation before the Fall of 1967.

These trends are charted on the basis of information obtained every six months from the Call Reports submitted by all insured banks. In addition, monthly data on bank credit cards have been collected since the beginning of 1968. This series has been published as part of the Board's monthly report on consumer credit since June 1968. An examination of the monthly data also shows a steady increase in the amount of credit outstanding as well as considerable fluctuation of a seasonal nature in monthly extensions and repayments. (Table 2). However, much longer

experience will be necessary before seasonal adjustment factors can be derived and applied to these figures. Another limitation of the reported totals is a slight degree of understatement because of the lag in obtaining reports from additional banks that are continually entering the credit card field. We expect to overcome this difficulty before the end of 1969 by shifting to a sampling basis for obtaining monthly reports.

Regional Growth Patterns

The western section of the country continues to be the principal center of credit card banking, but this technique of consumer financing is spreading rapidly in other regions of the country. (Table 3.) At the end of last December, 115 both member and non-member banks in the San Francisco Federal Reserve District had $531 million of receivables outstanding under credit cards, representing over one-fifth of all the banks with such plans and two-fifths of the total credit. Second place was held by the Chicago District which had $182 million in outstandings. The New York District was fairly close behind with $155 million. The next two in order were the banks in Atlanta and Richmond, with $100 million and $93 million, respectively, in outstandings.

The slower growth in bank credit cards in the Northeast Districts through 1968 partly reflected the relatively greater popularity of check-credit plans. At the end of last year, about $800 million was outstanding under check-credit plans -- of which well over two-fifths was concentrated

in the Boston, New York and Philadelphia Federal Reserve Districts. In contrast, banks in these same Districts accounted for less than one-fifth of the amount of credit outstanding under bank credit cards at the end of 1968. From the monthly consumer credit series, it appears that check-credit rose by one-fifth in the first seven months of 1969, while the amount outstanding under bank credit cards rose by over one-third. During the last 18 months, the share of check-credit in the total shrank from two-fifths to one-third. The relative positions of the two types of bank credit plans may shift further in favor of credit cards over coming months -- reflecting the recent adoption of the credit card form by several major New York banks which previously offered only check-credit plans.

The regional pattern of growth in bank credit card plans is shown in the results of the survey made by the Federal Reserve Banks in August of this year. (Table 4.) Between the end of June 1968, and the end of August 1969, the number of banks offering credit plans rose by 68 per cent. The increase was sharpest in the Richmond District (346 per cent), followed by Atlanta (192 per cent), Kansas City (120 per cent), and Cleveland (100 per cent), New York (82 per cent), and Dallas (76 per cent). The pace of expansion was slow in other Districts -- including no expansion at all in the number of banks offering bank credit cards in the Philadelphia District. In some Districts (San Francisco and Chicago, for example), the initial efforts to launch bank credit cards had been made earlier.

Distribution of Bank Credit Cards

Banks have found that the most effective way to develop customers for a new credit card plan is to mail a large number of unsolicited cards. This procedure resolves simultaneously the problem of having enough merchants signed to the bank's plan to make the card useful to consumers and of having sufficient people obtain the card to make forming the plan attractive to merchants. Competitive situations appear to rule out the alternative method of depending on applications to be returned before cards are mailed.

Yet, the use of unsolicited mailings has become one of the principal sources of controversy surrounding the advent of credit card banking. The practice involves some financial risks to the issuing banks and some inconvenience to the small percentage of potential customers who do not want to receive such cards. The substantial financial losses experienced by a number of Midwest banks a few years ago when they launched credit card plans on the basis of unsolicited (and in some cases unscreened) mailings led banks to take special steps to protect themselves against theft of cards during the process of distribution. They have also taken measures to minimize losses to customers through misuse of cards once they have been accepted. However, there has been no fundamental revision in the technique of distributing bank credit cards: the use of unsolicited mailings remains the basic method.

The Federal Reserve Board has been highly conscious of the problems involved in unsolicited mailing of bank credit cards. For this

reason, in the summer of 1968, the Board expanded the check list of questions used in the examination of State member banks; examiners were instructed "to make sure that banks realize the importance of developing initial mailing lists from their own records and carefully screening them before use." The same quidelines applied to State member banks are also applied to national banks through the examination procedures. The Office of the Comptroller of the Currency was the first Federal bank supervisory agency to use a separate credit card section in its examination report, and it has instructed its examiners to see that the national banks use prudent procedures in connection with unsolicited mailings.

At the Federal Reserve Board, we have made an assessment of the extent to which State member banks are following the suggested guidelines with respect to credit card plans. On the whole, these banks seem to have exercised prudence in credit card management. This conclusion is derived from a review of reports of examination for 65 State member banks with credit card plans.1/

While unsolicited mailings were found to have been the principal means of distributing cards, no significant problems were uncovered --

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1/ As of June 30, 1968, there were 64 State member banks with credit card plans. On last December 30, the number was 65, and it was 93 on June 30, 1969. Since State member banks are examined once each year, the reports on 65 banks provide almost complete coverage since the guidelines were recommended in the late summer of 1968.

certainly none of the magnitude of the difficulties surrounding the Chicago episode of late 1966 and early 1967. Nine of the 65 banks mailed cards on an unsolicited basis without obtaining adequate credit information on potential customers.

Other unsatisfactory features drawing comments of examiners are as follows:

Problem	Number of banks
Lack of control over unissued cards	1
Ineffective collection policies and practices	3
Inadequate procedures for reclaiming credit cards when accounts became delinquent	2
No preprinted expiration dates*	2
Lack of control on customers exceeding limits	4
Customers not informed of credit-card limits	1
Slow processing of items	3

In each of these instances, the unsatisfactory features noted by Federal Reserve bank examiners were corrected by management where problems existed. Specifically, in the nine cases involving lack of adequate credit information, practices were changed promptly, and such information is now obtained before cards are granted.

An even sharper view of bank credit card distribution practices is provided by the results of the survey undertaken by the Federal Reserve Banks in August this year. The survey covered the practices followed by Federal Reserve member banks which began bank credit card plans between June 30, 1968, and the end of August 1969. The results are summarized in

*Plans were effective in the 1950's, and no problems have been encountered.

Table 5. Several conslusions can be drawn from the information submitted. Unsolicited mailing of cards is used more often than not in starting new plans; but in some Federal Reserve Districts, an application-type system is also used frequently. In most cases, mailing lists are compiled from present customers of the banks, and these are screened before cards are mailed. In three Districts (Cleveland, Richmond, and Atlanta), a few banks were reported to have used outside sources (such as directory services, credit bureaus or credit rating firms) in adding to their mailing lists -- which were composed primarily of their own customers. In one case (in the Kansas City District), a bank was reported to have used unsolicited mailing of cards to launch its credit card plan -- including the use of names obtained outside the bank -- without screening the lists prior to mailing cards to potential customers. Moreover, in that case, reportedly no credit check is made of the accounts until such time as the accounts became active.

Where information was available from the Federal Reserve Bank survey, it indicated that pre-mailers were generally used, as recommended in the Federal Reserve guidelines. These pre-mailers advise the customer that a card is being sent unless the customer indicates to the bank that he wishes his name removed from the list. In this way the customer is able to refuse a card before it is sent. The pre-mailer also helps reduce the prospect of fraud by alerting the customer to expect the card and also informs the bank of changes in addresses. During a single week this summer,

for example, more than 2 million bank credit cards were mailed in New York when a new plan was adopted by a group of three major banks. The fact that these cards had been preceded by pre-mailers undoubtedly contributed to holding reported losses or thefts of cards during this mailing to 250 cases.

On the other hand, the pre-mailer still puts the burden on the potential card recipient to take a positive step to stop the card's arrival if he does not want it. This is one of the remaining sources of complaint voiced by consumers. An even more serious complaint stems from the sending of cards via registered mail in a few instances. So far only a handful of banks have adopted this practice -- mainly because they consider it to be too costly to the bank. (One bank is reported to have spent an average of 80 cents per mailing to distribute its cards by registered mail.) However, in my personal opinion, the really important objection to the use of registered mail in the distribution of unsolicited credit cards is the burden placed on consumers. Since registered mail must be accepted by a responsible person at the address indicated, in many cases this means that the potential card holder must make a special effort to pick up the letter at his post office. Not infrequently this means taking time off from work (many times without pay), incurring transportation costs and other inconveniences. Consequently, the actual cost to potential card holders may be substantially greater than that borne by the sending bank. Since the main objective of employing the registered

mail technique is to minimize the exposure of banks to financial losses associated with the distribution of its own card through unsolicited mailings, I personally feel that the shifting of any part of this cost to potential consumers is entirely unwarranted.

Aside from the above reservations, it appears that precautions banks have taken recently to avoid potential problems with credit card mailings are being helpful. In the summer of 1968, the Board decided, after reviewing the results of the System Task Group Study, that there was no need to ban unsolicited mailings. That position has not changed.

Earlier this month, the Federal Trade Commission held hearings on a pending regulation that would forbid the mailing of credit cards without the written request or written consent of the recipient. Such mailings would be designated as unfair trade practices and unfair competition. Banks would not be covered by this prohibition since the Federal Trade Commission lacks jurisdiction over the banking system. If the Federal Trade Commission decides to adopt this regulation, legislation to prohibit the unsolicited mailing of bank credit cards undoubtedly would be pushed.

The Board's position has been and continues to be that (while the unsolicited mailing of credit cards by banks has involved some problems) there have not been any developments thus far that appear to make Federal legislation necessary. With respect to the effect of

unsolicited distributions of credit cards upon competition, the Board has concluded that the prohibition of this method of issuance of cards would seriously hamper banks in launching credit card plans, thus giving those banks already in the field a protected position that would discourage competition. On October 9, 1968, I testified on behalf of the Board before the Subcommittee on Financial Institutions of the Senate Banking and Currency Committee. In my statement, I said:

> "Banks have found that the most effective way of starting a new credit-card plan is to mail a large number of unsolicited cards. This is necessary to resolve simultaneously the problem of having enough stores signed to the bank's plan to make the card useful to consumers and of having sufficient people using the card to make forming the plan attractive to merchants. Reliance on the alternative method of depending upon application returns entails considerable delays in reaching a profitable volume of business, delays which may be unacceptable when trying to compete with other banks' plans."

I still believe that the opportunity to distribute credit cards via unsolicited mailings should not be closed off. I believe it is to the country's advantage to keep the competitive channels open for the thousands of banks that have yet to enter the credit card field. On

the other hand, several further steps need to be taken to minimize the remaining burdens on consumers.

Customer Liability for Fraud Losses

The most critical remaining problem involves customer liability for fraud losses if he fails to receive a card. It should be recognized that this is not entirely a problem of unsolicited mailing -- the same problem could arise for requested cards and renewals of existing cards. In addition, cards can be and sometimes are fraudulently used after the customer accepts the card.

With regard to the first type of fraud -- the unauthorized use of cards stolen before they are received or accepted by the proper person -- we know that most banks do not attempt to collect from the intended recipient. If there are banks which do, at least the Board is not aware of them. Moreover, it seems evident that they would have legal difficulties. In addition, the trend is for states to pass laws specifically exempting from liability the customer who has not accepted or begun to use an unsolicited card.

In the case of misuse of cards stolen or lost after being accepted by the cardholder, it is generally true that the customer has no liability for fraud losses after the bank has been informed that the card is lost or stolen. As for the liability of the cardholder prior to informing the bank, there is much more variation in banks'

policies. Some banks seek to collect in these cases from the customer for all losses occurring before the bank is notified. Others do not attempt to collect, even where the customer does not report the loss or theft of the card. Still other banks (and some State statutes) specify an upper limit on the dollar liability of the customer.

The majority of banks apparently follow the practice of absorbing losses, but do not reveal that policy to their customers for fear they might be unduly careless in their handling of the card. This is often true even where the bank informs the customer that his liability is limited to $50 or $100. These announced limits are primarily designed to make the customer take care in the handling of the card and to stimulate prompt reporting of lost or stolen cards. Thus, actual policy is often much more lenient than announced policy.

I would like to see all banks inform their customers of their potential liability. It is possible to do this in the literature accompanying the card, and a number of banks have developed statements which achieve this objective in a simple, straightforward manner. At a minimum, announcements mailed by banks should reassure customers that they are not responsible for cards stolen before they are received. Such announcements should specify what a customer's maximum liability is after acceptance of the card. Of course, whether a bank actually attempts to collect infrequently, if at all, is a decision for management. But uncertainty on the part of the customer as to the potential

liability while not as susceptible to advance determination, is in rather the same category as uncertainty about true interest rates. In any event, failure to disclose the terms of liability are no longer tolerable standards of business conduct for card issuers.

The question of legislation has arisen on this issue, and it may be helpful to restate the comments I made last October on behalf of the Board before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency. The Board felt as a matter of principle (1) that the entire burden of loss arising from cards stolen before being received by the customer should rest entirely on the issuer and (2) after acceptance, the customer could become liable for losses before the bank is informed, but the liability on the customer should be limited. The issuer is in a much better position to bear losses and control them. In any event, the customer should be clearly informed of his liability.

The Board believes that some legislation may be required to clarify the liability question and to achieve uniformity of treatment. If appropriate legislation is enacted with respect to customer liability, the major problem associated with unsolicited mailing will be solved. To be effective and equitable, such legislation should apply to other credit cards, including travel and entertainment cards, gasoline company cards and so on, as well as to bank credit cards. The legislation might be at either the State or

Federal level. It is not self-evident that a Federal law is needed -- although it may be. In states such as Illinois which have laws on this subject, the legislation has apparently had no adverse effects on the banks' operations while helping clarify the position of the cardholder.

Ownership of Bank Credit Cards

It has been evident for quite some time that the vast majority of consumers accept bank credit cards once they are received -- although they may acquire them through unsolicited mailings. Moreover, a sizable proportion of those receiving such cards actually use them. In contrast, very few potential bank customers seem prepared to initiate applications for such cards.

To learn more about the extent of bank credit card ownership, a question was included on the questionnaire used in the Federal Reserve Board's Survey of Consumer Awareness of Credit Costs conducted in June of this year. This Survey, covering 5,150 households, was undertaken mainly to provide a benchmark measure of consumer knowledge before the Truth in Lending Law went into effect on July 1, 1969. Questions were designed primarily to find out the extent to which consumers now know about the finance charges and interest rates on their various types of consumer credit transactions. The interviewing was completed about July 1, but processing of the complete results will not be finished for a month or so. In the meantime, preliminary data on the ownership of bank credit cards

by education and income were developed on the basis of a random subsample of 1,025 of the 5,150 responses in the Survey.* The results are shown in Table 6.

These findings are by no means surprising. About one-quarter of the total respondents had a bank credit card. This proportion increased steadily as the level of income and education rose. While only one-sixth of respondents with grade school educations had bank credit cards, the proportion was 26 per cent for high school graduates and 32 per cent for college graduates. Among those with post graduate college experience, 48 per cent had a bank credit card.

With respect to personal income, the same trend is evident. Only 7 per cent of respondents with incomes under $3,000 reported having such a card. In the income range $5,000 - 7,999, only about one-fifth of the households reported having a bank credit card. In the range $10,000 - 14,999, the proportion was 31 per cent. For those with incomes over $15,000 the ratio reached 44 per cent.

Again, this new evidence on the ownership of bank credit cards reinforces the conclusions reached earlier: the American public taken as a whole has accepted the credit card as a useful innovation in banking.

Use Patterns and Economic Impact of Bank Credit Cards

It is becoming increasingly evident that credit extended through

* Sampling experts involved in the Survey have given assurance that the proportions shown for this subsample probably will not be very much different from those shown by the entire sample.

Start of excellent agreement against idea that bank credit cards have furthered inflation.

bank credit cards is being used as a substitute for some other forms of credit. However, there is no evidence suggesting that the total amount of bank credit extended to consumers has accelerated because of the spreading use of cards.

Credit card banks were transacting a somewhat larger proportion of their consumer instalment business through credit cards at the end of 1968 than a year earlier. At the end of last year, about one-tenth of their instalment credit was on credit cards, compared with slightly less than one-twelfth at the close of the preceding year. Nearly all of the credit card receivables continue to arise from retail sales. In spite of the fact that many plans offer cash advances, such transactions now account for less than one-sixth of all credit card loan volume and appear to be declining in relative importance so far this year. (See Table 7.)

Consumer instalment credit has increased in recent months, but not as a proportion of total bank loans. During the last two years of rapid credit card growth, consumer instalment credit has accounted for only one-seventh of the banks' total loan portfolio and credit card receivables for less than one per cent. (See Table 8.) In spite of the marked increase in credit card outstandings, total holdings are still too small relative to both consumer borrowing and total bank borrowing to be of great significance in the recent expansion.

It appears that the increased use of bank credit cards has lessened to some extent consumers' reliance on other types of credit

card plans. However, because of the aggregate nature (and seasonal variablity) of data, it is difficult to pinpoint the degree of substitution that is taking place. Nevertheless, the available statistics do seem to point in this direction. (See Table 9.) During the 18 months ending June 30 of this year, the amount outstanding under bank credit cards more than doubled, rising from $800 million to $1.7 billion. In contrast, consumer outlays financed by travel and entertainment cards registered no growth at all. On a year-to-year basis (which partly eliminates seasonal factors), department store revolving credit outstanding under credit card plans rose by about $200 million through the end of last June. Retail charge accounts rose by $600 million between December 1967, and December 1968, but in the twelve months ending last June, the increase was only $300 million. The year-to-year increase in the amount outstanding under oil company credit cards was also about $200 million.

Thus far, there is no conclusive evidence that credit cards have tended to raise prices. While the retailer is faced with an extra cost in the form of the merchant discount each time a credit card purchase is made, it does not follow that there is a net increase in costs or that the purchase would have been made without a card. To the extent credit cards replace high-cost merchant-operated credit plans, they reduce costs; and to the extent they attract customers who wish to buy on credit, they generate increased sales which may offset any increases in costs.

Thus, although the evidence is admittedly not conclusive, it does suggest that credit cards have not had -- and at present magnitudes are not likely to have -- any noticeable impact on general price levels.

There is also the question of whether individual consumers might get deeply into debt because of easy credit extended through these plans. Again it is difficult to point to a quantitative conclusion. The average line of credit extended under credit card plans is in the neighborhood of $350. This is not so high as to be a cause in itself of a customer incurring excessive indebtedness. In addition, the credit standards aim at middle-income consumers who by and large can afford to contract debt within the applicable limits. This is indicated also by the preliminary tabulation from the Board's Survey of Consumer Awareness of Credit Costs mentioned above. While about one-fourth of the consumers covered by this Survey reported having a bank credit card, nearly one-half had incomes over $10,000, and only about one-tenth had incomes of less than $5,000.

Finally, there is no evidence that the use of credit cards is contributing substantially to inflationary pressures. Only a small part of the growth in consumer credit in recent months can be attributed to the expansion of bank credit card plans.

Evolving Structure of Credit Card Banking: Implications for Public Policy

The Federal Reserve's study of bank credit cards published last year concluded that there was no reason to believe that the most widely-used

systems raised any serious questions under the antitrust laws. At that time, the Department of Justice had initiated actions in a few cases (involving potentially adverse effects on competition or requirements that merchants limit their participation to one bank's plan). But, in general, there was no suggestion that serious antitrust problems were on the horizon. The same conclusion seems warranted today.

However, as the two national interchange systems for bank credit cards continue to grow, the implications for antitrust policy may become more important. As of last June 30, commercial banks which were members of these two systems (BankAmericard and Interbank) held a total of $1.5 billion of credit card outstandings (Table 10). This was 90 per cent of the total outstandings of $1.7 billion on that date.

While the details differ somewhat between the two systems, the scope of their activities is reasonably comparable. While Interbank has enrolled a somewhat greater number of card-issuing banks, BankAmericard (at least as of last June) seems to have enlisted a somewhat greater proportion of the large banks. This is suggested by the fact that the amount of outstanding credit averaged $3.6 million for banks in the BankAmericard system, compared with $1.8 million for those in the Interbank system. The number of agency banks (those which offer a credit card but do not carry receivables on their own books) in the two systems was fairly close -- 2,900 for BankAmericard and 2,550 for Interbank. BankAmericard member banks had 22.9 million cardholder accounts, and Interbank members

had 20.5 million. The two systems had about the same number of merchant members (450,000). The amount of outstanding credit totaled $660 million for BankAmericard member banks and $900 million for those in Interbank. The average amount outstanding per active account was virtually identical for banks associated with the two organizations -- $185 for BankAmericard and $180 for Interbank.

It may be that the BankAmericard and Interbank systems soon will have even more banks signed up. As this occurs, which seems likely from the antitrust law standpoint, it would be important that the two systems continue to remain open for new banks to join.

The mere fact that the two interchange systems are attracting more and more banks is not the critical question under present Federal antitrust statutes, but rather how the interchange groups exercise the power acquired, as it were, through "bigness It may be recalled that the Associated Press (which also runs an interchange system) had antitrust troubles in the 1940's. These did not arise just because it was the news-gathering agency for more than 1,200 subscribing member newspapers, but because of unreasonable restrictions on admissions of new members and other anticompetitive restrictions (such as exclusive dealing arrangements) binding on the subscribing newspapers.

A question that thus far has been more theoretical than practical is whether nonbank institutions should be able to join bank credit card systems. The two major systems currently do not have non-bank members.

During the preparation of the Federal Reserve's bank credit card study in 1967-68, the matter of "nonbank entry" was discussed, but it was not pressed. However, if small, nonbank credit cards find it difficult to meet the competition of bank cards in the future, the question of nonbank entry into nationwide interchange systems may take on some importance.

Whether credit card operations, especially those under BankAmericard and Interbank, ought to be likened to public utilities has occurred to some observers. Whether this is a proper comparison remains open. To begin with, in some respects the regulation of banking today is much like public utility regulation, except for rate regulation. Aside from usury and similar statutes, the permissible interest charges on loans are not regulated. In addition, there appears to be no legal obligation for card-issuing banks to serve all applicants for service in the sense that such an obligation has developed in the public utility field for water companies, telephone companies, and the like. Banks that have issued credit cards -- including banks in national card interchange systems -- are individual competitive units. The sale of credit may be an indispensable service, but at present it is not monopolized, although we may be moving in the direction of fewer banking institutions. The credit card device, plus computers, may move us faster on that course than in earlier periods, however.

While views on the matter may differ, as indicated above, some might feel that the development and growth of credit card interchange arrangements suggest the advisability of utility-type regulation. For example, interstate bank credit card interchange systems might be made expressly permissible but only under a Federal licensing procedure. The practices of any such system, including those of the card-issuing banks, would be subject to regulatory standards prescribed by the Federal licensing authority, which might be responsible also for prescribing maximum permissible finance charges for card holders and maximum permissible discounts on other costs for merchants and other concerns participating in a card with an interchange arrangement. Regulatory standards could be devised to assure, among other things, the entry of new banks and acceptance of new cardholders on equitable, nondiscriminatory bases.

The theory -- and reality -- of such an approach, of course, would depend on whether the bank credit card interchange arrangements were approaching monopoly proportions. In this posture, the tendency for uniform practices would seem to increase, as might the likelihood of operating techniques not conducive to the public interest. Credit being virtually an indispensable service, and the advantages of interchange arrangements being what they are to the banks, their cardholders, and participating businesses, at least some of the basic features for the application of a utility-type control would seem to be present.

As will be noted, such an approach as outlined generally above ignores the gas and oil cards, the T and E cards, and other cards issued

by nonbanks. It will be a long time, if ever, before these cards are displaced by bank cards. In the meantime, the Utility-type control limited to bank card interchange syst might seem unfair and opposed on this ground.

Briefly, however, it seems fair to conclude that, for the time being, and so long as BankAmericard and Interbank operate as they do now, it is unlikely that any antitrust issues will be raised. But, if either of those two systems -- or any other bank credit card plan, for that matter -- should initiate restrictive, anticompetitive arrangements, the antitrust laws could be expected to be invoked. An example of such a restriction would be that used one time by a bank which prohibited any merchant that signed up with that bank's card from signing up also with another credit card issuer. This practice was stopped by a consent decree following an antitrust challenge by the Department of Justice.

Finally, the key lesson is that banking institutions (or any other group) possessing substantial market power must be especially alert not to act oppressively or unreasonably. So far, the existing interchange systems for bank credit cards seem to be meeting this standard of responsible behavior.

Table 1.

Credit Card Plans by Class of Bank

(Amounts in millions of dollars)

	All banks		National banks		State member banks		Nonmember banks	
	Number having plans	Amount outstanding	Number having plans	Amount outstanding	Number having plans	Amount outstanding	Number having plans	Amount outstanding
September 30, 1967[1/]	197	633	119	496	34	100	44	37
December 30, 1967[2/]	390	828	187	636	50	145	153	47
June 30, 1968[2/]	416	953	219	731	64	170	133	52
December 31, 1968[2/]	510	1,312	272	1,019	65	210	173	83
June 30, 1969[2/]	699	1,705	359	1,317	93	275	247	113

1/ Federal Reserve study, Bank Credit-Card and Check-Credit Plans, July 1968.
2/ Federal Deposit Insurance Corporation, Report of Call.

Table 2.

Bank Credit-Card and Check-Credit Plans, 1968 1/
(Amounts in millions of dollars)

	Outstandings end of month		Extended during month		Repaid during month	
	Credit card	Check credit	Credit card	Check credit	Credit card	Che cre
January	815	531	147	85	139	
February	817	543	120	78	118	
March	822	549	125	76	120	
April	859	570	158	95	121	
May	878	586	152	97	133	
June	914	600	155	93	119	
July	945	622	172	103	141	
August	983	644	175	103	137	
September	1,024	665	176	105	135	
October	1,066	687	195	111	153	
November	1,111	694	188	98	143	
December	1,265	739	318	134	164	
1969						
January	1,292	762	228	125	201	10
February	1,321	769	190	113	161	10
March	1,341	782	219	120	199	10
April	1,457	814	270	147	154	11
May	1,541	834	277	137	193	11
June	1,631	859	299	138	209	11
July	1,700	880	319	135	250	11

1/ Data for reporting banks representing approximately 95 per cent of the dollar volume of bank credit-card and check-credit outstandings.

Table 3.

Bank Credit Card Plans by Federal Reserve District
All Commercial Banks
(Amounts in millions of dollars)

Federal Reserve District	September 30, 1967		December 31, 1967		June 30, 1968		December 31, 1968	
	Number offering plan	Amount outstanding	Number offering plan	Amount outstanding	Number offering plan	Amount outstanding	Number offering plan	Amount outstanding
Boston	14	21.8	16	27.9	20	36.9	21	57.5
New York	16	64.8	23	109.5	27	120.4	20	155.3
Philadelphia	6	12.3	10	11.2	12	14.0	9	25.4
Cleveland	6	26.9	14	31.2	26	36.1	48	63.7
Richmond	5	28.2	13	38.9	15	47.4	28	92.7
Atlanta	20	30.6	43	40.0	39	48.9	53	99.5
Chicago	35	126.2	86	153.2	92	153.0	107	181.6
St. Louis	10	12.3	36	22.2	39	26.2	57	52.8
Minneapolis	5	.1	25	1.8	24	1.4	11	1.0
Kansas City	6	6.4	19	10.2	15	12.3	19	32.5
Dallas	7	8.1	22	12.4	21	21.0	22	18.9
San Francisco	67	295.3	83	369.9	86	435.3	115	530.6
All districts	197	633.0	390	828.4	416	952.9	510	1,311.5

Table 4. Growth of Bank Credit Card Plans in Selected Federal Reserve Districts (Number of Banks)

Federal Reserve District 1/	Banks with Plans June 30, 1968	Banks Starting Plans July 1968 - August 1969	Percentage Increase Since June 1968
1. Boston	20	6	30
2. New York	27	22	82
3. Philadelphia	12	0	0
4. Cleveland	26	26	100
5. Richmond	15	52	346
6. Atlanta	39	75	192
7. Chicago	92	5	5
10. Kansas City	15	18	120
11. Dallas	21	16	76
12. San Francisco	86	21	24
Total: Selected Districts	353	241	68

1/ Information on new bank credit card plans started in the St. Louis (8) and Minneapolis (9) Districts was incomplete and could not be used in this tabulation.

Table 5.

Bank Practices in the Distribution of Credit Cards, By Federal Reserve District

Federal Reserve District 1/	Number of Banks Starting Plans, July, 1968-August, 1969	Use of Unsolicited Mailing	Use of Outside Lists	Use of Pre-mailers
1. Boston	6	All	None	All
2. New York	22	Virtually all	None	Most
3. Philadelphia	0	--	--	--
4. Cleveland	26	Most	Few	Most
5. Richmond	52	Virtually all	Few	Most
6. Atlanta	75	Most	Few	N.A.
7. Chicago	5	All	None	N.A.
10. Kansas City	18	Most	One	N.A.
11. Dallas	16	Most	None	Most
12. San Francisco	21	Some	None	Some

1/ Information on new bank credit card plans started in the St. Louis (8) and Minneapolis (9) Districts was incomplete and could not be used in this tabulation.

N.A. Not Available

Table 6.

Ownership of Bank Credit Cards,

June, 1969

Selected Household Characteristics	Households in Subsample		Has Bank Credit Card		Does Not Have Bank Credit Card	
	Number	Per Cent	Number	Per Cent	Number	Per Cent
Total Responses*	1,025	100.0	258	25.2	767	74.8
Education Level						
Grade school or less	177	100.0	29	16.4	148	83.6
Some high school	224	100.0	42	18.8	182	81.2
Graduated high school	312	100.0	81	26.0	231	74.0
Some college	142	100.0	43	30.3	99	69.7
Graduated college	104	100.0	33	31.7	71	68.3
Post-graduate college	60	100.0	29	48.3	31	51.7
Income Level						
Less than $3,000	128	100.0	9	7.0	119	93.0
$3,000 - 4,999	122	100.0	22	18.0	100	82.0
$5,000 - 7,999	244	100.0	48	19.7	196	80.3
$8,000 - 9,999	170	100.0	50	29.4	120	70.6
$10,000 - 14,999	179	100.0	56	31.3	123	68.7
Over $15,000	124	100.0	55	44.4	69	55.6

Source: Preliminary results from Federal Reserve Board Survey of Consumer Awareness of Credit Costs.

*Note: Sum of the rows does not add to total row due to "no answers" to some of the specific questions.

Table 7. Credit Extended on Credit Card Plans 1/
(Amounts in millions of dollars)

	1968				1969			
	Credit extended			Cash advances as percentage of total	Credit extended			Cash advances as percentage of total
	Total	Retail purchases	Cash advances		Total	Retail purchases	Cash advances	
Jan.	147	123	24	16	228	195	33	14
Feb.	120	97	23	19	190	157	33	17
Mar.	125	102	23	18	219	181	38	17
Apr.	158	127	31	20	270	220	50	19
May	152	126	26	17	277	235	42	15
June	155	126	29	19	299	254	45	15
July	172	139	33	19	319	269	50	16
Aug.	175	141	34	19				
Sept.	176	145	31	18				
Oct.	195	163	32	16				
Nov.	188	159	29	15				
Dec.	318	275	43	14				
	2,081	1,723	358	17				

1/ Data for reporting banks which represent approximately 95 per cent of the dollar volume of bank credit-card outstandings.

Table 8.

Commercial Bank Loans Outstanding - All Commercial Banks

End of month	Billions of dollars				Percentage of total loans		
	Total loans, net 1/	Total consumer credit	Consumer instalment credit	Credit card credit	Total consumer credit	Consumer instalment credit	Credit card credit
September 1967	224.8	39.7	32.4	.6	17.6	14.4	0.3
December 1967	235.2	40.0	32.7	.8	17.0	13.9	0.3
June 1968	243.2	42.1	34.6	1.0	17.3	14.2	0.4
December 1968	262.6	44.9	37.0	1.3	17.1	14.1	0.5
June 1969	273.5	46.9	38.9	1.7	17.1	14.2	0.6

1/ Including valuation reserves.

Table 9.

Credit Card Plans
(Amount outstanding - In billions of dollars)

Type of Credit	December 31, 1967	June 30, 1968	December 31, 1968	June 30 1969
Bank credit cards 1/	.8	1.0	1.3	1.7
Oil companies 2/	1.0	1.1	1.2	1.3
Department store revolving credit	3.5	3.6	3.7	3.8
Retail charge accounts	r 5.9	5.3	6.5	5.6
Travel and entertainment cards 2/	.1	.1	.1	.1
All other 3/	r .2	.2	.2	.2
All types	11.5	11.3	13.0	12.7

r - revised
1/ Excludes check credit plans.
2/ Consumer portion only.
3/ Including large independent credit card firms and revolving credit accounts of nondepartment stores.

Table 10.

Credit Card Activities of Selected Interchange Systems

June 30, 1969

Type of Activity	BankAmericard	Interbank
Number of card-issuing banks	185	500
Number of agency banks	2,900	2,550
Number of merchant cardholder accounts	22.9 mil.	20.5 mil.
Number of merchant members	450,000	450,000
Amount of outstanding credit	$660 mil.	$900 mil.
Average amount outstanding per active account	$185	$180

A SUMMARY

OF THE

UNIFORM CONSUMER CREDIT CODE

PREPARED BY
NATHANIEL E. BUTLER
Educational Director

Courtesy of ALASKA RETAIL ASSOCIATION

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
1155 East 60th Street
Chicago, Illinois 60637

ALASKA RETAIL ASSOCIATION, INC.



BOX 1727
ANCHORAGE, ALASKA
99501

January 31, 1970

PRESIDENT:
JOHN W. WALLS
BARBS FLORIST
ANCHORAGE, ALASKA

VICE PRESIDENT:
LOWELL HANSEN
CO-OP DRUG
FAIRBANKS, ALASKA

SECRETARY-EXECUTIVE DIRECTOR
DEAN EHRICH
CONRIGHTS FURNITURE & APPLIANCE
ANCHORAGE, ALASKA

BOARD OF DIRECTORS
ALASKA
RETAIL ASSOCIATION

ANCHORAGE:
S. G. "JERRY" NERLAND
NERLANDS HOME FURNISHINGS
JOHN W. WALLS
BARBS FLORISTS
J. A. MILLER
J. C. PENNEY CO., INC
KENNETH E. HIGBY
NORTHERN COMMERCIAL CO

FAIRBANKS:
LOWELL HANSEN
CO-OP DRUG
AUSTIN WARD
SACHS
LES GRAY
FOODLAND

ALTERNATE:
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RONALD MALSTON
NORTHERN COMMERCIAL CO.

ALTERNATE:
AL CRUVER
ARMY-NAVY SURPLUS

NOME:
FRANK A. COUCH
NORTHERN COMMERCIAL CO.

Hon. Barry W. Jackson
Alaska State House of Representatives
Pouch V State Capitol Bldg.
Juneau, Alaska 99801

Dear Mr. Jackson:

During recent years, there has been much concern on the part of legislators regarding consumer protection. This concern is quite rightly reflected from the concern evidenced by your constituants in all segments of our society.

One of the more important subjects in this field is, of course, consumer credit; an area of our economy that has shown fantastic growth. In 1939 consumer credit outstanding totaled about Seven Billion Dollars. Today, it exceeds 113 Billion Dollars and is still growing.

Existing laws & regulations covering consumer credit are really not adequate to provide the necessary safeguards to consumers , nor are they sufficiently clear, in some respects, to insure complete understanding by the credit industry. One well thought out approach to this problem is the Uniform Consumer Credit Code, drafted by the National Conference of Commissioners on Uniform State Laws.

As you know, the Uniform Consumer Credit Code was introduced in the Alaska Senate as Senate Bill 211 in February of 1969. Our Association supports this measure and urges that you give it some study and consideration.

(over please)

We are enclosing a summary booklet on the code which, we hope, will be of aid to you. Additionally, we have prepared a comparison study which compares UCCC with existing Alaska statutes and the Federal Consumer Credit Protection Act of 1968 (Truth In Lending). Copies of this study are available from Association offices upon request.

Very Truly Yours:

DEAN EHRICH
Executive Director
272-4222

A SUMMARY

OF THE

UNIFORM CONSUMER CREDIT CODE

PREPARED BY
NATHANIEL E. BUTLER
Educational Director

Courtesy of ALASKA RETAIL ASSOCIATION

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
1155 East 60th Street
Chicago, Illinois 60637

The National Conference of Commissioners on Uniform State Laws is an organization of state appointed officials who are practicing lawyers, judges and law school professors. Customarily the governor of each state appoints three men to serve as Commissioners. The Commissioners serve without compensation. The expenses of the Conference are paid from appropriations made by the states, and when special projects are undertaken, foundations and interested groups often make contributions. The function of the Conference is to draft legislation in areas of the law where uniformity among the states is particularly desirable and offer it to the states for enactment.

THE PROBLEM

Consumer credit is treated under a variety of laws in each state today. Historically, a type of statute that has dominated the growth of consumer credit has been the simple general usury statute. These statutes, originating in this country as early as 1664, set flat 6% and 8% per annum ceilings on the rate of interest that may be charged for loans of money. In the twentieth century these ceiling rates have been unevenly increased in some states so that today the ceiling rates range from 6% to 12% per annum with one state having a 16% ceiling, one state a 21% ceiling and two states none at all. The 6% to 12% rates are below those at which legitimate creditors can extend many kinds of consumer credit. As a result, many exceptions and exemptions from usury laws have been created by courts and legislatures. In most states today general usury statutes cover only a small portion of consumer credit transactions, and this coverage is highly erratic and generally unreasoned.

Exceptions to usury statutes have come from both the courts and the legislatures. The so-called "Time Price" doctrine developed by the courts exempts from general usury statutes all sales credit purchases. This doctrine creates an enormous exception to usury statutes and is recognized in all but two of the states.

State legislatures have recognized the distinction between credit sales and direct loans and have enacted many laws regulating credit sales. Often there is one law regulating credit sales of motor vehicles, and another regulating credit sales of goods other than motor vehicles. Sometimes there are additional laws governing home improvement sales, revolving store charge accounts, and insurance premium financing. Generally these laws are limited to consumer transactions, but occasionally they have broader application. Not infrequently these laws provide different ceilings on rates that can be charged, and express the rate ceilings differently (add-on, discount, U.S. Rule, per cent per month, etc.). Often these laws treat substantially similar aspects of different credit transactions differently where no reason for the difference in treatment exists.

In addition to the exemption from usury laws for sales credit, state legislatures have enacted a number of laws permitting loans to be made at rates in excess of the usury rate. Most common are the Small Loan Laws which require the lender to be licensed and limit both the amount and length of the loan. In addition to the Small Loan Laws, many states have enacted so-called Installment Loan Laws, Industrial Loan Laws and other laws exempting from general usury statutes certain classes of lenders such as commercial banks, credit unions and savings and loan associations or a certain class of transactions such as revolving loan accounts. These laws also frequently set different rules for what are very similar aspects of the various transactions.

Finally, some states have enacted laws dealing with specific aspects of consumer credit transactions such as door-to-door sales cancellation acts, rate disclosure (truth-in-lending) acts and so forth.

Compounding the problem of the numerous laws governing the consumer credit market is the new Federal Truth-in-Lending Act which is effective July 1, 1969. It requires full disclosure of the terms of substantially all consumer credit transactions including, among other things, the rate of the credit service or loan finance charge stated in terms of an annual percentage. This law provides that if a state passes a law which requires substantially similar disclosure, the state law will apply and the control will move back from the federal to the state government.

THE UNIFORM CONSUMER CREDIT CODE — GENERALLY

The Uniform Consumer Credit Code is a balanced consumer protection law. It restructures all laws imposing maximum charges on the cost of money or credit, regulates consumer credit generally and brings substantially all consumer credit transactions under one comprehensive code. In the area of maximum charges and rate ceilings it imposes a single and standard set of maximum charges on substantially all types of consumer credit and, except in the case of extortionate charges, frees substantially all types of business credit from any maximum charge or rate ceiling. It puts all creditors extending consumer credit on substantially an equal footing so far as maximum charges and control of practices are concerned. It stimulates competition by eliminating artificial barriers to entry into the credit granting business and by requiring disclosure of the cost of the credit, both in terms of the dollar amount and in terms of an annual percentage rate. While the Uniform Consumer Credit Code sets *maximum ceilings* on rates which may be charged in consumer transactions, it relies on competition to *fix actual effective rates*. It restricts certain practices of creditors which have been shown to be particularly subject to abuse and has broad provisions to eliminate unconscionable conduct.

It is designed to secure for any state enacting it exemption from the Federal Truth-in-Lending Act.

COVERAGE

Generally, the Code applies to consumer credit transactions and excludes business transactions. The basic test is the kind of debtor involved. If the debtor is an individual, some or all of the provisions of the Code apply. If the debtor is an organization, (a corporation, partnership, trust, governmental body or the like), with one minor exception regulatory and maximum rate provisions of the Code do not apply. The non-application of the Code to organizations eliminates the major portion of all business credit from regulatory coverage.

If an individual debtor (sometimes called a sole proprietor) seeks not in excess of $25,000 of credit for a business purpose, the transaction will be covered only by the provisions of the Code relating to maximum rates and charges which can be made. In other words, the sole proprietor of a corner grocery is given maximum rate protection under the Code in transactions up to $25,000 but otherwise the transaction is unregulated.

The major concern of the Code is with consumer credit and except for the provisions on rates and maximum charges having limited applicability to non-consumer transactions, all of the Code's provisions apply only to consumer credit. Consumer credit includes and is limited to credit extended for the personal, family, household or agricultural purpose of the person to whom credit is extended.

Credit extended for agricultural purposes is included in consumer credit, but it is excluded from a number of the substantive provisions found to be unsuited to the particular characteristics of farm financing. Of course, if the debtor is not an individual, regulatory provisions of the Code do not apply.

Credit sales of homes and home mortgages entered into for a consumer purpose are covered by the maximum rate and charge limitations as well as the disclosure requirements of the Code. Transactions in which the rate of credit service or loan finance charge exceeds 10%, calculated as prescribed in the Code, are subject to all of the substantive provisions of the Code.

REGULATION OF PRACTICES

The Code takes three basic approaches to the problem of better enabling the consumer to deal with the professional creditor. First, it requires full disclosure of the cost of credit to the consumer prior to or at the time the transaction is entered into. Second, it makes illegal or severely limits certain specific practices of creditors which have been shown to be subject to abuse. Finally, it has broad provisions for attacking and eliminating unconscionable conduct.

The first approach is the requirement of complete disclosure of the terms of the credit transaction including disclosure of the cost to the debtor both in dollar amounts and in terms of an annual percentage rate. The disclosure provisions are more fully discussed below.

The second approach is to prohibit or greatly limit certain kinds of agreements and practices. In deciding what practices to prohibit or limit, the Commissioners recognized that unless there were very real and corresponding benefits to the consumer, restrictions on rights of creditors could, in fact, hurt consumers because the restrictions might result in higher costs and consequently higher rates throughout the consumer credit market. With this process of evaluating and balancing in mind, the Commissioners sought only to restrict rights and practices in which evidence of serious abuse of consumers was strong.

Among the specific restrictions the Code imposes is the prohibition of negotiable promissory notes in sales credit transactions. Closely related to t' is is the treatment of the buyer's waiving as to an assignee of the consumer's con'ract any defenses he might have against the seller. The Code offers alternative sections, either of which might be enacted. The first alternative prohibits and renders non-effective the buyer's waiving his defenses. The second alternative requires the buyer promptly to inform the assignee of any defenses which arise within three months of the sale and if he fails to do so, the assignee is free from defenses arising during the three month period. Under the present law of most states, once the contract is assigned, the buyer must pay the finance company and try to seek his remedy from the seller. The theory of the Code's provision is that the financing institution is in a better position to guard against the seller pushing shoddy and sub-standard goods or services than the buyer who very likely has only a single isolated transaction with the seller.

Another practice the Code prohibits in sales credit transactions is the seeking of a deficiency judgment after goods have been repossessed if the original cash price of the goods was less than $1,000. In effect, where the cash price is less than $1,000, the Code provides that the creditor must either elect to sue on the contract or repossess the goods; he may not do both. The theory of this sectio is that in transactions in which the cash price is under $1,000, the right to seek a deficiency after repossession is worth little to the legitimate creditor, but it can be used abusively by the unscrupulous creditor.

The Code eliminates in sales credit the practice of the seller's taking a security interest in a houseful of furniture to secure the payment of the price of a single refrigerator or television set. Although the Code does permit taking a security interest in more than the goods sold when debts arising out of other sales are consolidated, it requires payments to be allocated so that the goods are freed from the security interest on a first in first out basis.

The Code restricts balloon payments which often have been used to push a debtor into extending and refinancing the debt. It also prohibits irrevocable assignments of earnings, garnishment proceedings prior to judgment, and confessions of judgment. It sets limits on charges which can be made on default, attorney's fees which can be collected from debtors, and the amount of a debtor's earnings subject to garnishment. It limits small loans to 25 months or 37 months when the annual rate of loan finance charge exceeds 10%. It gives buyers three days to cancel home solicitation sales and prohibits referral sales. It includes provisions on credit life insurance and credit accident and health insurance like those now in force in states which effectively regulate such insurance.

The third approach of the Code toward eliminating harmful practices

and enabling consumers to deal more effectively with creditors is contained in provisions which permit courts in proceedings commenced by the Administrator to declare any agreement or part of an agreement unconscionable and unenforceable as a whole or in part. The court is empowered to order the enforcement of the agreement in such a way as to avoid any unconscionable result. Debtors themselves and also the Administrator may bring proceedings to recover excess charges, the Administrator may himself order creditors to cease violating the Code and the Administrator may bring court proceedings to obtain injunctions against violations of the Code and against unconscionable conduct. Varying special civil and criminal penalties are provided for different kinds of violations. Studies have shown that the major part of overreaching and abuse stems from a relatively small percentage of creditors. In total effect the Code sets standards of conduct for all creditors participating in consumer credit and provides strong and effective remedies against creditors committing serious abuses without impairing the rights of legitimate creditors and without seriously raising the general cost of credit to consumers.

DISCLOSURE

The disclosure requirements of the Code are in most cases the same as those in the Federal Truth-in-Lending Act. Where they differ, the Code's provisions are more stringent.

Basically, in a credit sale the seller is required to set forth: 1) what is being sold; 2) the cash price; 3) the down payment; 4) the balance owing; 5) amount payable for registration or certificate of title fees not included in the cash price; 6) the amount of official fees and taxes; 7) a brief description of any insurance provided and, if a separate charge is made, the amount of the charge; 8) in the case of a sale of land the amount and a description of the closing costs; 9) the total amount financed; 10) the dollar amount of the credit service charge; 11) the total unpaid balance; 12) the annual rate of the credit service charge; 13) the payment schedule; 14) the charges to be made in the event of default; and 15) a description of any security interest taken.

The dollar amount of the credit service charge is not required in a land transaction if the rate of credit service charge is under 10%.

Similar disclosure is required in the case of loans, and under somewhat different mechanical requirements, in the case of revolving sale and loan accounts, and in refinancings, consolidations, and deferrals.

The percentage rate which is disclosed must be computed according to what is known as the U.S. Rule. This is the method traditionally employed in first mortgage real estate financing where payments are applied first to accrued interest and then to the reduction of principal.

The kinds of charges which may be excluded from the calculation of the rate to be disclosed are limited. Except for certain closing costs in real estate transactions involving a credit service or loan finance

charge not exceeding 10% per year, all extra charges must be included in the credit service or loan finance charge except a defined category called "additional charges". "Additional charges" are official fees and taxes, liability and casualty insurance if the buyer is told that he can choose the insurer, and life, health and accident insurance if such insurance is not a factor in the granting of the credit and the buyer is so told. If insurance charges do not meet these tests, they must be included in the credit service charge or loan finance charge. Other charges of benefit to the debtor apart from the granting of credit may be excluded from the finance charge if the Administrator has approved them.

These exceptions from the credit service and loan finance charge are the same as those in the Federal Truth-in-Lending Act. All other extra charges must be included in the credit service or loan finance charge in calculating the rate.

The theory of the disclosure requirements is that the buyer or borrower will be able to shop for credit just as he shops for other commodities. The dollar cost of having goods or money immediately rather than waiting will be clear to him. The requirements that all creditors state a rate in the same manner (in terms of an annual percentage) will permit the consumer to make meaningful comparisons and choose between alternative sources of credit and get the best deal. Looking at the dollar cost and the rate, the consumer might decide to use savings rather than to incur debt at all.

RATES

The rates in the Code are based on the underlying principle that legislation should *not* attempt to fix rates in the sense that public utility commissions fix rates for public utilities, but rather that the economic forces of free enterprise and supply and demand should set rates through improved competition within maximum ceilings prescribed in the consumer credit area. In consumer credit, ceilings are imposed in part because they have been imposed frequently in the past and in part because consumers are generally considered not to have equal bargaining power with creditors. On the other hand, with two narrow exceptions, no ceilings are imposed for business credit and any residual ceilings still applicable to business credit under general usury statutes are removed.

In deciding what the rate maximums should be, the Commissioners took into account that raising and lowering maximum rates have the inevitable effect of increasing or decreasing the size of the consumer credit market. High maximums permit more persons to obtain credit from legitimate sources; low maximums decrease the number of persons who may obtain credit. The maximum ceilings provided in the Code are designed to permit most credit-worthy consumers to have access to the consumer credit market.

The basic maximum rate in the Code is 18%. There are higher graduated rates where the amount of the credit is small. 36% per annum is permitted on the amount of the unpaid balance up to $300, 21% on the amount from $300 to $1,000 and 15% on the amount over $1,000, with the composite actual rate under these graduated rates levelling off at 18%. In order to charge rates in excess of 18%, a lender (but not a seller) must either be licensed or a supervised financial organization, e.g., a bank, credit union or the like.

On revolving charge accounts in sales credit, the maximum permitted rate is 2% per month (24% per year) on the amount outstanding up to $500 and 1½% per month (18% per year) on the amount in excess of $500.

LICENSING, FEES AND ADMINISTRATION

Each creditor who is regularly engaged in the business of granting consumer credit is required to notify the Administrator that he is so engaged. In addition, he is required to pay an annual fee based upon the amount of the consumer credit obligations owed to him. This fee is designed to defray all or part of the cost of administering the Act.

In order to make loans at rates in excess of 18%, a lender must first obtain a license from the Administrator. The Administrator is directed to investigate the applicant and grant the license only if he finds that the financial responsibility, character and fitness of the applicant are such as to warrant belief that the business will be conducted fairly.

Banks and other institutions which are supervised by other governmental agencies are not subject to the licensing requirement.

The Administrator has broad powers to investigate, issue orders and go to court to obtain compliance by creditors with the act. His actions, however, are subject to notice, fair hearing and other due process requirements.

Among his other powers, the Administrator is authorized to seek an injunction against unconscionable agreements or conduct.

EFFECT OF CODE ON POWERS OF ORGANIZATIONS

The Code prescribes maximum charges for all creditors extending consumer credit and displaces existing limitations on the powers of creditors based on maximum charges.

In the case of sellers of goods or services, small loan companies, licensed lenders, consumer and sales finance companies, industrial banks and loan companies, and commercial banks and trust companies, the Code displaces existing limitations on their powers based solely on amount or duration of credit.

Except as to maximum charges, the Code does not displace limitations on powers of credit unions, savings banks, savings and loan associations, or other thrift institutions.

Except as to maximum charges, the Code does not displace limitations on powers either of commercial banks or thrift institutions with respect to the amount of a loan to a single borrower, the ratio of a loan to the value of collateral, the duration of a loan secured by an interest in land or other similar restrictions designed to protect deposits.

THE FEDERAL CONSUMER CREDIT PROTECTION ACT (FCCPA)

The Federal Consumer Credit Protection Act [Public Law 90-321, 82 Stat. 146] does not purport to be a comprehensive consumer credit law. It requires disclosure of the terms of a credit transaction and regulates credit advertising (Title I), it makes extortionate extensions of credit illegal (Title II), it restricts the amount of a debtor's earnings subject to garnishment (Title III), and it sets up the National Commission on Consumer Finance which is directed to study the consumer credit industry (Title IV).

Title I of the FCCPA is officially named the "Truth-in-Lending Act". Section 123 of that law directs the Federal Reserve Board to exempt from the disclosure requirements of the Act any class of transactions if the Board determines that under the law of the state the class of transactions is subject to requirements "substantially similar" to those imposed by the "Truth-in-Lending Act" and that there is adequate provision for enforcement.

The Code is designed and intended to have disclosure requirements which meet the "substantially similar" test in order that any state enacting the Code will be exempt from the disclosure requirements of the Federal "Truth-in-Lending Act".

The Federal Reserve Board has not yet issued regulations under the FCCPA. A final ruling that the Code will exempt any state enacting it from the disclosure requirements of the "Truth-in-Lending Act" is being requested in August, 1968.

The Code's provisions on advertising are substantially the same as those in the FCCPA, and the Code's provision on garnishment is more restrictive than that in the FCCPA.

Assuming the Code meets the "substantially similar" and adequate enforcement tests of the FCCPA, the FCCPA would affect only credit advertising and extortionate extensions of credit in any state enacting the Code.

THE UNIFORM COMMERCIAL CODE'S APPLICATION

The Uniform Commercial Code provides that the rules it sets forth are subject to regulatory legislation particularly in consumer transactions. Thus the Consumer Credit Code will supplement the Commercial Code. The Commercial Code sets the background and its rules will continue to apply to consumer transactions except where the Consumer Credit Code provides different rules for consumer credit transactions.

J. Carlson work copy

Introduced: 1/20/70
Referred: Commerce and Judiciary

IN THE HOUSE BY BORER

HOUSE BILL NO. 497

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to revolving credit plans."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 06.05.208(c) is repealed and re-enacted to read:

(c) A seller of goods or services who sells instruments provided for in (a) of this section to ~~a~~ bank at a discount shall, upon request of the buyer of the goods and services, sell them for cash in an amount equal to the regular price less the discount.

* Sec. 2. AS 06.05.208 is amended by adding a new subsection to read:

(d) A buyer of goods or services whose request for a discount is refused, and who then buys from the seller at the regular price, may recover from the seller an amount equal to three times the regular price.

Commerce recommended strike "to a bank"

File HB-497

TELEGRAM

1929 Communications Group (ACS) USAF
FEDERAL BLDG. ROOM 137 PHONE 6-7477
JUNEAU, ALASKA

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1970 FEB 4 PM 1 44

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ANCHORAGE ALASKA 4

HON BARRY JACKSON ALASKA STATE HOUSE OF REPRES

POUCH V STATE CAPITOL BLDG JUN 1967

WE WOUL' APPRECIATE YOUR ENTERING THE FOLLOWING TESTIMONY REGARDING HOUSE BILL NUMBER 497 RELATING TO REVOLVING CREDIT PLANS INTO THE MINUTES OF YOUR COMMITTEE HEARING ON FEBRUARY 5, 1970. THIS REPRESENTS THE VIEWS OF THE ALASKA RETAIL ASSOCIATION ON THAT MEASURE.

HB 497 WOULD REQUIRE A SELLER OF GOODS AND SERVICES WHO SELLS INSTRUMENTS TO A BANK AT A DISCOUNT, TO, UPON REQUEST OF A BUYER OF GOODS AND SERVICES, SELL THEM FOR CASH EQUAL TO THE REGULAR PRICE, LESS THE DISCOUNT. FRANKLY, IT IS A LITTLE DIFFICULT TO DETERMINE THE EXACT PURPOSE OF THIS MEASURE. IT WOULD APPEAR THAT THIS BILL WOULD HAVE THE EFFECT OF ATTEMPTING TO CONTROL THE PRICES A SELLER CHARGES. IN ESSENCE, HB 497 IS SAYING TO RETAILERS: "YOU MUST SELL AT A DISCOUNT TO ANYONE REQUESTING IT." THIS COULD LEAD TO SOMEWHAT CHAOTIC MARKET CONDITIONS IF THIS PHILOSOPHY IS CARRIED FAR ENOUGH. ON THE SURFACE, THIS SEEMS TO BE A SOMEWHAT DANGEROUS PIECE OF LEGISLATION IF THIS IS INDEED THE INTENT.

HB 497 IS APPARENTLY AIMED DIRECTLY AT THE BANK CREDIT CARD CONCEPT, WHICH IS PRESENTLY BEING UTILIZED BY APPROXIMATELY 850 SMALL AND MODERATE SIZED RETAILERS THROUGHOUT ALASKA. THE RETAILER, IN CONTRACTING FOR THIS SERVICE, AGREES TO A FEE AMOUNTING TO A SPECIFIED PERCENTAGE OF GROSS SALES MADE UNDER A BANK REVOLVING CREDIT PLAN. THIS FEE IS A DIRECT COST TO THAT RETAILER AND IS REGARDED AS A PART OF HIS COST OF OPERATION. REQUIRING A RETAILER TO GIVE A DISCOUNT BECAUSE HE HAPPENS TO SELL CERTAIN INSTRUMENTS TO A BANK AT A DISCOUNT SEEMS UNUSUALLY

A FORM OF PRICE CONTROL.

A RETAILER'S CASH PRICE IS GEARED TO TWO BASIC THINGS: COST OF OPERATION AND COMPETITION. INCREASES IN VOLUME THROUGH USE OF BANK CREDIT CARDS CAN OFF-SET AT LEAST A PORTION OF THE COST OF THE DISCOUNT PAID TO THE BANK. REQUIRING THAT RETAILER TO GIVE EVERYONE A DISCOUNT COULD SERVE TO DRIVE THAT CASH PRICE UP, WITH A CONSEQUENT LOSS TO ALL CONSUMERS--BOTH THOSE WHO BUY ON A STRICTLY CASH BASIS AND THE CREDIT CUSTOMER.

THE ADVANTAGES OF A BANK CREDIT CARD PLAN TO A RETAILER ARE

(1) QUICK TURN-OVER OF CASH AND

(2) INCREASED BUSINESS THROUGH BEING IN A POSITION TO OFFER HIS CUSTOMERS EXTENDED TERMS; SOMETHING THE AVERAGE SMALL RETAILER IS USUALLY UNABLE TO DO COMPETITIVELY.

THE QUESTION MIGHT ARISE: WHY SHOULD A BANK OBTAIN A PERCENTAGE FEE FROM THE RETAILER AND THEN, ADDITIONALLY, CHARGE THE CONSUMER A MONTHLY FINANCE CHARGE ON TOP OF THIS? THE ANSWER IS READILY APPARENT. EVEN THOUGH THE INSTRUMENTS SOLD TO A BANK ARE DISCOUNTED AND ARE ON A NON-RECOURSE BASIS, THERE ARE STILL HANDLING COSTS TO CONSIDER FROM THE POINT OF VIEW OF THE BANK. WHILE WE DON'T HAVE THE EXACT FIGURES, IT IS OBVIOUS THAT A FAIR PERCENTAGE OF THE DISCOUNT FEE IS USED UP IN THOSE HANDLING COSTS. FROM THE POINT OF VIEW OF THE RETAILER, HE IS ABLE TO FINANCE A PORTION OF HIS ACCOUNTS RECEIVABLE AT WHAT IS, IN THIS DAY AND AGE, A VERY SATISFACTORY RATE. BORROWING DIRECT TO FINANCE HIS OWN RECEIVABLES WOULD COST SUBSTANTIALLY MORE. BECAUSE OF THESE COST FACTORS, WHICH LARGELY WIPE OUT THE FEE PAID TO THE BANK BY THE RETAILER, IT IS NECESSARY AND REASONABLE FOR THE BANK TO CHARGE A FINANCE FEE TO THE CONSUMER-USER OF THE CREDIT CARD PLAN. ADDITIONALLY, LIKE MOST RETAIL CREDIT PLANS, A CUSTOMER MAY PAY IN FULL WITHIN 25 TO 30 DAYS WITHOUT INCURRING ANY FINANCE CHARGE.

DEAN FURICH ALASKA RETAIL ASSOCIATION

BOX 1727 ANCHORAGE ALASKA

497 5 1970 497 497 497 850 (1) (2) 25 30.

HB
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SUPERIOR COURT

FIRST JUDICIAL DI[illegible], AT JUNEAU

[illegible], [illegible], [illegible]
and [illegible],

Plaintiffs,

v.

[illegible], [illegible]
OF [illegible], STATE OF [illegible]

Defendant.

Civil Action No. [illegible]

ORDER

This matter having come on before the Court on plaintiffs' motion for summary judgment, plaintiffs having appeared by [illegible], their attorney, and defendant having appeared by [illegible], his attorney, the Court having considered the motion, memoranda of counsel, and being fully advised in the premises, finding undisputed the facts of the matter, and the law applicable thereto, and having determined that plaintiffs are entitled to judgment as a matter of law,

IT IS HEREBY ORDERED that:

1. Pursuant to the provisions of [illegible] plaintiffs [illegible] shall be placed on the ballot as [illegible] candidates for [illegible] on the general election [illegible] and the ballots of [illegible] shall be counted for said candidates as votes cast specifically for presidential electors. The designation of Dem. or Rep. following the name of each candidate for presidential elector shall be followed by a designation of (Unp.) to signify the independent nature of their candidacy.

2. Plaintiffs are entitled to their costs herein including an attorney's fee of [illegible].

-1-

DATED this 30th day of August, 2013.

Approved as to form

Paul J. Mahoney

THE FOLLOWING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

TRANSCRIPT OF ORAL DECISION RENDERED IN THE
SUPERIOR COURT, FIRST JUDICIAL DISTRICT,
STATE OF ALASKA, AUGUST 28, 1963,
BY JUDGE THOMAS B. STEWART

This time has been fixed for the rendering of a decision in the case of Mellin et al vs. Miller, No. 63-158. Before considering the merits of the case I wish to preface my remarks by noting that the opinion I am about to render is most informal rather than a more precise written opinion that I should have preferred to prepare in this case, but as counsel, who have prepared excellent briefs, well know, the problem of writing a precise statement is one that consumes a great deal of time and in view of the public significance of this case and the desirability of there being a decision at the trial level, without any further delay I have determined that this course is preferable and the purpose of my remarks is mainly to inform both the interested public and the reviewing court, if there should be a review or appeal, of the reasons why I have reached the conclusion that I have.

Upon close examination of all the briefs and in view of the cases cited in the briefs I do not believe there is any significant case authority outside of that that has been provided to me and I, therefore, am going to avoid the citation of cases and the statement of my reasons can be related to the citations that are in the briefs upon anyone wishing to review what I have to say.

The facts of the case I think are set out perhaps most completely in the memorandum submitted on behalf of the plaintiffs. These plaintiffs submitted petitions to the Secretary of State, the defendant Miller that is, requesting that the names of George C. Wallace and Samuel M. Griffin be

placed on the November general election ballot, that is November 5, 1968, and that votes for those candidates be counted as votes for the petitioners who seek to be shown as presidential electors in the case. Petitions were signed by over 1700 persons and were in the form prescribed by law for all nominations by petitions, that is no party nominations as titled in the statute. The Secretary accepted the petitions but informed the plaintiffs that he refused to recognize them as legally valid to accomplish their nomination to the office of presidential elector. Upon being advised of the Secretary's action the plaintiffs commenced this litigation in which they request the court to direct the Secretary to do what he has refused to do, that is to recognize their petitions as valid and place the names of the candidates for the national offices whom they support on the general election ballot, or in the alternative, that if the nomination is not permitted by petition, then the law which would be found to be restricted to nominations through political parties receiving 10% of the vote at the last gubernatorial election be found unconstitutional. So the issues of law involved are first, whether the applicable statutes may be reasonably interpreted to permit the selection, the appointment, of these plaintiffs as presidential electors, or if not, whether the applicable statutes are constitutional, specifically under the due process and equal protection provisions of the Alaska Constitution, Sections 1 and 7, Article 1, or the United States Constitution, the Fourteenth Amendment. In procedure in the case before the court on cross motions for summary judgment, both parties have agreed that there are no genuine issues of material fact and the facts are taken as shown by the pleadings on file and by the affidavits submitted in support of them. In my view, the central concern is that there is indeed a serious constitutional problem if the statutory

plan can now be held to permit nominations of presidential electors by petition. Without an alternate means of nomination there is no practical way for any new party or group of voters, no matter how substantial, to gain a place on the ballot. I think the seriousness of the constitutional challenge is shown by the Idaho case which is specifically cited in plaintiffs reply memorandum and which was discussed in the oral argument before this court. Even though in this case a different constitutional provision was involved, the challenge to the constitutionality of the statute was to a provision of the Idaho Constitution directly relating to suffrage, and the courts, neither the trial court nor the Supreme Court of Idaho, considered specifically the application of the equal protection clauses of their state Constitution or the federal Constitution. But it seems to me that equal protection would be denied these plaintiffs and the substantial group of voters they represent where the Legislature has fixed a plan for the appointment of presidential electors that provides for all qualified voters of the state to vote on their appointment, which is the plan in effect in Alaska, yet a substantial group cannot vote for candidates of their choice in that system because of the restrictive plan that exists that there is no alternate route for substantial groups to get the names of their preferred national candidates other than that of the two major parties on the general election ballot. So initially, in this case, I take the course of avoiding decision on the constitutional issue which is indeed a serious one, if by any reasonable construction the statutes can be found to permit these names to be placed on the ballot as sought by plaintiffs under the present provisions. In this I follow the principal of the _____ case cited in the briefs and it is reiterated, that is the principal, reiteration of the principal in other

cases cited by the plaintiffs. Then I turn to the statutes to examine whether by their construction the constitutional question can be avoided. There are in fact two alternatives exposed, one is nomination by petition and the other would be selection of the presidential electors at the general election through a write in process. In examining first the write in process I would recommend a reading of the analysis given by the trial court in the Idaho case in which it is clearly set out that this is not a practical and reasonable means to accomplish the end. Not only would these voters have to select, have to write in the names of three electors which are uncommon, that is publicly unknown names, but the very process would deny what is available to other voters, that is to cast their vote having confronted before them the names of the candidates for president and vice president. It seems to me that the interpretation problem is at least as complicated if not more so by the use of the write in provisions of our statutes than by use of the petition provisions, and the procedure is, might become, equally unwieldy, or more outside the intent of the legislature to use the write in provisions for this purpose than to use the petition provisions as an alternate route to nominate these presidential electors.

The defendants have set out several bases on which the court should find that petition provisions, which are in Chapter 25 of Title 15, should not be interpreted to allow the nomination of these plaintiffs as presidential electors. They [illegible] that they do not hold an office as the term is used in the statutes. Well, as plaintiffs indicate, the right to nomination by that process refers to candidates, to obtain [illegible] public office or offices, but the rights to [illegible] which refers to candidates, and I believe certainly that these plaintiffs are candidates, not only

AS 15.25.140

that, but candidates for office and I see no reason to reach the--to consider the phrase public office. The statute is not cast in those terms. The defendants make substantial argument as to the inconsistency of other provisions of Chapter 25 with the proposition that these plaintiffs can be nominated by (indistinguishable) / as well as by petition. It may very well be that there are inconsistencies but I think a reasonable interpretation of the whole picture is that the Legislature by some oversight or omission would not apply the procedural provisions with the relation to other offices to the office of presidential elector, and the reasonable interpretation of the statute in the circumstance, in the face of the constitutional question, is that the procedural provisions of Chapter 30 which specifically deals with presidential elections ought to be used, reasonably as they are available, for the procedural problems in relation to the placing of names on the ballot, including the use of the candidates for national office, Mr. Wallace and Mr. Griffin, to be reproduced on the ballot, and that votes for them be counted for these petitioners as the electors pledged to support them. I think this answers some of the suggestion of inconsistencies which are to be found only if you rather narrowly confine your view of the statute to Chapter 25, and I think that it is not at all unreasonable or an unfair reading of the statute to relate Chapter 30 to Chapter 25 when you are considering the office of presidential elector, which removes some of the problems of inconsistency. It seems to me further that the inconsistencies are greater with respect to the use of the write in provision which defendants suggests might be an alternative than by using the petition provisions as an alternative to the one that is explicitly set out relative to nomination by political parties. The defendants make an argument that these should be applied here the legal doctrine

expressly until the statute amended, that is since the statute speaks expressly on nomination by political party, that any other route must be found beyond legislative intent. As indicated, I think the reasonable interpretation is to read Chapters 25 and 30 together, in which case I think it is not so clear that there is a legislative expression intending to exclude nomination of electors by petition. I find nothing unreasonable in the use of the figure 1000 voters as being the minimum to assure that this group is a significant one, not one that is so insignificant that it would be more expensive, more trouble, more difficult, more awkward that it would be justified to burden the ballot with their names. The defendant argues that 10% of the vote in the preceding general election ought to be used, but interpreting, as I say, Chapters 25 and 30 together, peremptory, as it were, I see no reason why the Legislature would have sought any more signatures for the office of president or vice president than they would have the office of United States senator or United State congressman or for governor as a basis to indicate that there is indeed a substantial group standing for the candidacy of these national officers. Defendant argues that plaintiffs suggest the principal of the case of Hale, Hale vs. Hyde, the Alaska case in which an interpretation of the construction, liberal interpretation of the construction became the purpose as made by the Supreme Court of Alaska even though that case did involve the interpretation of the Constitution and not of a statute, I think the analogy is not an unreasonable one for me to consider in terms anyway whether a reasonable interpretation of this statute permits nomination of presidential electors by petition. In substance, then, I hold that the relief sought by the plaintiffs should be granted. That relief should include the placing of the names of the national candidates whom these

plaintiffs' names on the election ballot and that votes for those candidates be counted for these petitioners as presidential electors pledged to support those national candidates. Plaintiffs may submit a form of judgment in accordance therewith.

THE PRECEDING DOCUMENT(S) MAY NOT FILM LEGIBLY BECAUSE OF POOR QUALITY OF THE ORIGINAL.

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4, 1968.

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APPEALS OF TEXAS.

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WILLIAMS ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 543. Argued October 7, 1968.—Decided October 15, 1968.*

Under the Ohio election laws a new political party seeking ballot position in presidential elections must obtain petitions signed by qualified electors totaling 15% of the number of ballots cast in the last gubernatorial election and must file these petitions early in February of the election year. These requirements and other restrictive statutory provisions virtually preclude a new party's qualifying for ballot position and no provision exists for independent candidates doing so. The Republican and Democratic Parties may retain their ballot positions by polling 10% of the votes in the last gubernatorial election and need not obtain signature petitions. The Ohio American Independent Party (an appellant in No. 543), was formed in January 1968, and during the next six months by securing over 450,000 signatures exceeded the 15% requirement but was denied ballot position because the February deadline had expired. The Socialist Labor Party (an appellant in No. 544), an old party with a small membership, could not meet the 15% requirement. Both Parties brought actions challenging the Ohio election laws as violating the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court held those laws unconstitutional and ruled that the Parties were entitled to write-in space but not ballot position. The Parties appealed to this Court. The Independent Party immediately sought interlocutory relief from MR. JUSTICE STEWART, which he granted by order after a hearing at which Ohio represented that it could place the Party's name on the ballot without disrupting the election if there was not a long delay. Several days after that order the Socialist Labor Party sought a stay which he denied because of that Party's failure to move quickly for relief, the State having represented that at that time the granting of relief would disrupt the election. *Held:*

1. The controversy in these cases is justiciable. P. 28.

*Together with No. 544, *Socialist Labor Party et al.* v. *Rhodes, Governor of Ohio, et al.*, also on appeal from the same court.

THIS OPINION MAY BE READ IN FULL IN VOLUME 393
AT PAGE 23 OF THE U.S. REPORTS AT LAW LIBRARY.

HB
782

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PHONE 586-3340
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April 6, 1970

The Honorable Tom A. Fink, Vice Chairman
House Judiciary Committee
Alaska State Legislature
Juneau

Re: House Bill No. 782

Dear Tom:

Pursuant to my telephone call to you this past Friday, I wish to confirm that I did get the expected materials and have had them duplicated and accordingly enclose one copy each of the following:

1. Confidential Committee Print No. 1 of Senator Magnuson's bill S. 2236 creating a Federal Insurance Guaranty Corporation. This represents the most recent printer version of the bill. However, there was a meeting last week in Washington, D. C., to consider still further amendments, but we do not have any copies. The indication is that the amendments will further reduce the Federal bureaucracy required and further strengthen state regulation.

2. The Nixon Administration's bill S. 3542 establishing a Federal insurance guaranty program under the Federal Insurance Administrator in the Department of Housing and Urban Development.

3. A statement by Senator Norris Cotton, Republican of New Hampshire, when he introduced S. 3542 at the request of the Department of Housing and Urban Development.

4. A Committee statement comparing the Committee redraft of S. 2236 (Confidential Committee Print No. 1) with the Administration bill S. 3542.

I realize the Committee is probably inclined to go along with Director Fritz's recommendation, but I am equally sure that the NAIC policy is based on Senator Magnuson's bill and not on S. 3542.

Sincerely yours,

F. O. Eastaugh

FOE:bh
Encs.
cc: Hon. Barry W. Jackson

FEDERAL INSURANCE GUARANTY: A Comparison Between the Magnuson Proposal (S. 2236 revised) and the Administration Proposal (S. 3542)

Form

The Magnuson proposal establishes a Federal Insurance Guaranty Corporation that is independent of existing governmental machinery.

The Administration bill creates a Federal Insurance Guaranty Program under the Federal Insurance Administrator in the Department of Housing and Urban Development.

Management

The Magnuson proposal vests the management of the Corporation in an Administrator appointed by the President with the advice and consent of the Senate for a term of six years. The Administrator is assisted by an Advisory Committee consisting of consumer representatives, insurance industry spokesmen, and state insurance commissioners. In addition to advising the Administrator, the Committee is given actual power to approve or reject proposed national standards for insurance regulation and liquidation. The Committee must also concur in any decision by the Administrator to revoke guaranty status.

The management of the Program is vested in the Secretary of HUD and the Federal Insurance Administrator who is appointed by the Secretary. An Advisory Committee chaired by the President's Adviser on Consumer Interests is created and given only advisory power.

Financing

The Magnuson proposal provides for the independent financing of the Corporation through the issuance of capital stock and yearly national assessment on companies whose policies are guaranteed under the Act. The Corporation is also authorized to borrow from the Treasury to cover any immediate obligations. Funds generated through national assessments or special state post-insolvency assessments are used

to repay the loans and interest. There are certain important ceilings imposed by the Magnuson proposal:

1. Yearly national assessments are limited to one twenty-fifth of 1 per centum of the net direct premiums written. (Currently about $10 million per year or 4 cents per $100 of premium.)

2. The Corporation can spend no more than $7.5 million per year for administrative expenses.

3. National assessments cease when the guaranty fund exceeds one-eighth of 1 per centum of the net direct premiums written (currently about $30 million.)

4. State assessments cannot exceed 1 per centum of the net direct premiums written in any one year.

5. There is an outstanding treasury loan ceiling of $100 million.

The Administration's Federal Insurance Guaranty Program is financed through appropriations that are maintained in a separate fund and through monies received from post-insolvency state assessments and treasury loans. The only ceiling imposed is the 5% ceiling on administrative expense add-on to any post-insolvency assessment Because interest on treasury loans is designated as an administrative expense, the ability to borrow from the treasury could be hampered by the unavailability of appropriations to cover all administrative expenses including interest on loans. In other words, the 5% ceiling, as a practical matter, may prevent the Program director from actually borrowing money to meet the guaranty obligations of the Corporation.

PROTECTION OF CONSUMERS

Prevention of Insolvencies

(1) Improvement of State regulation:

The Magnuson proposal attempts to improve state regulation by providing for the

setting of voluntary national standards for regulation, rehabilitation, and liquidation. In so doing, the Corporation is required to pay attention to the Wisconsin Liquidation and Rehabilitation Act which the National Association of Insurance Commissioners has adopted as a model state act. No standards become effective until the Advisory Committee, by majority vote, approves them.

By creating two guaranty statuses, the Magnuson proposal attempts to create incentives for the states to meet the national voluntary standards. A state living up to the national standards is insulated from any and all unwanted Federal intervention. The Corporation performs the guaranty function only upon presentation by the State of the unadjudicated claims. Because insurance companies domiciled in States meeting the national standards are not subject to Federal examination and are granted permanent guaranty status, the Magnuson proposal provides incentives for the domiciliary insurance companies to work with the State supervisory authority and the State legislature in order to meet national standards. An ostensible incentive for improving State insurance regulation is also provided by the possible post-insolvency assessment liability of companies (and therefore their policyholders) doing business in a State where an insolvency occurs.

The Administration relies upon the post-insolvency assessment approach as its only vehicle for improving state regulation. The efficacy of this approach was questioned in hearings on S. 2236 (pages 287 and 298). Would the threat of assessment cause the insurance industry of the State to bring pressure upon the State supervisory authority to do a better job of regulating? Does the ability of the insurance industry to pass most of the assessment cost on to the public reduce the likelihood of strong industry pressure for improved regulation? Would the ten or fifteen cent price increase per policy so incense the public that they would insist that the State supervisory authority do a better job of preventing insolvencies?

If the State post-insolvency assessment approach does provide incentive for improved State regulation, does it provide such strong incentives that no other incentives need be provided?

(2) Monitoring of interstate activities, providing of useful information, and availability of a body of experts --

The Magnuson proposal, by providing for an independent Corporation which is independently financed, insures that the Federal Corporation will assist the State commissioners by providing them with information related to the interstate operations of insurers. It could also provide accurate information about security values and generally serve as an information gathering agency for State regulatory authorities.

The Magnuson proposal would certainly provide State commissioners a much needed expertise.

The National Association of Insurance Commissioners has recognized the need for such services in their Report of the Special Committee on Automobile Insurance Problems at pages 196 and 197:

> (3) Technical Staff Assistance to the States. A third function of the Corporation would be to provide State insurance departments with professional expertise and assistance both before and during an insolvency proceeding. The Corporation would possess knowledgeable consultants from which the individual commissioner could solicit aid if and when desired.
>
> The State insurance departments would retain their jurisdiction; insolvency proceedings would be handled in the usual way.. However, an insurance company insolvency can be a complicated transaction. It is frequently difficult to find, on a local basis, accountants or lawyers with special expertise in this area. Insolvencies create extra work demands on State insurance departments which they are not always equipped to meet, and liquidation costs are sometimes higher because those handling them are dealing with them for the first time. This also applies to ancillary proceedings. But, with the Corporation available to pull the interstate pieces together for the local insolvency proceedings, greater efficiency and lower costs could result.

> . . . The existence of a competent, well staffed and well financed group of experts in the Corporation, to supplement the insurance department staffs, could be most helpful in efforts to speedily administer criminal and civil justice." (emphasis added.)

The Administration's Program depends upon appropriations for staffing and other administrative activities. The imposition of a 5% add-on to any post insolvency assessment to cover administrative costs (including interest on treasury loans) suggests that the Administration contemplates a rather limited role for the Program staff.

(3) Loans to participating insurers --

Section 8(c) of the Magnuson proposal authorizes the Corporation to advance loans to participating insurers in order to get them back on their feet and prevent their liquidation. This loan authority has enabled the FDIC and FSLIC to keep many banks from becoming insolvent.

The Administration's bill has no comparable provision.

(4) Federal examination of companies domiciled in states not meeting federal standards --

To further aid in the prevention of insolvencies, the Magnuson proposal authorizes the Corporation to examine, when necessary, companies domiciled in states not meeting the voluntary national standards. Such examinations are to be conducted by Federal examiners in cooperation with the State supervisory authority. No federal examination is authorized in those states meeting the national standards.

The Administration proposal has no such provision.

(5) Revocation of guaranty status --

The Magnuson proposal allows the Corporation to revoke the guaranty status of participating insurers in order to put them out of business. The revocation of any insurer domiciled in a State meeting the voluntary national standards can only take

place if the State supervisory authority asks the Corporation to revoke an insurer's guaranty status or concurs in such a motion made by the Corporation. The Corporation may revoke the guaranty status of an insurer domiciled in a State not meeting the national standards, but such revocation cannot take place without the concurrence of a majority of the Advisory Committee. A company who continues to do business without guaranty status when it is required to have guaranty status is subject to a fine of not more than $1,000 per day.

The Administration bill has no comparable provision.

Payment of Guaranty

(1) Scope of protection --

The Magnuson proposal requires the Corporation to assume all the insurance company's guaranteed policy obligations, including the obligation to provide legal defense. The Corporation steps into the shoes of the insurer without interferring with the State and performs as if it were the company pursuant to the suggestion of the NAIC Report, supra. The only limitations on the scope of the protection are those imposed by the policy contract provisions themselves.

The Administration's proposal protects the consumer to the extent the State liquidator determines he should be protected. The Program pays the adjudicated claims that the State liquidator files with the Secretary of HUD. In those states having post-insolvency assessment plans, the Secretary will not pay the first $100 of any valid claim. In other words, citizens of states having post-insolvency assessment plans are afforded less protection than those in states without such plans.

(2) When is the consumer protected?

Under the Magnuson proposal the consumer is protected as soon as the insurance company is placed in liquidation (for whatever reason) and ceases to meet its policy

obligations. Claimants against companies who are domiciled in States meeting national standards file their claims with the State liquidator who immediately turns them over to the corporation which is required to investigate, examine, adjust, compromise, or settle them as quickly as possible. The Corporation becomes the receiver of companies domiciled in States not meeting the national standards when they are placed in liquidation and cease to meet their policy obligations. It pays valid claims against the company as soon as possible. Under the Magnuson proposal no consumer should go without payment of valid claims for any significant length of time -- certainly no longer than several months from the time the Corporation receives the claim and much less time if the claim is for return of uncarned premium.

Under the Administration's proposal the time of payment is very uncertain. If a State had the Wisconsin Rehabilitation and Liquidation Act and an experienced liquidator, the Administration approach might work as speedily as the Magnuson approach if the borrowing authority under the Administration bill were workable. But only Wisconsin has such a law, even though the National Association of Insurance Commissioners adopted the Wisconsin law as the model rehaibilitation and liquidation law in 1968. The previous model legislation was the New York Uniform Liquidation Act adopted in 1939. To date only twenty-eight states have adopted the 1939 model act.

Under the Administration bill the following must occur before any claimant is paid:

(1) Insurer placed in liquidation.

(2) Insurer adjudicated insolvent.

(3) Private contractual remedies of claimant pursued.

(4) Claim submitted to State liquidator.

(5) Claim investigated, adjusted, compromised or settled by State liquidator with court approval where necessary, or by the insurance industry in the State if the State has a post-insolvency assessment plan.

(6) Claim submitted to the Secretary for payment.

(7) Payment, either before or after periodic assessment, to the State liquidator.

(8) State liquidator pays the claimant.

An adjudication for insolvency alone can take as much as five years.

Of course time factors vary from State to State. But as the NAIC has stated: "It is frequently difficult to find, on a local basis, accountants or lawyers with special expertise in this area." (see supra.) The Administration's proposal does not seem to guarantee "the expeditious compensation of consumers for insured losses arising under policies of property, liability, or surety policies issued in interstate commerce by insurers which become insolvent," even though "expeditious compensation" is a stated purpose of the Administration's bill.

Agreement on principles reflected in the two proposals

1. Federal legislation is needed to guarantee that every citizen, every policyholder, and every claimant is properly and fully compensated for his insured losses. (Hearings at 274)
2. The Federal legislation should provide incentives for improving State regulation. (Hearings at 287)
3. The Federal legislation should not disturb the basic framework of State regulation. (Hearings at 276; see also id. at 190, 200, and 201.)
4. If a State has acted already or decides to act in the future the Federal

legislation should not conflict with it but only reinforce and bolster it up. (Hearings at 280)

Possible Disagreement

1. Magnuson's proposal: Voluntary national standards for regulation, rehabilitation, and liquidation do not disturb the basic framework of State regulation. (Hearings at 200-01.)

Administration's view:

2. Federal standards might very well constitute Federal regulation. (Hearings at 276)

S. 3542--INTRODUCTION OF THE FEDERAL INSURANCE GUARANTY ACT

Mr. COTTON. Mr. President, at the request of the department involved, I now introduce the administration's proposed Federal Insurance Guaranty Act and ask unanimous consent that it be referred to our Committee on Commerce.

I make this request in view of the fact that on May 23, 1969, a similar measure, S. 2236, was introduced by the distinguished Senator from Washington (Senator Magnuson) for himself and others, which was referred to our Committee on Banking and Currency which subsequently discharged the bill for referral to our Committee on Commerce.

Since that time our Committee on Commerce has held several days of hearings on the bill S. 2236, the last being on February 10 of this year at which time administration witnesses testified in response to the committee's request indicating that it, the administration, would submit its own legislative proposal as an alternative to the bill S. 2236.

Mr. President, this alternative legislative proposal is the one which I now introduce and, as previously noted, request unanimous consent for its referral to our Committee on Commerce.

In making this introduction, I am mindful of the fact that there is considerable concern both within and without Congress with respect to such legislative proposals and the probable impact of such upon the McCarran-Ferguson Insurance Regulation Act which provides in part a congressional declaration that "the continued regulation and taxation by the several States of the business of insurance is in the public interest."

It is my understanding, Mr. President, that the bill which I now introduced is in consonance with this congressional declaration of policy and will do minimum violence to it. Quite frankly, if it were to do otherwise and upset this long-standing Federal/State relationship, then I would be constrained to oppose its enactment. I have been advised, however, that this alternative legislative proposal will serve to meet the particular problem at hand without any such adverse impact, and I would hope that subject to the granting of my unanimous-consent referral to our Committee on Commerce, such legislative proposal will be accorded every consideration along with the bill S. 2236 now pending before that committee.

91ST CONGRESS
2D SESSION

S. 3542

IN THE SENATE OF THE UNITED STATES

MARCH 4, 1970

Mr. COTTON introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To authorize the Secretary of Housing and Urban Development to establish a Federal insurance guaranty program under the Federal Insurance Administrator to protect the American public against losses resulting from the insolvency of insurers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Insurance Guaranty Act".

PURPOSE

SEC. 2. The purpose of this Act is to provide a national program within the framework of State regulation of the insurance industry, for the expeditious compensation of con-

sumers for insured losses arising under policies of property, liability, or surety insurance issued in interstate commerce by insurers which became insolvent, where the funds readily available from all other sources are insufficient to satisfy the insurer's valid outstanding claims in full.

DEFINITIONS

SEC. 3. (a) When used in this Act, unless the context otherwise requires, the term—

(1) "approval of a claim" or "approved claim" means any unpaid claim—

(i) including claims for refunds of unearned premiums, but excluding amounts due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise,

(ii) arising under and within the coverage and limits of insurance policies issued by any insurer adjudged, subsequent to the effective date of this Act, to be insolvent under the laws of its domiciliary State, and

(iii) which has been finally determined administratively or judicially under applicable State law to be valid in a fixed amount;

(2) "certification of an approved claim" or "certified approved claim" means an approved claim (in whole or in part) which the State insurance authority

of the domiciliary State of an insolvent insurer certifies to the Secretary (i) is unpaid, and (ii) is not payable under any other policy or contract of insurance or reinsurance, or under any State insolvency or guaranty fund, pool, association, or assessment;

(3) "domiciliary State" means:

(i) the State of incorporation or organization of an insurer organized or incorporated in the United States, or

(ii) the State of entry of an alien insurer;

(4) "Federal Insurance Administrator" means the Federal Insurance Administrator within the Department of Housing and Urban Development, authorized by section 1105 of the Housing and Urban Development Act of 1968 (42 U.S.C. 3533a);

(5) "insolvency" or "insolvent," as applied to an insurer, shall be construed in accordance with the applicable laws of its domiciliary State;

(6) "insurance" means all kinds of direct insurance except life, title, disability; and mortgage guaranty insurance;

(7) "insurance policy" or "policy" means any contract or policy of insurance, including any valid endorsement thereto, delivered or issued for delivery in any State;

(8) "insurer" means any person licensed to engage in the business of insurance under the laws of any State, which issues policies of insurance in interstate commerce or reinsures its policies (in whole or in part) in interstate commerce;

(9) "interstate commerce" means trade or commerce between or among several States or within the District of Columbia;

(10) "net direct premiums written" means gross direct premiums written on insurance policies, less return premiums thereon and dividends paid or credited to policyholders on such direct business, and excluding premiums on contracts between insurers or reinsurers;

(11) "person" means any individual or group of individuals, corporation, partnership, association, or any other organized group of any of the foregoing, and includes State and local governments and agencies thereof;

(12) "Secretary" means the Secretary of Housing and Urban Development;

(13) "State" or "United States" means the several States, the District of Columbia, the territories and possessions, the Commonwealth of Puerto Rico, and the Trust Territories of the Pacific Islands; and

(14) "State insurance authority" means the per-

son having legal responsibility for regulating the business of insurance within a State.

(b) The Secretary is authority to define, by rules and regulations, any technical or trade term, insofar as such definition is not inconsistent with the provisions of this Act.

GENERAL AUTHORITY

SEC. 4. The Secretary is authorized to establish under the Federal Insurance Administrator, and to carry out under his direct supervision, a national insurance guaranty program in accordance with the provisions of this Act to protect the consumer public from uncompensated losses arising under insurance policies issued by insurers subsequently adjudged to be insolvent under the laws of their domiciliary State.

LISTS OF INSURERS

SEC. 5. Each State insurance authority shall file with the Secretary within sixty days after the effective date of this Act, and on or before August 31 of each calendar year thereafter, a list of all insurers licensed to do business in the State, showing the amounts of net direct premiums written by lines of insurance to which this Act applies in the State by each insurer during the preceding calendar year.

INFORMATION ON INSOLVENCY PROCEEDINGS

SEC. 6. (a) Within ten days after finding any domestic, foreign, or alien insurer insolvent, the State insurance authority making such finding shall so notify the Secretary.

(b) Within ten days after the institution of any proceeding to rehabilitate or liquidate an insurer or which might result in the rehabilitation or liquidation of an insurer, the State insurance authority of the State where such proceeding is instituted shall so notify the Secretary, and shall keep the Secretary currently and fully informed of the progress and outcome of each such proceeding.

NOTIFICATION OF POSSIBLE CLAIMS

SEC. 7. (a) Whenever an insurer is adjudged insolvent and placed in receivership or liquidation by a court of competent jurisdiction, the State insurance authority in its domiciliary State shall promptly determine and notify the Secretary if it appears that all the valid outstanding claims against such insurer cannot be fully and expeditiously paid from its assets and such funds as may be available from other insurers or reinsurers and from insolvency or guaranty funds or associations established under State laws. For the purposes of this Act, it shall be presumed that such claims, arising in any State in which an applicable insolvency or guaranty fund or association established under State law does not exist, cannot be fully and expeditiously paid, but such presumption shall be subject to an explicit contrary determination and certification by the domiciliary State insurance authority.

(b) Whenever the Secretary receives the foregoing no-

tice from the domiciliary State insurance authority that an insurer has been adjudged insolvent and that any outstanding claim may not be fully and expeditiously paid, the Secretary shall promptly notify all other insurers licensed within the domiciliary State of the insolvent insurer of the possibility that he may be required to make guaranty payments under the authority of this Act shall that the insurers so notified may be required to pay assessments to provide the necessary funds.

CERTIFICATION AND PAYMENTS OF CLAIMS

SEC. 8. (a) As soon as he has determined that any approved claims cannot be fully and expeditiously satisfied without recourse to the Secretary, the domiciliary State insurance authority shall certify to the Secretary, in accordance with such regulations as the Secretary may prescribe, such approved claims for payment by the Secretary.

(b) Upon receipt from the domiciliary State insurance authority of a list, or of periodic lists, of certified approved claims, the Secretary shall, as promptly as practicable, pay to the appropriate receiver or liquidator in such State sufficient moneys to satisfy in full such certified approved claims: *Provided*, That with respect to any State where an insolvency or guaranty fund or association has been established pursuant to State law, only that portion of each approved claim shall be paid by the Secretary which is in excess of

$100 and is less than $300,000, and is not payable under such State law.

INSURER ASSESSMENTS

SEC. 9. (a) Whenever he is required to make guaranty payments under the authority of this Act to satisfy the certified approved claims of an insolvent insurer, the Secretary shall obtain funds for or reimbursement of such payments by periodically (but not more often than monthly) assessing each other insurer licensed to do business in the domiciliary State of the insolvent insurer for a proportionate share of (1) the total amount of the guaranty payments required, plus (2) up to an additional 5 per centum of such amount to defray his estimated administrative and operating expenses. Such proportionate share for each insurer shall be based upon its relative share of the total net direct premiums written within that State by all insurers in the calendar year prior to the year in which the insolvent insurer was determined to be insolvent: *Provided*, That in the event the total assessments under any applicable State law and by the Secretary upon any insurer in any State in any calendar year (including any assessment balance from a prior year) exceed 2 per centum of its net direct premiums written in such State in the applicable prior year, the excess over 2 per centum, plus interest as provided herein, may be paid to the Secretary in the immediately succeeding year or years thereafter.

(b) Payments by insurers of such assessments shall be due and payable within thirty days of receipt of notice from the Secretary of the amounts owed. After such thirty-day period, interest shall begin to accrue on any unpaid amounts at a rate determined by the Secretary: *Provided*, That such rate shall not be less than the sum of (1) a rate determined annually by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of less than one year, and (2) a fee of 1 per centum per annum.

(c) Within forty-five days after date of notice of assessment, but only after making such payment or the portion thereof due in the current year, any insurer may file a written notice of objection to the Secretary's determination and shall be entitled to a hearing in accordance with the provisions of this Act to determine whether all or a portion of such assessment should be refunded.

SUBROGATION

SEC. 10. (a) The Secretary shall be subrogated to any approved claim which any claimant has against the estate of the insolvent insurer in the amount paid by the Secretary to satisfy such approved claim.

(b) The Secretary shall credit equitably to the assessed insurers of the domiciliary State of an insolvent insurer,

and periodically repay to such insurers, subject to appropriate offsets and less any additional expenses incurred in connection with such collections, any amounts which he may recover through his subrogation to claims against the estate of such insolvent insurer.

PENALTIES

SEC. 11. Section 709 of title 18, United States Code, is amended by inserting after the eighth paragraph thereof the following new paragraph:

"Whoever, except with the specific written authorization of the Secretary of Housing and Urban Development or of the Federal Insurance Administrator, uses the words 'Federal Insurance Guaranty', 'Federal Insurance Administration', 'FIA', or any combination or variation of those words or letters alone or with other words or letters as a business name or part of a business name, or publishes, advertises, or represents by any device or symbol or other means reasonably calculated to convey the impression that he or it has a connection with or authorization from, or in any way represents or acts as agent for, or is insured or protected against loss or insolvency by, the Department of Housing and Urban Development or the Federal Insurance Administration, for the purpose of inducing or influencing any person to purchase or with respect to the purchase or retention of insurance; or".

HEARINGS

SEC. 12. (a) All hearings in which an insurer is a principal party shall be held before a hearing examiner appointed by the Secretary in the Federal judicial district for the State in which such insurer is domiciled unless the insurer afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of title 5, United States Code. All hearings shall be public, unless the party afforded the hearing and the State insurance authority jointly request a private hearing to protect the public interest. After such hearing, and within ninety days after the Secretary has notified the insurer that the case has been submitted to him for final decision, the Secretary shall render his decision (which shall include findings of fact upon which his decision is predicated) and shall issue and cause to be served upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in subsection (b). Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in subsection (b), and thereafter until the record in the proceeding has been filed as so provided, the Secretary may at any time, upon such notice and in such manner as he shall deem proper, modify, terminate, or set aside any such order with permission of the court.

(b) Any party to the proceeding may obtain a review of any order served pursuant to this subsection (other than an order issued with the consent of the insurer), by filing in the court of appeals of the United States for the circuit in which the insurer is domiciled, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the Secretary be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record in the proceeding, as provided in section 2112, title 28, United States Code. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall, except as provided in the last sentence of subsection (a), be exclusive to affirm, modify, terminate, or set aside, in whole or in part, the order of the Secretary. Review of such proceedings shall be had as provided in chapter 7 of title 5, United States Code. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254, title 28, United States Code.

(c) The Secretary may, in his discretion, petition the court of appeals of the United States for the circuit in which the insurer is domiciled, or in the United States Court of

Appeals for the District of Columbia Circuit, for the enforcement of any final order issued by the Secretary under this section, and such court shall have jurisdiction and power to order and require compliance therewith.

ADVISORY COMMITTEE

SEC. 13. (a) There is hereby established a Federal Insurance Guaranty Advisory Committee composed of not less than seven, nor more than eleven, members to be appointed by the Secretary from among representatives of the Federal and State governments, including State insurance authorities, the insurance industry, and consumers. The Special Assistant to the President for Consumer Affairs shall be a member of such Committee and shall serve as Chairman. The Committee shall elect a Vice Chairman of the Committee.

(b) Each member of the Committee, other than the Chairman, shall serve for a term of two years or until his successor has been appointed, except that no person who is appointed while a full-time employee of a State or the Federal Government shall serve in such position after he ceases to be so employed unless he is reappointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of that term.

(c) The Chairman shall preside at all meetings, and

the Vice Chairman shall preside in the absence or disability of the Chairman. The Committee shall meet at the call of the Chairman, or at the request of the Secretary, but not less often than four times a year.

(d) The Committee shall advise and make recommendations to the Secretary with respect to obtaining the cooperation of insurers, industry groups, and Federal and State agencies in the insurance guaranty program; improving the effectiveness of the insurance guaranty program; and on such general policy matters as may be appropriate.

(e) The members of the Committee shall not, by reason of such membership, be deemed to be employees of the United States, and such members, except those who are regular full-time employees of the Government, shall receive for their services as members per diem equivalent to the rate for grade GS–18 of the General Schedule under section 5332, title 5, United States Code, when engaged in the performance of their duties, and each member of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703, title 5, United States Code, for persons in the Government service employed intermittently.

TREASURY LOANS

SEC. 14. (a) As authorized in appropriation Acts, and such authorizations may be without fiscal year limitation,

the Secretary may borrow from the Secretary of the Treasury, and the Secretary of the Treasury is authorized and directed to lend to the Secretary, such funds as in the judgment of the Secretary are required for the purposes of this Act. Such loans shall bear interest at a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans. For such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds of the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under the Second Liberty Bond Act, as amended, are extended to include such loans. Any such loan shall be used by the Secretary solely in carrying out his functions with respect to insurance. All loans and repayments under this section shall be treated as public debt transactions of the United States.

(b) Interest charged to the Secretary shall be an administrative expense of the Secretary and interest payments received by the Secretary shall be regarded as income to be used by the Secretary for operating and administrative expenses.

FINANCING, BUDGET, AND AUDIT PROVISIONS

SEC. 15. (a) Funds are hereby authorized to be appropriated from time to time in such amounts as are necessary to finance the establishment, maintenance, and operation of the Federal insurance guaranty program.

(b) Amounts appropriated under the above authority, together with the proceeds of loans advanced from the Treasury Department, payments made by insurers upon assessment by the Secretary, and any other receipts of the program shall be administered as a separate fund in the Treasury of the United States.

(c) The Secretary shall prepare annually and submit a budget program as provided for wholly owned Government corporations by title I of the Government Corporation Control Act (31 U.S.C. 847).

(d) The Secretary shall maintain an integral set of accounts which shall be audited annually by the General Accounting Office in accordance with the principles and procedures applicable to commercial transactions as provided by title I of the Government Corporation Control Act (31 U.S.C. 850–851).

GENERAL POWERS

SEC. 16. In the performance of, and with respect to, the functions, powers, and duties vested in him by the Act, the

Secretary, notwithstanding the provisions of any other law, may—

(a) sue or be sued;

(b) without regard to sections 3648 and 3709 of the Revised Statutes, as amended (31 U.S.C. 529 and 41 U.S.C. 5), and section 322 of the Act of June 30, 1932 (47 Stat. 412, as amended (40 U.S.C. 278a)), enter into and perform contracts, leases, cooperative agreements, or other transactions, on such terms as he may deem appropriate, with any agency or instrumentality of the United States, or with any State or agency or political subdivision thereof, or with any person, firm, association, or corporation and consent to modification thereof, and make advance or progress payments in connection therewith;

(c) without regard to sections 3648 and 3709 of the Revised Statutes, as amended (31 U.S.C. 529 and 41 U.S.C. 5), and section 322 of the Act of June 30, 1932 (47 Stat. 412, as amended (40 U.S.C. 278a)), by purchase, lease, or donation acquire such real and personal property and any interest therein, make advance or progress payments in connection therewith, and hold, use, maintain, insure against loss, sell, lease, or otherwise dispose of such real and personal property as

the Secretary deems necessary to carry out the purposes of this Act;

(d) issue such rules and regulations as he deems necessary to carry out the purposes of this Act;

(e) enter into such contracts, agreements, treaties, or other arrangements without regard to section 3679 (a) of the Revised Statutes of the United States (31 U.S.C. 655 (a)) as he may deem necessary to carry out the purposes of the Act; and

(f) exercise all powers specifically granted by the provisions of this Act and such incidental powers as may be necessary to carry out the purposes of this Act.

91ST CONGRESS
2D SESSION

S. 3542

A BILL

To authorize the Secretary of Housing and Urban Development to establish a Federal insurance guaranty program under the Federal Insurance Administrator to protect the American public against losses resulting from the insolvency of insurers, and for other purposes.

By Mr. COTTON

MARCH 4, 1970
Read twice and referred to the Committee on Commerce

[CONFIDENTIAL COMMITTEE PRINT NO. 1]

MARCH 10, 1970

Calendar No.

91ST CONGRESS
2D SESSION

S. 2236

[Report No. 91–]

IN THE SENATE OF THE UNITED STATES

MAY 23, 1969

Mr. MAGNUSON (for himself, Mr. DODD, Mr. HART, Mr. HOLLINGS, Mr. INOUYE, Mr. MOSS, and Mr. PASTORE) introduced the following bill; which was read twice and referred to the Committee on Banking and Currency

MAY 27, 1969

The Committee on Banking and Currency discharged, and referred to the Committee on Commerce

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A BILL

To create a Federal Insurance Guaranty Corporation to protect the American public against certain insurance company insolvencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Insurance Guaranty Corporation Act".

DEFINITIONS

SEC. 2. As used in this Act—

(1) The term "insurer" means any enterprise engaged in the business of issuing property, casualty, or surety insurance policies in interstate commerce or engaged in the business of issuing property, casualty, or surety policies which are reinsured (in whole or in part) in interstate commerce.

(2) The term "local insurer" means any enterprise engaged in the business of issuing property, casualty, or surety insurance policies solely within one State.

(3) The term "participating insurer" means any enterprise whose property, casualty, or surety insurance policies are guaranteed under this Act.

(4) The term "policy" means (a) any contract of property, casualty, or surety insurance, including any endorsements thereto and without regard to the nature or form of the contract or endorsements, insuring against legal liability and/or loss contingencies, other than those provided for by life, accident and health, or title insurance; (b) any agreement written by the insurer or reinsurer in favor of a self-insurer; or (c) any agreement written by an insurer or reinsurer in favor of another insurer assuming 100 per centum of all obligations of the ceding insurer.

(5) The term "policy required to be guaranteed" means any property, casualty, or surety policy issued or delivered

in the United States by any insurer (or its agent) to any person (including any individual, partnership, association, or corporation).

(6) The term "net direct premiums written" means direct gross premiums written on property, casualty, and surety insurance policies required to be guaranteed under this Act less return premiums thereon and dividends paid to policyholders on such direct business.

(7) The term "policyholder claim" means (a) a claim of a policyholder or insured or his assignee within the coverage of a policy, arising out of an occurrence wherein such policyholder or insured suffered damage or is subject to liability for damages within the coverage of the policy, or (b) a claim by a policyholder or insured or his assignee for return premium arising out of the termination of the policy by reason of insolvency.

(8) The term "Administrator" means the Administrator of the Federal Insurance Guaranty Corporation.

(9) The term "Fund" means the Federal Insurance Guaranty Fund as described in section 9 (b).

(10) The term "interstate commerce" means trade or commerce among the several States, or between the District of Columbia or any possession of the United States and any State or other possession, or within the District of Columbia.

(11) The term "State" means any State, any possession

of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(12) The term "State supervisory authority" means the agency or individual of the State of domicile of the insurer having responsibility for regulating the business of insurance within that State: *Provided*, That in the case of an insurer organized under the laws of a foreign country that has no domicile in the United States the "State supervisory authority" means the agency or individual of the State in which policies required to be guaranteed are primarily issued or delivered.

CREATION OF CORPORATION

SEC. 3. There is hereby created a Federal Insurance Guaranty Corporation (hereinafter referred to as the "Corporation") which shall guarantee, as hereinafter provided, the contractual performance of participating insurers and which, in connection therewith, shall have the powers hereinafter granted.

MANAGEMENT OF CORPORATION

SEC. 4. (a) ADMINISTRATOR.—The management of the Corporation shall be vested in an Administrator appointed by the President, by and with the advice and consent of the Senate. The Administrator shall hold office for a term of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the person whom

he shall succeed: *Provided, however*, That upon the expiration of his term of office the Administrator shall continue to serve until his successor shall have been appointed and shall have qualified. The Administrator shall be ineligible during the time he is in office and for two years thereafter to hold any office, position, or employment in any participating insurer; and he shall not be an officer or director of any participating insurer or hold stock in any participating insurer; and before entering upon his duties as Administrator he shall certify under oath that he has complied with this requirement and file such certification with the Secretary of the Corporation.

(b) (1) There is hereby established an Advisory Committee consisting of eleven members appointed by the Administrator. Of the members of the Committee, one shall be the Special Assistant to the President on Consumer Affairs, four shall be selected from among representatives of the private insurance industry (including one representative of the reinsurance industry), four shall be representatives of State insurance authorities, and two shall be consumer representatives of the general public.

(2) The Administrator shall designate a Chairman and a Vice Chairman of the Committee.

(3) Each member shall serve for a term of two years or until his successor has been appointed, except that no per-

son who is appointed while a full-time employee of a State or the Federal Government shall serve in such position after he ceases to be so employed, unless he is reappointed.

(4) Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of that term.

(5) The Chairman shall preside at all meetings, and the Vice Chairman shall preside in the absence or disability of the Chairman. In the absence of both the Chairman and Vice Chairman, the Administrator may appoint any member to act as Chairman pro tempore. The Committee shall meet at such times and places as it or the Administrator may fix and determine, but shall hold at least four regularly scheduled meetings a year. Special meetings may be held at the call of the Chairman or any three members of the Committee, or at the call of the Administrator. A majority of the members shall constitute a quorum for the transaction of business.

(6) The Committee shall review general policies of the Corporation and advise the Administrator with respect thereto, assist in obtaining the cooperation of insurers, industry groups, and Federal and State agencies, consult with and make recommendations to the Administrator with respect to carrying out the purposes of this Act, and perform such other functions as the Administrator may, from time to

time, assign. The written reports and recommendations of the Committee shall be made available by the Administrator to the public.

(7) The members of the Committee shall not, by reason of such membership, be deemed to be employees of the United States, and such members, except the one who is a regular full-time employee of the Government, shall receive for their services, as members, the per diem equivalent to the rate for grade GS–18 of the General Schedule under section 5332 of title 5, United States Code, when engaged in the performance of their duties, and each member of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of such title for persons in the Government service employed intermittently.

INCORPORATION; POWERS

SEC. 5. (a) Upon the date of enactment of this Act, the Corporation shall become a body corporate and shall be an instrumentality of the United States, and as such shall have power—

(1) to adopt, alter, and use a corporate seal;

(2) to have succession until dissolved by an Act of Congress;

(3) to make contracts, and execute all instruments necessary and appropriate in the exercise of its powers;

(4) to sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof without regard to the amount of controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect. No attachment or execution shall be issued against the Corporation or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court. The Administrator shall designate an agent upon whom service of process may be made in any State, territory, or jurisdiction in which any participating insurer does business;

(5) to appoint through its Administrator such officers, employees, attorneys, agents, adjusters, examiners, and other persons as may be necessary for the performance of its duties, to define their duties, fix their compensation, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or em-

ployees. Nothing in this chapter or any other Act shall be construed to prevent the appointment and compensation as an officer or employee of the Corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof;

(6) to prescribe through its Administrator bylaws not inconsistent with law, regulating the manner in which its general business may be conducted and the privileges granted to it by law may be exercised and enjoyed;

(7) to exercise by its Administrator, or duly authorized officers or agents, all powers specifically granted by the provisions of this Act, and such incidental powers as shall be necessary to carry out the powers so granted;

(8) to make examinations of and to require information and reports from any insurer or local insurer making application for guaranty status in accord with subsection (f) of section 6 of this Act; and

(9) to prescribe by its Administrator such rules and regulations as it may deem necessary to carry out the provisions of this title.

(b) No individual, association, partnership, or corpo-

ration, other than the Corporation, shall hereafter use the words "Federal Insurance Guaranty Corporation" or any combination of such words, as the name or part thereof under which he or it shall do business. Any violation of this subsection shall be punishable by a fine of not exceeding $1,000 for each day during which such violation is committed.

ADMINISTRATION

SEC. 6. (a) The Administrator shall administer the affairs of the Corporation fairly and impartially and without discrimination. The Administrator shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid within the limitations imposed by this Act. The Corporation shall be entitled to the use of the United States mails in the same manner as the executive departments of the Government and, with the consent of the head of any department or agency of the Federal Government, or of any State government, may avail itself of the use of information, services, and facilities thereof in carrying out the provisions of this Act.

(b) GUARANTY STATUSES.—Any insurer or local insurer issuing policies guaranteed under this Act shall be placed in one of two guaranty statuses characterized as either "temporary guaranty status" or "permanent status." Any participating insurer shall inform the purchaser prior to pur-

chase of its guaranty status and shall prominently display its guaranty status on each and every guaranteed policy it issues in accordance with regulations promulgated by the Corporation.

(c) APPLICATION FOR GUARANTY STATUS.—Each insurer shall, and each local insurer may, make application to the Corporation for guaranty status under this Act. Such application shall be in such form and contain such information as the Corporation shall by regulation prescribe.

(d) APPROVAL OF APPLICATION AND ASSIGNMENT OF GUARANTY STATUS.—

(1) Any insurer or local insurer making application to the Corporation in the prescribed manner shall be granted temporary guaranty status if that application is certified by the State supervisory authority of the applicant. Such certification shall state that the applicant is conducting its business in a sound and solvent manner and, in determining whether such certification shall be made, the State supervisory authority shall give consideration, along with such other factors as it may deem necessary and appropriate, to the applicant's capital and surplus, reasonableness of operational expenses, premium writings are related to surplus, adequacy of loss and expense reserves, reinsurance, investment portfolio, and managerial qualifications.

(2) Any insurer or local insurer making application to the Corporation in the prescribed manner shall be granted permanent guaranty status if that application is certified by the State supervisory authority in the domiciliary State of the applicant and if that State supervisory authority has met certain national insurance regulation standards established by the Corporation in accordance with the provisions of this Act: *Provided,* That any such State supervisory authority can request that any insurer be retained on temporary status.

(e) Establishment of standards.—The Corporation shall establish by regulation, after opportunity for hearing, standards for insurance regulation that must be met by a State supervisory authority before an insurer can be granted permanent guaranty status in the Corporation. No such standards shall become effective until approved by a majority of the Advisory Committee: *Provided,* That in promulgating standards for State insurance regulation the Corporation shall incorporate as part of its national standards, insofar as appropriate, the standards for regulation, rehabilitation, and liquidation embodied in chapter 89, Wisconsin Session Laws of 1967.

(f) Corporation examination of participating insurers assigned temporary status.—

(1) The Corporation, through appointed examiners,

shall have the power to examine any insurer or local insurer whose policies are temporarily guaranteed under this Act, whenever in the judgment of the Corporation such examination is necessary. In making necessary examinations of such participating insurers, the Corporation shall have the power to make examinations as if it were a State supervisory authority complying with national standards.

(2) All examiners appointed by the Corporation shall cooperate as far as practicable with the appropriate State supervisory authorities in conducting any necessary examinations under this Act. Copies of reports of examinations by examiners appointed by this subsection shall be furnished by the Corporation to the appropriate State supervisory authorities which shall be afforded the opportunity to comment thereon.

(g) Reports to the Corporation.—Each participating insurer shall make to the Corporation reports of condition which shall be in such form, at such time, and shall contain such information as the Administrator may require. The Administrator may require reports of condition to be published in such manner, not inconsistent with any applicable law, as it may direct. Every participating insurer which fails to make or publish any such report within ten days of its due date shall be subject to a penalty of not more than $1,000 for

each day of such failure, which penalty shall be recoverable by the Corporation for its use.

(h) Revocation of guaranty status.—

(i) Any participating insurer who has attained permanent guaranty status may have its guaranty status revoked if its State supervisory authority so recommends or if the State supervisory authority concurs in a motion of revocation made by the Corporation. The Corporation shall give any participating insurer who has attained permanent guaranty status thirty days written notice of intention to terminate its guaranty status and opportunity to correct the deficiencies of its operation which are stated in that notice as grounds for termination. Any participating insurer, prior to termination, shall upon request be granted an opportunity for a hearing which shall be conducted in accord with the provisions hereinafter provided.

(2) Any participating insurer who has been granted only temporary guaranty status may have its guaranty status revoked whenever the Administrator, with the concurrence of a majority of the Advisory Committee, shall find that such participating insurer or its directors or officers have engaged or are engaging in unsafe or unsound practices in conducting the business of the insurer, the insurer is in an unsafe or unsound condition to con-

tinue operations as a participating insurer, or the insurer has violated any provisions of this Act or any rule, regulation, or order issued pursuant to this Act. Prior to revocation the Administrator shall give the insurer and the State supervisory authority a statement with respect to such practices or violations for the purpose of securing the correction thereof. Unless correction shall be made within one hundred and twenty days from receipt of such statement, or such shorter period as may be fixed by the Corporation (but in any event not less than twenty days) in any case where the Administrator in his discretion has determined that the insurance risk of the Corporation is unduly jeopardized, or unless within such time the Corporation shall have received acceptable assurances that such correction will be made within a time and in a manner satisfactory to the Corporation, or in the event such assurances are submitted to and accepted by the Corporation but are not carried out in accordance with their terms, the Administrator, if he shall determine to proceed further, shall give to the insurer not less than thirty days' written notice of intention to terminate its guaranteed status. Such notice shall contain a statement of the facts constituting the alleged violation or unsafe or unsound practice or condition and shall fix a time and place for a hearing before the Administrator or before a

person, designated by him to conduct such hearing, at which evidence may be produced, and upon such evidence the Administrator shall make written findings which shall be conclusive, subject to right of review as hereinafter provided for. If the Administrator shall find that any unsafe or unsound practice or condition or violation specified in such statement has been established and has not been corrected within the time above prescribed in which to make such corrections, the Administrator may terminate guaranteed status of the insurer on a date subsequent to such finding and to the expiration of the time specified in such notice of intention. Unless the insurer shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its guaranteed status and termination of such status thereupon may be ordered. Any insurer whose guaranteed status has been terminated by order of the Administrator under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (i) of this section. The Corporation may publish notice of such termination and the insurer shall give notice of such termination to each of its policyholders at his last address of record on the books of the insurer, in such manner and at such time as the Adminis-

trator may find to be necessary and may order for the protection of policyholders. In the event of failure to give the notice to policyholders as herein provided, the Corporation is authorized to give such notice. An order terminating the guaranteed status of any participating insurer shall not affect any guaranteed policy issued by such insurer prior to the date on which the order was issued, but shall be effective with respect to (1) the renewal of such policy, and (2) any property, casualty, or surety insurance policy thereafter issued by such insurer.

(i) Hearings and judicial review.—

(1) Any hearings provided for in this Act shall be held in the Federal judicial district or in the territory in which the principal officer of the insurer is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of title 5, United States Code. Such hearing shall be public, unless the Corporation, in its discretion, after fully considering the views of the party afforded the hearing, determines that a private hearing is necessary to protect the public interest. After such hearing, and within ninety days after the Corporation has notified the parties that the case has been sub-

mitted to it for final decision, the Corporation shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and cause to be served upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection. Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the Corporation may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the Corporation may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to the proceeding may obtain a review of any order by filing in the court of appeals of the United States for the circuit in which the principal office of the insurer is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the Corporation be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court

to the Corporation, and thereupon the Corporation shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall, except as provided in the last sentence of said paragraph (1), be exclusive, to affirm, modify, or set aside, in whole or in part, the order of the Corporation. Review of such proceedings shall be had as provided in chapter 7 of title 5, United States Code. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of title 28 of the United States Code.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the Corporation.

PENALTIES

SEC. 7. (a) Any insurer (other than a local insurer) issuing any property, casualty, or surety insurance policy which is required to be but is not guaranteed under this Act shall forfeit to the United States a sum of not more than $1,000 for each and every day that such policy is in effect and is not guaranteed under this Act. Such forfeiture shall be

payable to the Corporation for its use. The Corporation is authorized to collect any unsatisfied forfeiture claim from the directors and officers of the Corporation individually. This subsection shall take effect upon the expiration of one year after the effective date of this Act.

(b) Whoever falsely advertises or otherwise misrepresents by any device whatsoever that any property, casualty, or surety insurance policy is guaranteed by the Federal Insurance Guaranty Corporation, or by the Government of the United States, or by any instrumentality thereof, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

PAYMENT OF GUARANTY

SEC. 8. (a) Participating insurers assigned permanent guaranty status.—Whenever any such insurer is placed in liquidation, the Corporation shall pay all justified loss claims, unearned premium and small loss claims, judgments, interest thereon, including the first $50 of such claims.

(1) The liquidator appointed by the State supervisory authority will present such claims to the Corporation which is authorized to investigate, examine, adjust, compromise, or settle any such claim.

(2) The Corporation shall investigate, examine, adjust, compromise, or settle such claims as quickly as possible in order to provide the public the insurance

protection that would have been available but for the liquidation.

( ) The Corporation shall present the liquidator with a complete report of the disposition of such claims and [illegible] by the Corporation.

( ) The Corporation is authorized to defend any action pending or brought against the policyholder or the insured for an insurable event occurring before or fifteen days after the date of issuance of the liquidation order.

(5) The Corporation shall be entitled to any valid claim against the liquidator up to an amount equal to the liabilities of such insurer paid by the Corporation. Payment of such claim shall follow the normal order of distribution of the liquidation laws of the State.

(b) Participating insurers assigned temporary guaranty status—

(1) The Corporation shall assume and perform all the obligations of a participating insurer under policies which are guaranteed under this Act, if such insurer is placed in liquidation and cannot perform its insurance function by paying valid claims of policyholders and insureds or their claimants or providing contracted for legal services of policyholders and insureds. In such a situation the receiver or liquidator shall make all books

and records (including claim files) available to the Corporation; and the Corporation shall file forthwith a certificate of assumption with the court having jurisdiction over such insurer.

(2) Upon the filing of a certificate of assumption, all proceedings pending in any court against the insured or the insurer arising out of an occurrence within the coverage of a policy guaranteed under this title shall be stayed automatically for a period of thirty days.

(3) The Corporation shall be subject to the same obligations, liabilities, terms, conditions, and waivers of the insurer and shall have available any defense or defenses (including that of policy limits) which would be available to the insurer.

(4) The Corporation is authorized to investigate, examine, adjust, compromise, or settle any claim pending against the insured or the insurer on or after the date of the filing of a certificate of assumption. The Corporation is authorized to defend any action pending or brought against the policyholder or the insured on or after the date of the filing of such certificate.

(5) The Corporation shall be entitled to valid claim against the insurer, or its liquidator, rehabilitator, conservator, receiver, or trustee in bankruptcy, in an amount equal to the liabilities of such insurer paid from the Fund.

(c) When the Corporation has determined that a participating insurer is in danger of becoming insolvent, in order to prevent such insolvency the Corporation, in the discretion of the Administrator, is authorized to make loans to such insurer upon such terms and conditions as the Administrator, in consultation with the State supervisory authority, may prescribe.

(d) Any person (including any individual, partnership, association, or corporation) having a claim against his insurer under any insolvency protection provision contained in his insurance policy, which claim arises out of the insolvency of a participating insurer, may file a claim with the liquidator or Corporation for the total amount of the alleged loss without first proceeding against the insurer. If any person having a claim against his insurer under any insolvency protection provision contained in his insurance policy first proceeds against the liquidator or the Corporation, the Corporation is subrogated to the rights of that person against his insurer. If any person first proceeds against his insurer, any valid claim against the liquidator or Corporation will be reduced by the amount recovered from his insurer under any insolvency protection provision contained in his insurance policy.

(e) When a participating insurer who has issued assessable policies is liquidated, the Corporation shall exercise

discretion when claiming against the assets of the liquidated insurer in order to avoid, so far as possible, the imposition of unreasonable assessments on policyholders who were unaware of the assessment exposure.

FINANCING

SEC. 9. (a) CAPITAL STOCK.—The Corporation shall have a capital stock of $10,000,000 which shall be divided into shares of $1,000 each. The total amount of such capital stock shall be subscribed to by the Secretary of the Treasury. For the purpose of making payments for such stock the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds of the sale of any securities hereafter issued under the Second Liberty Bond Act, and the purpose for which securities may be issued under such Act are extended to include such purchases. The Corporation shall make annual payments to the Secretary of the Treasury as interest on the amounts advanced to the Corporation on stock subscription, from the time of such advance until the amounts thereof are repaid, at a rate determined annually by the Secretary of the Treasury, taking into consideration the current average market yields on outstanding marketable obligations of the United States.

(b) GUARANTY FUND.—

(1) Funds obtained by the Corporation from the sale of its capital stock, as provided in subsection (a) of

this section, and from guaranty fees collected pursuant to subsection (c) of this section shall be deposited in the Guaranty Fund which is hereby established. The Fund shall be held by the Corporation and used by it for carrying out its guaranty functions under this Act, and for operating expenses arising in connection therewith not to exceed $7,500,000 per year.

(2) Whenever after retirement of the outstanding Treasury shares issued pursuant to subsection (a) of this section the net asset value of the Fund exceeds one-eighth of 1 per centum of the annual net direct premiums written by all participating insurers, the Corporation shall waive the requirements for fees as herein stated: *Provided,* That such requirement shall be reinstated whenever the net asset value of such Fund is less than one-eighth of 1 per centum of the annual net direct written premiums written by all participating insurers: *Provided further,* That no distribution or rebate shall be made by reason of the fact that the total amount in fees collected by the Corporation at any time exceeds one-eighth of 1 per centum of such annual direct written premiums. In determining net asset value for the purposes of this paragraph, the Board shall include estimated liabilities that may be chargeable to such Fund.

(3) The Corporation shall retire as rapidly as

practicable, having due regard to the need to maintain at all times the solvency of the Fund, the capital stock of the Corporation which is held by the Treasury.

(4) In the event that the Congress should repeal this Act, any moneys remaining in such Fund at that time, after redemption of any outstanding capital stock, repayment of any outstanding loans from the Treasury under subsection (c) of this section and discharge of all expenses and obligations under this Act, shall be returned to the participating insurers pro rata in accordance with the guaranty fees they have paid into the Fund.

(5) In the event that the Congress should reduce the size of the Fund specified in subsection (b) of this section, any excess in the Fund above the new statutory limit shall be returned to the participating insurers pro rata in accordance with the guaranty fees they have paid into the Fund.

(c) Assessments.—

(1) National assessments —

(i) Each calendar year following the year in which the application of a participating insurer was certified, such participating insurer shall pay to the Corporation at guaranty fee. This fee, which shall be equal to one twenty-fifth of 1 per centum of the net

direct premiums written by the participating insurer during the year, shall be assessed semiannually, based on net direct premiums written during the periods January 1 through June 30 and July 1 through December 31.

(ii) On or before the last day of the first month following each of the above-mentioned semiannual periods, each participating insurer shall file with the Corporation a certified statement showing the net direct premiums written by such insurer during that period. In the event that accurate information is not available at that time, an estimate may be filed: *Provided, however,* That a final certified statement must be filed not later than sixty days from the last day of the reporting period.

(iii) The certified statements required to be filed with the Corporation under subparagraph (ii) of this paragraph shall be in such form and set forth such supporting information as the Administrator shall prescribe and shall be certified by the president of the insurer or any other officer designated by its board of directors to be, to the best of his knowledge and belief, true, correct, and complete and in accordance with this Act and regulations issued thereunder. The assessment payments required from par-

ticipating insurers under subparagraph (i) of this paragraph shall be made in such manner and at such time or times as the Administrator shall prescribe, provided the time or times so prescribed shall not be later than sixty days after filing the certified statement setting forth the amount of assessment.

(iv) Except as otherwise provided in this subsection, the Administrator shall prescribe all needful rules and regulations for the enforcement of this subsection. The Administrator may limit the retroactive effect, if any, of any of its rules or regulations.

(v) The Corporation may (1) refund to a participating insurer any payment of assessment in excess of the amount due to the Corporation, or (2) credit such excess toward the payment of the assessment next becoming due from such insurer and upon succeeding assessments until the credit is exhausted.

(vi) Any participating insurer which fails to make any report of condition under subsection (g) of section 6 of this Act or to file any certified statement required to be filed by it in connection with determining the amount of any assessment payable

by the insurer to the Corporation may be compelled to make such report or file such statement by mandatory injunction or other appropriate remedy in a suit brought for such purpose by the Corporation against the insurer and any officer or officers thereof in any court of the United States of competent jurisdiction in the district or territory in which such insurer is located.

(vii) The Corporation, in a suit brought at law or in equity in any court of competent jurisdiction, shall be entitled to recover from any participating insurer the amount of any unpaid assessment lawfully payable by such insurer to the Corporation, whether or not such insurer shall have made any such report of condition under subsection (g) of section 6 of this Act or filed any such certified statement and whether or not suit shall have been brought to compel the insurer to make any such report or file any such statement. No action or proceeding shall be brought for the recovery of any assessment due to the Corporation, or for the recovery of any amount paid to the Corporation in excess of the amount due to it, unless such action or proceeding shall have been brought within five years after the right accrued for which the

claim is made, except where the participating insurer has made or filed with the Corporation a false or fraudulent certified statement with the intent to evade, in whole or in part, the payment of assessment, in which case the claim shall not be deemed to have accrued until the discovery by the Corporation that the certified statement is false or fraudulent.

(viii) Should any participating insurer fail to make any report of condition under subsection (9) of section 6 of this Act or to file any certified statement required to be filed by such insurer under any provision of this section, or fail to pay any assessment required to be paid by such insurer under any provision of this Act, and should the insurer not correct such failure within thirty days after written notice has been given by the Corporation to an officer of the insurer, citing this subparagraph, and stating that the insurer has failed to file or pay as required by law, all the rights, privileges, and franchises of the insurer granted to it under this Act shall be thereby forfeited. Whether or not the penalty provided in this subparagraph has been incurred shall be determined and adjudged after hearing in the manner provided in section 6(i) of this

Act. The remedies provided in this subparagraph and in the two preceding subparagraphs shall not be construed as limiting any other remedies against any participating insurer, but shall be in addition thereto.

(ix) Any participating insurer which willfully fails or refuses to file any certified statement or pay any assessment required under this Act shall be subject to a penalty of not more than $1,000 for each day that such violations continue, which penalty the Corporation may recover for its own use.

(2) State contributions and assessments.—

(i) Whenever the Corporation has advanced funds in excess of those available from the sale of its capital stock and collected guaranty fees in order to perform its guaranty function under this Act and has not recovered said funds (including any interest due because of such advancement) from the assets of the insurer upon final liquidation, then the Corporation shall seek recovery of said funds in the domiciliary State through the appropriate insurance insolvency protection plan.

(ii) If the domiciliary State cannot provide for the recovery of said funds, then the Corporation, in order to recover such funds, is authorized to assess

participating insurance companies doing business in the domiciliary State on a pro rata basis relative to the net direct premiums written in the State. No such assessment shall exceed 1 per centum of the net direct premiums written in any one year. Participating insurers assessed by the Corporation in the domiciliary State shall be subject to the same rules and regulations during the State assessment process as they are during the national assessment process.

(3) Nothing in this Act shall be construed to deny the several States the right to levy taxes or require license fees for insurers doing business within their jurisdiction: *Provided, however,* That no participating insurer shall be required automatically to pay any annual or other periodic or continuing assessment or fee under any State insurers insolvency or liability security fund law for any period during which the insurance policies of that insurer are guaranteed pursuant to this Act.

(d) Treasury loans.—The Corporation is authorized to borrow from the Treasury, and the Secretary of the Treasury is authorized and directed to loan to the Corporation on such terms as may be fixed by the Corporation and the Secretary, such funds in the judgment of the Administrator of the Corporation is from time to time required for insurance purposes,

not exceeding in the aggregate $100,000,000 outstanding at any one time, or such further sum as the Congress, by joint resolution, may from time to time determine: *Provided*, That each loan made pursuant to this subsection shall bear interest at a rate determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturity of such loans. For such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds of the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under the Second Liberty Bond Act, as amended, are extended to include such loans. Any such loan shall be used by the Corporation solely in carrying out its functions with respect to such insu ance. All loans and repayments under this subsection shall be treated as public debt transactions of the United States.

CORPORATION MONEYS; INVESTMENT

SEC. 10. Money of the Corporation not otherwise employed shall be invested in obligations of the United States or in obligations guaranteed as to principal and interest by the United States: *Provided*, That the Corporation shall not sell or purchase any such obligations for its own account and

in its own right and interest, at any one time aggregating in excess of $100,000 without the approval of the Secretary of the Treasury: *And provided further*, That the Secretary of the Treasury may waive the requirement of his approval with respect to any transaction or classes of transactions subject to the provisions of this section for such period of time and under such conditions as he may determine.

EXEMPTION FROM TAXATION

SEC. 11. All notes, debentures, bonds, or other such obligations issued by the Corporation shall be exempt, both as to principal and interest, from all taxation (except estate and inheritance taxes) now or hereafter imposed by the United States, by any territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority: *Provided*, That interest upon or any income from any such obligations and gain from the sale or other disposition of such obligations shall not have any exemption, as such, and loss from the sale or other disposition of such obligations shall not have any special treatment, as such, under the Internal Revenue Code, or laws amendatory or supplementary thereof. The Corporation, including its franchise, its capital, reserves, and surplus, and its income, shall be exempt from all taxation now or hereafter imposed by the United States, by any territory, dependency, or possession thereof, or by any State, county, municipality, or local

taxing authority, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

FORMS OF OBLIGATIONS

SEC. 12. In order that the Corporation may be supplied with such forms of notes, debentures, bonds, or other such obligations as it may need for issuance under this Act, the Secretary of the Treasury is authorized to prepare such forms as shall be suitable and approved by the Corporation, to be held in the Treasury subject to delivery, upon order of the Corporation. The engraved plates, dies, bed pieces, and other material executed in connection therewith shall remain in the custody of the Secretary of the Treasury. The Corporation shall reimburse the Secretary of the Treasury for any expenses incurred in the preparation, custody, and delivery of such notes, debentures, bonds, or other such obligations.

REPORTS; AUDITS

SEC. 13. (a) The Corporation shall annually make a report of its operations to the Congress as soon as practicable after the 1st day of January in each year. Such report shall include a statement with respect to the status of the fund established pursuant to section 9, together

with such recommendations concerning its adequacy or inadequacy as the Corporation deems necessary or desirable.

(b) The financial transactions of the Corporation shall be audited by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where accounts of the Corporation are normally kept. The representatives of the General Accounting Office shall have access to all books, accounts, records, reports, files, and all other papers, things, or property belonging to or in use by the Corporation pertaining to its financial and other operations and determined necessary by the Comptroller General to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositaries, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers, and property of the Corporation shall remain in possession and custody of the Corporation.

(c) The fiscal year of the Corporation shall be the calendar year. A report of the audit for each calendar year shall be made by the Comptroller General to the Congress not later than July 15 following the close of the calendar year. The report shall also show specifically any program,

expenditure, or other financial transaction or undertaking observed in the course of the audit, which, in the opinion of the Comptroller General, has been carried on or made without authority of law. A copy of each report shall be furnished to the President and to the Corporation at the time submitted to the Congress.

GOVERNMENT CORPORATION CONTROL ACT

SEC. 14. (a) Section 101 of the Government Corporation Control Act, as amended (31 U.S.C. 846), is amended by adding after "Federal Housing Administration", the following: "Federal Insurance Guaranty Corporation".

(b) To the extent of any inconsistency between the provisions of this Act and the provisions of the Government Corporation Control Act, the provisions of this Act shall govern.

SEPARABILITY CLAUSE

SEC. 15. If any provision of this Act is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

[CONFIDENTIAL COMMITTEE PRINT NO. 1]

MARCH 10, 1970

Calendar No.

91ST CONGRESS
2D SESSION

S. 2236

[Report No. 91–]

A BILL

To create a Federal Insurance Guaranty Corporation to protect the American public against certain insurance company insolvencies.

By Mr. MAGNUSON, Mr. DODD, Mr. HART, Mr. HOLLINGS, Mr. INOUYE, Mr. MOSS, and Mr. PASTORE

MAY 23, 1969

Read twice and referred to the Committee on Banking and Currency

MAY 27, 1969

The Committee on Banking and Currency discharged, and referred to the Committee on Commerce

ROBERTSON, MONAGLE, EASTAUGH, ANNIS & BRADLEY
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200 NATIONAL BANK OF ALASKA BLDG.
PHONE 586-3340
CABLE ADDRESS: ROMEA

April 2, 1970

Hon. Barry W. Jackson, Chairman
House Judiciary Committee
Alaska State Legislature
Capitol Building
Juneau, Alaska 99801

Re: House Bill No. 782

Dear Chairman Jackson:

As I understand your instructions, I am to submit a short statement of the position of American Insurance Association with respect to HB 782 now being considered by your Committee.

AIA agrees with the concept embodied in S. 2236 that if the insuring public is to be provided the protection it deserves in a timely fashion, action at the federal level is needed.

It agrees also with the concept that the protection is required in the property, casualty and surety fields.

As to the terms of S. 2236, and the amendments offered by the Administration on March 16, I have been advised by telegram that copies of both are on the way to me.

The Administration amendments are represented as creating a federal agency operating on a significantly reduced scale both in size and scope with that proposed in S. 2236; and, would limit the role of the federal agency to that of a vehicle for compensating the insolvency of claimants and policyholders while leaving full responsibility for insurance regulation in the hands of state authorities.

The states would continue to have sole authority for examination of insurers for solvency and would retain full and exclusive regulatory powers.

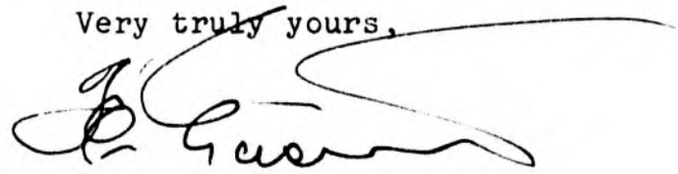
I suggest, without the ability to demonstrate, that the opposition of the NAIC to the federal approach was formulated prior to the proposed amendments to S. 2236, and

that if the opposition is not eliminated or reduced by the amendments, the Committee is left to appraise the benefits of a uniform federal act as compared to a variety of state acts.

As already mentioned in my testimony to the Committee the AIA is opposed to the creation of a number of State funds for security of policyholders against insolvencies, such as the New York State fund of some $125 million with a ceiling of $200 million. The AIA is of the opinion that the federal approach will give wider and more uniform security, without encroachment upon state regulatory powers, and at less cost to the policyholders.

I will provide the Committee with copies of S. 2236 and the proposed amendments as soon as received.

Very truly yours,



FOE:bh

F. O. Eastaugh

Xerox copies for committee

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MICHAEL M. HOLMES

March 20, 1970

The Honorable Barry W. Jackson
Chairman, Judiciary Committee
House of Representatives
Juneau, Alaska 99801

Re: House Bill No. 782, to Guarantee Certain Insurance Contracts

Dear Mr. Chairman:

As a representative of American Mutual Insurance Alliance I am interested in appearing before the Judiciary Committee of the House when you consider House Bill No. 782 which was reported favorably by the Commerce Committee of the House today and is next referred to your committee.

If this bill is enacted it will incorporate a corporation consisting of members. Every insurance company doing business in Alaska in the kinds of insurance covered by the Act will be required to be members of the corporation in order to continue doing business in Alaska. The insurance companies would elect a Board of Directors and if they failed to do so, the Insurance Commissioner would appoint directors.

In the event any insurance company which does business in Alaska is declared insolvent in Alaska or elsewhere, the corporation would go into action to reimburse anyone insured by that company who had suffered a loss prior to or within thirty days after the decree of insolvency is entered by any court. Moreover, the policyholder whose policies would otherwise be worthless have thirty days within which to turn in their policies and get a refund of the unearned premium from this corporation. One of the duties of the corporation is to give public notice of the insolvency of any insurance company declared to be insolvent by any competent court anyplace in the United States. Otherwise persons holding policies from such companies which may be doing only a small amount of business in Alaska may have no knowledge of the insolvency until some official notice is received from a trustee in bankruptcy. Until they get new insurance they would be otherwise uninsured. The policyholders in Alaska

would have thirty days from the date of the decree of insolvency within which to replace their insurance with some other company, get a refund of their unearned premium and recover for any loss suffered whether before the decree or within thirty days thereafter.

The corporation would make an assessment on its members after the insolvency occurred. In Alaska we are proposing the alternative provision which would set up three separate accounts which would be as follows: workmen's compensation, automobile insurance and all other insurance coming under the act. If the insolvent insurance company was writing only automobile and workmen's compensation insurance in Alaska there would be separate assessments against every company in Alaska writing these two kinds of insurance. Payment of the assessments would be a condition to the continuance of doing business in Alaska. From the fund raised thereby the unearned premiums of the worthless policies and accumulated claims would be paid.

All kinds of insurance companies except life, title, security, disability, credit, mortgage guarantee and ocean marine insurance would participate as members.

No claim would be paid amounting to less than $100 and claims would be paid up to a limit of $300,000 except workmen's compensation claims would be fully paid including claims for permanent disability or death which run for long periods of time.

This bill is a model bill approved by the National Association of Insurance Commissioners on December 4, 1969, after which time it became available to the various state legislatures and being promoted by the Insurance Commissioners of the various states. It has already been adopted by South Dakota, Georgia, Iowa, West Virginia, Idaho and because of the need for this legislation it has probably been adopted by other states without my knowledge.

The model bill was revised by the Local Affairs Agency for the Commerce Committee to the extent necessary to make it conform to the style used in Alaska. After this was done I checked the bill against the model bill and found that it conforms to the model bill.

During the past few years we have had no losses by policyholders as a result of insolvency of insurance companies but in the not too distant past we have had several companies registered to do business in Alaska who were declared insolvent elsewhere and the policyholders had to go to court to fight over the bond posted by the Insurance Commissioner. Although the industry is closely regulated it is a hazardous industry as evidenced by the fact that the Wall Street Journal carried an article last Monday to the effect that State Farm Insurance Company lost $91,000,000 in 1969 in the automobile casualty business.

This bill is a foolproof system of guaranteeing that the other insurance companies admitted to do business in Alaska will pay the claims and redeem the policies for their unexpired premiums of any company which does business in Alaska in the lines of insurance covered by the bill provided the policyholders will surrender their policies and present their claims within thirty days of the date of insolvency.

It is a system in which the Director of Insurance sits on the sidelines and polices the operation but the insurance companies do the work through their own board of directors and at their own expense except that directors can be repaid for their actual expenses in connection with their duties out of the corporation funds. The insurance companies would be allowed to take any losses into consideration in determining their premiums thereafter.

It is unfortunate that this bill is coming to your committee so late in the session and still must go to the Senate in order to be enacted. It is, therefore, requested that you give this matter your attention as soon as possible and let me know when it will be considered.

Yours very truly,

N. C. Banfield

NCB:db

cc: Chas. A. Brown
Kenneth Nails
Wendell P. Kay
Tom Fink

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200 NATIONAL BANK OF ALASKA BLDG.
PHONE 586-3340
CABLE ADDRESS: ROMEA

March 23, 1970

Hon. Barry W. Jackson, Chairman
House Judiciary Committee
Alaska State Legislature
Capitol Building
Juneau, Alaska 99801

Re: House Bill No. 782

Dear Chairman Jackson:

Here are the following enclosures which have an important bearing on the subject bill:

1. Key excerpts from Nixon Administration Testimony before Senate Commerce Committee

2. Statement of T. Lawrence Jones, President, American Insurance Association with respect to S. 2236 providing a Federal Insurance Guaranty Corporation Act, before Senate Commerce Committee.

I understand that Director Fritz and Mr. Banfield for the Mutual Alliance testified in favor of HB 782 and it was reported out favorably by the House Commerce Committee.

The American Insurance Association opposes HB 782 in favor of the federal approach in S. 2236 by Senator Magnuson. I would like to appear to answer the proponents of the bill at such time as your Committee considers it. In the meantime perhaps you and members of your Committee would like to review the enclosed material.

Very truly yours,

F. O. Eastaugh

FOE:bh
Encs.

KEY EXCERPTS FROM NIXON ADMINISTRATION TESTIMONY
BEFORE SENATE COMMERCE COMMITTEE
ON S.2236 TO CREATE A FEDERAL INSURANCE GUARANTY CORP.
JOINT STATEMENT OF DEPARTMENTS OF COMMERCE AND TRANSPORTATION
FEBRUARY 10, 1970

This Administration is strongly in support of federal legislation to guarantee that every citizen, every policyholder and every claimant is properly and fully compensated for his insured losses. We will present an Administration proposal for your consideration next month . . .

* * * *

With more than $25 billion of premiums written annually, something less than $25 million of insured property and casualty losses are going unmet each year as a result of insurer insolvencies . . .

Together, we speak for the Administration when we say that while the problem area is modest in comparison with the insurance in force nationwide, the adverse impact of insurer insolvency especially on individuals and smaller insureds, warrants federal legislation.

* * * *

It is impossible not to be impressed by the remarkable consensus regarding the importance of the problem shared among those whose views as to its solution are divergent . . .

* * * *

We believe that action is needed now. Even though some states have enacted insolvency plans and a number of others are considering doing so,

the continuing lack of adequate protection for many consumers from the financial consequences of insolvencies is incompatible with the interests of either the public or the insurance industry . . .

We also agree that if the insuring public is to be provided the protection it deserves in a timely fashion, action at the federal level is needed. We are prepared to cooperate in taking that action. . .

* * * *

The Administration believes that consumers should be protected from the financial consequences of insolvencies of insurance companies in the property, casualty and surety fields. Such protection can be afforded through a guaranty mechanism. . .

* * * *

The Administration does not favor the enactment of S.2236 in its present form. We will submit a proposal next month. . .

The Administration believes that a measure can be developed and enacted which can effectively accommodate the needs and interests of the consumer public, the insurance industry, state supervisory authorities and state governments generally . . .

* * * *

The activities of the federal agency should be those only of an administrator of the guaranty mechanism and not a regulator of the insurance industry. The basic supervisory function should remain the province of state

supervisory authorities. The federal agency should work through the state supervisory authorities whenever any question arises as to the solvency of a specific company.

There should be an assessment mechanism to meet reasonable and validated claimant and policyholder losses created by insolvency through a post-insolvency assessment technique. Such assessment mechanism should be compatible with programs which have been or may be adopted by any of the several states to meet the insolvency problems on a state basis and at the same time avoid the immobilization of insurance capital which is needed to supply the economy's growing demands for insurance and for the constructive employment of capital . . .

The federal agency contemplated by the Administration's proposal would operate on a significantly reduced scale both in size and scope compared with that currently provided in S.2236. The Administration proposal would limit the role of the federal agency to that of a vehicle for compensating the insolvency losses of claimants and policyholders while leaving full responsibility for insurance regulation in the hands of state authorities.

The states would continue to have sole authority for examination of insurors for solvency and would retain full and exclusive regulatory powers.

THE NEED FOR PROTECTION AGAINST INSURANCE COMPANY INSOLVENCIES

The Problem:

- Insurance company insolvency continues to be a problem for the public, state regulators and the insurance industry itself. It has cost the public over $135,000,000 during the last twelve years in loss claims and premiums, plus additional indirect losses that are difficult to measure exactly.

- Present systems of surveillance and regulation have not been able to ameliorate the problem. Some insolvencies occur every year and an average of more than ten have occurred every year in the last twelve years.

- Victims of insurance company insolvency are not generally guaranteed reimbursement. For their benefit and for the health and strength of the industry, a system of prompt payment of innocent victims is needed, as is an improved system of detection of faulty insurance company operation..

The Background:

Public officials, legislators and the insurance industry itself have been concerned with the problem of insurance company insolvency for more than ten years.

All three groups agree that the prime consideration must be protection of the public in the event of an insurance company insolvency.

All three groups agree that a key objective of legislation or regulatory procedures should be the prevention of insurance company insolvencies.

Various Suggested Proposals:

1. Expansion of uninsured motorist endorsement.

2. State pre - insolvency assessment fund laws.

3. State post - insolvency assessment laws.

4. Private national or regional insurance guaranty facility.

5. National guaranty facility through a governmental corporation (Federal Insurance Guaranty Corporation).

The Solution:

WE BELIEVE THAT A FEDERAL INSURANCE GUARANTY CORPORATION -- PATTERNED AFTER THE HIGHLY - SUCCESSFUL FEDERAL DEPOSIT INSURANCE CORPORATION IN THE BANKING FIELD -- IS CLEARLY PREFERABLE TO ALL OTHER PROPOSALS.

The Reason:

Only the Federal Insurance Guaranty Corporation meets all of the essential requirements of:

- Strengthening the insurance regulatory process by supplementing state examination authority and responsibility, otherwise leaving state regulatory authority and responsibility and state taxation unchanged;
- Assisting in the detection of the interstate shifting of a company's assets, which has been a factor in many insolvencies; and,
- Prohibiting proliferation of state insolvency funds which are unsound and unfair in the concept.

The Shortcomings of the Other Suggested Proposals:

1. Expansion of the uninsured motorist insolvency coverage places the financial burden of insurance company insolvency where it does not belong, that is, on the responsible individual who selected a strong company. He pays for his own insurance and then has to insure himself against the unwise selection of another person. This coverage is slow to respond and cumbersome to administer. Lengthy procedures must be followed before insolvency is established and right to reimbursement is determined. There are significant "gaps" in the extent of coverage; many innocent victims of insolvency have no uninsured motorist coverage against which to proceed.

2. Pre - insolvency assessment laws in all states would add up to an unrealistic liability that would constrict the capacity of insurance companies and, therefore, the amount of insurance they would be able to make available. Such laws also create funds that can be diverted by the states to meet other financial obligations.

3. State post - insolvency assessment laws place the total economic burden on the solvent and well managed insurers. They are governmentally unsound in that they give the state regulator a "blank check" with which to cover the damage arising from failures of performance. And, they put a contingent liability on well managed companies that will make it difficult to portray and evaluate the exact financial condition of insurance companies.

   Neither the pre - insolvency nor the post - insolvency assessment laws, as presently written, provide complete or prompt guarantee of reimbursement to the victims of insurance company insolvency and neither make any sound and workable contribution to the prevention of insolvency.

4. Private insurance guaranty facility would require extensive rewriting of the federal laws, including possible expansion of anti - trust exemptions, and would pose problems of practicality and propriety in requiring competitors to police one another.

SEYMOUR E. SMITH, CHAIRMAN
T. LAWRENCE JONES, PRESIDENT
H. CLAY JOHNSON, VICE CHAIRMAN
JOHN F. NEVILLE, VICE PRESIDENT
PERCY CHUBB II, VICE CHAIRMAN
SIDNEY W. BISHOP, GENERAL COUNSEL

AMERICAN INSURANCE ASSOCIATION
85 JOHN STREET · NEW YORK · N. Y. 10038

November 18, 1969

To the EXECUTIVES:

Gentlemen:

Attached is a copy of the statement we will give on Wednesday, November 19, before the Senate Commerce Committee with respect to S. 2236, providing for a Federal Insurance Guaranty Corporation.

Sincerely,

T. Lawrence Jones

T. Lawrence Jones
President

TLJ:SSJ

enclosure

Statement of T. Lawrence Jones, President
American Insurance Association
With Respect to S. 2236, Providing A
Federal Insurance Guaranty Corporation Act,
Before Senate Commerce Committee
November 19, 1969

My name is T. Lawrence Jones and I am President of American Insurance Association, an organization of insurance companies writing all kinds of property and casualty insurance throughout this country. Our member companies have a premium volume of over $7 billion. We are pleased to have this opportunity to appear before the Senate Commerce Committee to present our views on the general problem of insurance company insolvency, and more particularly on S. 2236. This bill, introduced by Senator Magnuson and co-sponsored by Senators Dodd, Hart, Hollings, Inouye, Moss and Pastore, would create a Federal Insurance Guaranty Corporation for the purpose of protecting the American public against insurance company insolvencies.

Public officials, legislators and the insurance industry itself have been concerned with the problem of insurance company solvency for many years. As could be expected, the intensity of concern has varied substantially as the number of company insolvencies rose and fell and as reports of insurance company liquidations increased and decreased.

Regardless of the understandable ups and downs of public concern, American Insurance Association is convinced that there is a real problem to which a solution must be found.

Historical Position of Insurance Industry

Some years ago the insurance industry held to the position that all measures by which insurance companies collectively helped, in

one way or another, to defray the losses of insolvent insurance companies were unsound. It was argued that these measures put weak companies on a parity with strong ones and tolerated, if not encouraged, bad management. It was further argued that these plans removed incentives on the part of agents and brokers to be sure they were placing their business with responsible and reputable insurance companies. We cannot disagree with the logic of these arguments, but times have changed. Today, such arguments are outweighed by social considerations and we believe the prime consideration is that the public must be protected in the event of an insurance company insolvency. In addition, the nagging insolvency problem damages the industry as a whole and each company suffers in public esteem.

The Dimensions of the Problem

There has been considerable debate as to the size of the problem.[1] Some have endeavored to treat it as de minimis. It is our view that the figures should speak for themselves, but in any event we have concluded that one insurance company insolvency is one too many, especially if there is no way to reimburse the victims of that insolvency.

The only question open for discussion, in our judgment, is what solution will best serve the public interest.

Solutions

Expansion of Uninsured Motorist Endorsement

American Insurance Association has been seeking the

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[1] See New York Insurance Department Report to Governor Rockefeller, The Public Interest Now in Property and Liability Insurance Regulation, January 7, 1969 and Report of NAIC Special Committee on Automobile Insurance Problems, June 16, 1969.

best solution over a period of years and with renewed intensity since the introduction in January 1967 of S. 688, providing for a Federal Motor Vehicle Insurance Guaranty Corporation.[2]

Until recently the discussion has centered on automobile insurance. In fact, the earlier bills, such as S. 688, would have provided protection only against the insolvency of automobile insurers. The focus on automobile insurance suggested to some the desirability of expanding the uninsured motorist coverage specifically to include insurance company insolvencies.

All states, except Maryland and North Dakota, now have mandatory uninsured motorist laws.[3] Most of these laws are specifically applicable in cases where the insurer is insolvent but, even in those states where the law is silent as to coverage in case of insurer insolvency, there is a strong likelihood that the laws would be construed to apply. In fact, practically all auto insurers today have voluntarily included provisions in their uninsured motorist coverage making the coverage specifically applicable to insolvencies.

American Insurance Association has never regarded the uninsured motorist endorsement with coverage for insolvency as either an adequate or effective answer to insurance company insolvencies.

These uninsured motorist laws are confined to automobile insurance and therefore do not provide protection to other claimants and policyholders who may be the victims of an insurer insolvency.

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[2]A similar bill, S. 3919, was introduced in 1965 by Senators Dodd, Clark, Magnuson and Hart.

[3]See attached American Insurance Association Chart Analysis, October 1969.

Even in the area of automobile accidents they do not protect the non-car-owning pedestrian who has the misfortune of being injured by a motorist whose insurance company has become insolvent.

The uninsured motorist insolvency coverage is an obvious example of placing the financial burden of insurance company insolvency where it does not belong. It is not a valid solution and we doubt whether anyone today will seriously contend otherwise.

State Security Funds

A number of states have endeavored to meet the problem by the enactment of laws providing for state security or insolvency funds. These laws were originally enacted to protect employees under state workmen's compensation laws. (See attached list of states having workmen's compensation security funds.) Most of these laws were enacted during the 1930 depression years. Legislators were concerned that workers injured in industrial accidents might find their workmen's compensation benefits endangered by insurance company insolvencies.[4]

Most of these workmen's compensation security funds were of the pre-insolvency assessment type - i.e. they required the collection of funds by assessing insurers prior to a company insolvency. Two of them (Maryland and Minnesota) are post-assessment insolvency funds, which means insurers are assessed only after the insolvency has occurred.

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[4] The workmen's compensation laws, as originally enacted, made the employer liable for workmen's compensation benefits in the event the insurer became insolvent. This provision was eliminated in a few states which subsequently enacted security fund statutes.

The security-fund solution for automobile liability insurance companies was first enacted by the State of New York in 1947.[5] This law (Section 333 of the New York Insurance Law) was amended in 1969 to make the New York security fund applicable to all property and casualty lines other than workmen's compensation which continues to have its own security fund law.

In the 1950's Maryland and New Jersey enacted automobile liability insurance security fund laws of the pre-insolvency assessment type. In subsequent years some state legislatures, from time to time, considered insolvency fund legislation but no additional states enacted these laws until the renewed interest this year when California, Michigan, New Hampshire and Wisconsin enacted post-insolvency assessment laws and, as noted above, New York expanded its law to cover other property and casualty lines. In addition, New York has also placed a much needed ceiling of $200 million on the fund.[6] This year Maryland amended its law to make the fund applicable to automobile physical damage insurance.[7]

This renewed interest in state insolvency fund legislation has been caused by a recent flurry of insolvencies, some of which

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[5] In 1939 New York had established an insolvency fund to protect persons who had claims against a company providing the compulsory coverage for public motor vehicles.

[6] Under the New York law, before the 1969 amendment, the method of assessing insurers provided no realistic limitation on the size of the fund. It had grown to an amount in excess of $125 million. For a number of years AIA and others have urged a limitation be placed on the size of this fund.

[7] See the attached AIA Special Management Legislative Bulletin summarizing insolvency fund legislation in 1969. See also attached summary of Property and Liability Security Fund laws.

have been widely publicized. In addition, the introduction of legislation in the Congress, patterned after the Federal Deposit Insurance Corporation Act with strong support in both the Senate and House of Representatives, has rekindled interest in legislation at the state level.

The position of American Insurance Association on state pre-insolvency assessment funds (Maryland, New Jersey and New York) and state post-insolvency assessment laws (California, Michigan, New Hampshire and Wisconsin) is clear-cut. Neither, in our judgment, provides a sound solution to the problems and we do not think the public interest is well served by such legislation.

State Pre-Insolvency Fund Laws

The pre-insolvency assessment type of law creates a fund in anticipation of some possible future insolvency. The proliferation of such funds in each of the fifty states to protect policyholders and claimants from insolvencies in a business which is transacted across state lines would be difficult to justify from the standpoint of efficient and sound public administration. In the years following the Southeastern Underwriters Association decision by the United States Supreme Court in 1944, it was recognized that a sure way to encourage federal action would be for a number of states to enact pre-insolvency security fund laws. It did not make sense then, and it makes no sense today, to have fifty states amass such funds, administer them and make payments to claimants and policyholders. If one accepts the hypothesis that pre-insolvency funding is more effective and equitable than post-insolvency laws, then clearly one fund is preferable to the establishment of fifty funds.

There is valid concern that these state pre-insolvency funds which tend to reach amounts far in excess of foreseeable needs will be diverted to other purposes. This fear has been ridiculed by some public officials but the plain fact is that such diversion has happened in the past few years. Twice the New Jersey automobile security fund monies have been diverted into the New Jersey Claim and Unsatisfied Judgment Fund (Chapter 241, Laws of 1967 and Chapter 322, Laws of 1968). So this is not a fanciful fear; it is a real possibility.

A major weakness in the state pre-insolvency fund legislation is that it is solely a "bail-out" remedy. It does absolutely nothing to bolster and strengthen regulatory procedures in order to prevent insolvencies. Some have even suggested that these pre-insolvency funds may accelerate the number of insolvencies because state regulatory authorities may become complacent and less diligent in exercising their supervisory functions, knowing that the funds will take care of policyholders and claimants. We disagree with that view. There are far too many other discomforting consequences which will beset an insurance commissioner in the event of an insolvency - including market restrictions, loss of jobs, loss of tax revenue and all the other heartaches associated with a liquidation proceeding. While regulatory bodies will not relax their vigilance in regulating to preserve solvency, these security fund laws in no way help to prevent insolvencies. The industry has long held the view, and I believe it does today, that any solution to the insolvency problem which provides financial assistance to policyholders and claimants must be accompanied

by additional affirmative regulatory procedures to prevent insolvencies. American Insurance Association still holds to that proposition.

State Post-Insolvency Assessment Laws

The post-insolvency assessment law avoids, or at least lessens, some of the defects inherent in pre-insolvency assessment fund laws. Large sums are not accumulated and thus do not remain idle and unproductive long before they are needed. Also, since no funds are accumulated, there is no enticing opportunity for diversion to other purposes. However, like the pre-insolvency laws, post-insolvency assessment laws do not make any sound and workable contribution to the prevention of insolvency.

The post-insolvency assessment plan has other serious defects. It exposes insurers to unknown liabilities which could occur at a time when they might be least able to sustain such additional liabilities, even though there are annual limitations on assessments.

There is no way the post-insolvency assessment plan can soften the patent inequity of placing the total economic burden on solvent and well-managed insurers. The post-insolvency law, as we have noted, does nothing to prevent insolvencies and then compounds this inadequacy by making the strong and reputable companies pay for the sins of the mis-managed and weak, including a number whose managements might have engaged in highly questionable, if not at times clearly fraudulent, practices.

The post-insolvency assessment concept is embodied in model state legislation being proposed by the American Mutual Insurance Alliance. The AMIA model bill, as we understand it, places some regulatory power in an insolvency board composed of the insurance commissioner and representatives of insurance companies, thereby recognizing that something more than a financial rescue is needed. Whether it is a proper responsibility for the private sector to become involved in this kind of industry policing, is debatable. It is noteworthy that up to the present time, no post-insolvency assessment law has bestowed any such authority on insurance companies.

Summarizing our views on state security fund laws, American Insurance Association is completely opposed to a solution which would establish security funds in each state by means of an annual assessment on insurers. We are also opposed to the post-insolvency assessment plan although we recognize that it is probably the least objectionable remedy available at the state level. An additional reason that these state post-insolvency assessment laws are less objectionable than some of the other state proposals is that they can be effectively meshed into a national solution should a national plan prove to be the ultimate answer.

Alternative Measures

Since the American Insurance Association companies have realized the shortcomings of the conventional state-oriented solutions, we have explored alternatives to the Federal Deposit Insurance Corporation approach in order to see if we could develop a national plan which could be administered largely, if not solely, by the industry.

In this phase of our study, we were guided by the following basic criteria:

1. Any such plan must provide additional safeguards to prevent insolvencies; bail-out alone would be unacceptable.
2. It should include a private guaranty facility, national in scope.
3. In order to avoid further echelons of regulation, the role of state and federal regulation should be as little as legally possible.
4. All insurers should be compelled or strongly induced to participate in the facility.

Within the context of these criteria, we studied the concept of a private facility along the lines of the National Association of Securities Dealers (NASD) which is authorized by the 1938 amendments to the Securities Exchange Commission Act of 1934 to regulate over-the-counter brokers. Such a plan would have contemplated one or more private facilities guaranteeing the policies of its members. All insurers would be required to belong to a facility which would have certain examination powers over its members.

In the course of our study of this proposal we were advised by counsel that a purely private facility without federal legislation could present problems. It was recommended to us that it might be necessary to have some federal supervisory power over the private facility and that members of the facility should have the right to appeal the action of the facility to the supervising federal body. It

was further suggested that it might be necessary to have some exemption from the federal antitrust laws. Part of the reasoning for this suggestion was that the activities of the facility would include the policing of insurers and this could be construed to constitute, "boycott, coercion and intimidation" which are expressly excluded from the scope of the exemption contained in the McCarran-Ferguson Act.

If it were necessary to obtain federal legislation to permit the operation of a private insurance guaranty facility, three practical questions had to be answered.

1. Could we reasonably anticipate that the Congress would favorably consider legislation authorizing a private facility to exercise a policing function, albeit a limited one?
2. Would the Congress be likely to expand the present antitrust exemption even for such a worthy purpose as providing policyholder and claimant security against insolvencies?
3. Against the background of the highly successful Federal Deposit Insurance Corporation Act, is there any reasonable likelihood that the Congress would consider a different approach in the insurance area?

We have endeavored to analyze realistically and objectively these three questions and have concluded that they must be answered in the negative.

One other consideration has affected our view of the private facility approach. Some of our member companies do not believe that private insurers should become involved in the policing of their competitors.[8] Even if there were no federal legislative problems, they would be opposed to a private facility with policing powers. Additionally, we should reiterate that American Insurance Association is opposed to any solution which does not make a workable contribution to the prevention of insolvencies.

Although we have concluded that the private facility approach is not feasible, if we could be convinced that it did not necessitate far-reaching federal legislation, we would be willing to re-evaluate our position. The one caveat would be the practicality and propriety of any device requiring competitors to police one another.

We have examined other variations of the private facility approach, including the private insurance guaranty corporation proposal outlined in the June 16, 1969 Automobile Insurance Study Background Memorandum, prepared by the staff of the National Association of Insurance Commissioners' Central Office for consideration by the NAIC Special Committee on Automobile Insurance Problems.

We believe that our comments with respect to a private facility suggested by present regulation of over-the-counter brokers by NASD is applicable to the proposal suggested by staff of the NAIC Central Office.

Proposal of Economic Regulation Advisory Committee to the DOT Auto Insurance and Compensation Study

The Economic Regulation Advisory Committee to the Department of Transportation Auto Insurance and Compensation Study under date of

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[8]Some have attempted to compare this private industry role to insurance industry organizations which assist law enforcement authorities. We believe this is a far-fetched analogy and not at all relevant in the area of competitors.

July 8, 1969 submitted a report to the DOT on S. 2236. This advisory committee suggested its own proposal in lieu of S. 2236. Their plan would provide for the enactment by the Congress of a law providing for the imposition of a "substantial federal general revenue tax on insurance premiums derived within each state." It would further provide that the tax be forgiven in full as to all states which have in effect an insolvency guaranty law meeting certain criteria specified in the federal law. The purpose of this proposal is to apply maximum pressure on "state legislatures and regulators to have adequate legal requirements and adequate administrative supervision of insurers." The proposal contemplates the possibility of state enactment of insolvency fund laws similar to the New York law or a post-insolvency assessment law such as those enacted in four states this year.

This plan has all the weaknesses of the state insolvency measures and it is hard to see what it does to improve state regulatory machinery to prevent insolvencies.

We have great respect for the members of this advisory committee but we cannot convince ourselves that a tax threat proposal of this sort is a workable solution.

S. 2236

We come now to S. 2236, the consideration of which is the reason for the hearings of your committee.

S. 2236 is patterned on the highly successful federal legislation establishing the Federal Deposit Insurance Corporation which insures the deposits of all its member banks. The bill establishes a corporation to be known as the Federal Insurance Guaranty Corporation, to which practically all insurers are required to belong. Only a small number

of insurers would not be required to join since very few companies are not in one way or another engaged in interstate commerce.

Each insurer would pay an annual fee equal to one-eighth of one percent of its net direct premiums. These fees would be continued only to the extent it would be necessary to keep the net asset value of the fund at an amount not less than two percent of the annual direct premiums written by all participating insurers. Before this cut-off the corporation would have to retire the outstanding Treasury shares amounting to $50 million which supply the initial financing.

The FIGC would be empowered to settle or adjust any claim against an insolvent member insurer. Claims for return premiums would not be allowed in excess of fifty percent of unearned premiums. The bill would require claimants to exhaust their claims against state insolvency funds before receiving payment from FIGC. No further fees or assessments under any state insolvency law would be permitted for any period during which the insurance policies of that insurer are guaranteed under this legislation.

In the case of insolvency protection under the uninsured motorist endorsement, a policyholder would first have to exhaust his remedies against any applicable state insolvency fund and then against the FIGC before receiving any payment from his insurer.

It is clear, therefore, that the bill seeks to establish a single program for providing payments to those who have claims against an insolvent insurance company.

The bill grants broad examination powers to the corporation. All such examinations are required to be coordinated as far as practicable

with appropriate state supervisory authorities and the National Association of Insurance Commissioners. It authorizes the corporation to terminate the guaranteed status of an insurer if it finds:

1. That the insurer is engaging in unsafe or unsound practices,
2. The insurer is in unsafe or unsound condition, or
3. The insurer has violated this law or any rule or regulation issued under it.

The corporation also has power to bring cease-and-desist proceedings if it believes an insurer is enaging in an unsafe or unsound practice or is violating the law.

American Insurance Association, as previously stated, recognizes that a problem exists and a solution must be found. We have shared with this committee our analysis and conclusions with respect to the various proposals which are under consideration. It is our view that S. 2236, patterned after the Federal Deposit Insurance Corporation Act, is clearly preferable to all other proposals and we endorse this legislation.

It should be noted that S. 2236 provides a sure way to protect members of the public against the possibility of insurance company insolvency. It also prohibits the proliferation of state insolvency funds which, in our judgment, is a totally unacceptable solution. Finally, unlike all the other solutions under discussion, S. 2236 strengthens the regulatory process. It should prove to be especially helpful in preventing the interstate shifting of company assets, which has been beyond the reach of state regulatory power and which has been such a significant factor in a number of insolvencies.

We disagree with those who contend that this legislation portends the end of state regulation or that it diminishes the important role of state regulation. On the contrary, we believe it compliments and supplements state supervision. It will, in fact, strengthen state regulation by removing a long-standing source of criticism.

We have reached our decision supporting S. 2236 only after the most careful study. We are well aware that in varying degree a number of segments of the industry are opposed to this legislation. We also know that the National Association of Insurance Commissioners has adopted a resolution against this legislation. Our decision to support this bill reflects our considered judgment that the FDIC approach offers the most effective and workable solution to the insolvency problem of a business which is extensively transacted across state lines.

Respectfully submitted.

T. Lawrence Jones

T. Lawrence Jones, President
American Insurance Association

MANDATORY UNINSURED MOTORIST PROVISIONS

(Compiled by the Law Department of the American Insurance Association)

October 1969

STATE	LIMITS	PROPERTY DAMAGE EXCLUSION	MAY INSURED REJECT COVERAGE?	UNINSURED MOTORIST FEE	APPLICABLE WHERE INSURER INSOLVENT?	UNUSUAL FEATURES
Alabama	10/20		Yes+	None	No prov.	
Alaska	15/30		Yes	None	No prov.	
Arizona	10/20		Yes+	None	No prov.	
Arkansas	10/20		Yes	None	Yes	
California	15/30		Yes	None	Yes	(b)(h)
Colorado	15/30*		Yes+	None	No prov.	
Connecticut	20/20(a)		No	None	Yes	(n)
Delaware	10/20		Yes+	None	Yes	
Florida	10/20		Yes+	None	Yes	
Georgia	10/20/5(m)	$250	Yes+	None	Yes	(e)(h)(j)
Hawaii	10/20		Yes	None	No prov.	
Idaho	10/20		Yes+	None	Yes	
Illinois	10/20		No	None	Yes	
Indiana	10/20		Yes+	None	Yes	
Iowa	10/20		Yes+	None	Yes	(j)
Kansas	10/20		Yes+	None	Yes	(n)
Kentucky	10/20		Yes+	None	Yes	(h)(q)
Louisiana	5/10		Yes	None	Yes	(n)
Maine	20/40		No	None	Yes	
Massachusetts	5/10		No	None	Yes	
Michigan	10/20		Yes+	$35	Yes	(o)
Minnesota	10/20(u)		(p)	None	Yes	
Mississippi	5/10		Yes+	None	Yes	(e)(j)
Missouri	10/20		Yes+	None	Yes	
Montana	10/20		Yes+	None	No prov.	
Nebraska	10/20		Yes+	None	Yes	
Nevada	15/30		Yes+	None	Yes	(e)(h)(j)(q)
New Hampshire	15/30(a)*		No	None	Yes	
New Jersey	10/20	$100	Yes++	None	No prov.	
New Mexico	10/20/5	$250	Yes+	None	No prov.	
New York	10/20		No	None	No prov.	(h)
North Carolina	10/20/5(k)	$100	Yes	None	Yes	(g)(k)
Ohio	12.5/25*		Yes+	None	No prov.	
Oklahoma	5/10/(r)		Yes+	None	Yes	(s)(t)
Oregon	10/20		No	None	Yes	(c)(h)
Pennsylvania	10/20		No	None	Yes	
Rhode Island	10/20		Yes	None	No prov.	
South Carolina	10/20/5	$200	No	$50 max**	Yes	(d)(e)(f)(g)(h)(j)
South Dakota	10/20		Yes+	None	Yes	
Tennessee	10/20		Yes+	None	Yes	(e)(q)
Texas	10/20		Yes+	None	Yes	
Utah	10/20		Yes+	None	No prov.	
Vermont	10/20		No	None	Yes	
Virginia	20/30/5(a)*	$200	No	$50**	No prov.	(e)(g)(h)
Washington	15/30		Yes+	None	Yes	
West Virginia	10/20/5	$300	No	None	Yes	(e)(j)
Wisconsin	10/20/(r)		Yes+	None	Yes	
Wyoming	10/20		Yes+	None	Yes	

* Effective January 1, 1970

** Fund distributed to insurers after deduction of administration expense.

e-Arbitration provision prohibited.
f-Insurer must give notice of termination of policy.
g-Insurer may defend uninsured motorist.
h-Also covers cases where insurer denies liability.
i-Requires contact in hit-and-run cases.

+ If rejected, insurer need not offer coverage on renewal unless requested

++ Insured must elect to accept or reject offer of coverage in writing.

a-Insured may require limits equal to his liability limits.

b-Failure to file evidence of financial responsibility under Financial Responsibility Law creates rebuttable presumption that vehicle was uninsured.

c-Coverage not required in policy covering trucks of combined weight and load capacity of more than 6000 operated by employees covered by workmen's compensation.

d-No charge to be made for coverage.

k-Person who carries liability limits of at least 15/30 is entitled to 15/30 coverage.

m-Insured vehicle and contents only.

n-Arbitration optional with insured.

o-All policies to contain notice that coverage was explained and that insured may reject.

p-Coverage may not be rejected for policies covering private passenger vehicles or pick-up trucks. May be rejected as to others.

q-"Uninsured motor vehicle" includes vehicle insured in lower limits.

r-Insurer may make higher limits available.

s-If agreement by arbitration is not reached within 3 months from demand for arbitration insured may sue tortfeasor.

t-Inapplicable to motor carriers whose drivers are covered by workmen's compensation.

u-After 1970 insured may require limits equal to his liability limits.

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WORKMEN'S COMPENSATION SECURITY FUNDS

Arizona - Uninsured Employers and 2nd Injury Special Fund. -§23-1065, Revised Statutes - Fund is maintained by a tax not to exceed 2% of premiums; also in no-dependency death cases, carriers shall pay $1,150 into fund. §23-907B authroizes payments out of special fund plus a 10% penalty on employer.

Connecticut - 2nd Injury & Compensation Assurance Fund - §§31-354 and 31-355-Gen. Stats.-1% of compensation paid during preceding year with payments to cease when fund reaches $100,000 and to be resumed when it falls below $100,000.

Maryland - §§85-89, Art. 101, Maryland Code-Post-insolvency assessment, pro-rata, upon all insurers not to exceed 1% of workmen's compensation premiums written during preceding calendar year.

Minnesota - §§79-28, 79-29, Minn. Stat. 1965. Assessment of other carriers for the payment of unpaid workmen's compensation awards of insolvent company. Pro-rata assessment in any one year in no case to exceed 1% of workmen's compensation premiums written during the preceding calendar year.

New Jersey - Sec. 34:15-103 ff. Revised Statutes of 1937. 1% of net written premiums payable bi-annually until fund, over and above liabilities, equals 5% of workmen's compensation loss reserves of all stock carriers as of December 31 next preceding; payments to be resumed when said fund falls below this figure.

New York - Art. 6-A (§§106-109) of Workmen's Compensation Law. One percent of net written premiums payable until fund, less liabilities, equals 5% of New York Workmen's Compensation loss reserves of all stock carriers as of December 31 next preceding, or equals $2,300,000, whichever sum is greater. Payments are resumed when fund is reduced below this amount. Payments to be made quarterly.

North Carolina - Art. 3, Chap. 97, §§97-105-97-117, Gen. Stats. One percent of net written premiums payable bi-annually until fund over and above liabilities equals 5% of workmen's compensation loss reserves of all stock carriers as of December 31 next preceding; payments to be resumed when said fund falls below this figure.

Oregon - Direct Responsibility Employer's Adjustment Reserve §656.614, Oregon Rev. Stats.-Pro-rata assessment upon (DRE) employers sufficient to pay unpaid claims because of insolvency of surety or guarantor of employer.

Pennsylvania - Act No. 470, Laws of 1937. One percent of net written premiums payable annually until fund, over and above liabilities, equals 5% of workmen's compensation loss reserves of stock carriers as of June 30 next preceding. Payments are to be resumed when the fund falls below this amount.

United States Longshoremen's and Harbor Worker's Act - Special Fund - §§18 (b) and 44 - $1,000 paid into Fund by employer in each no-dependency death case.

Wisconsin - Workmen's Compensation Law, Sec. 102.65. One percent of earned premiums payable annually until fund, over and above liabilities, equals 5% of the loss reserves of all stock carriers for the payment of benefits under said section as of December 31 next preceding. Payments are to be resumed when fund falls below this amount. Payments into stock fund are not to be discontinued unless said fund consists of at least $25,000 over and above its known liabilities. This fund has now been consolidated with the mutual and reciprocal funds and transformed into a temporary fund for payment of assessments into the newly created post assessment Insurance Security Fund which has broad coverage, including workmen's compensation (S.B. 525) Chapter 144, Laws of 1969.

Broad Guarantee Provisions Including Workmen's Compensation

California - Act 14.2 Sec. 1063 ff. of the Insurance Code. Provides for creation of California Insurance Guarantee Association to which all insurers, with certain exceptions life, title, etc. must belong. Workmen's compensation writers included as a separate category. Post insolvency assessment limited to 1% of net direct premium written in particular category (Chapter 1347, Laws of 1969, effective August 31, 1969).

Michigan - Secs. 7833 and 7901 ff. (compiled Laws of 1948, added by Act No. 277, Laws of 1969) creates Property and Casualty Guaranty Association to which all insurers, except life, must belong. Workmen's compensation writers included as a separate category. Post insolvency assessment limited to 1% net direct premium written in previous calendar year in particular category.

Wisconsin - described above.

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11/13/69

MANAGEMENT BULLETIN
American Insurance Association
85 John Street New York, N.Y. 10038

Date November 10, 1969

No. 69-11-2

Special Management Legislative Bulletin

INSOLVENCY FUND LEGISLATION-AS OF NOVEMBER 7, 1969

STATE	BILL NO.	BRIEF SUMMARY	STATUS
California	House 1310	Creates the Insurance Guarantee Ass'n, which will assess all insurers other than life or title; post assessment- maximum 1% in year.	LAW
Florida	Senate 920	Would have created security funds for casualty, property, surety and workmen's compensation insurance. Pre-assessment.	Died
	Senate 1523	Would have required insurers to pay 1% of premiums on post-assessment basis where insurer is insolvent, to defray losses to claimants.	Died
Maryland	Senate 199	Makes the Motor Vehicle Liability Security Fund applicable to physical damage	LAW
Michigan	House 3166	Would create the Property and Casualty Insurance Insolvency Fund, which would assess upon insurers the amount needed to pay for transfer by reinsurance or coinsurance of all policies in force on residents, and for cost of adjustment and payment of claims. Post assessment.	No Action
	House 3216	Would create the Michigan Casualty Assessment Association consisting of all insurers writing automobile and workmen's compensation insurance; the Association to assume obligations of any casualty insurer declared insolvent; post assessment- maximum 1% in year.	No Action
	House 3699	Creates an insolvency pool, and requires all insurers writing casualty, property and workmen's compensation insurance to assume obligations of insurer declared insolvent; post assessment- maximum 1% in year.	LAW

(over)

STATE	BILL NO.	BRIEF SUMMARY	STATUS
New Hampshire	House 668	Creates the N.H. Automobile Assessment Association to which all automobile insurers must belong. Upon determination that an insurer is insolvent, the Insurance Commissioner shall assess all members of the Association for payment of all bodily injury liability, property damage liability, medical payments, uninsured motorists, auto physical damage claims and claims for unearned premiums.	LAW
New York	Senate 3534	Broadens the Motor Vehicle Liability Security Fund to cover all property liability lines, payments to cease when Fund reaches $200,000,000.	LAW
Wisconsin	Senate 525	Creates a Security Fund; post assessment-Maximum 2% in year.	LAW
U.S. Congress	H.R. 1087	Creates the Federal Motor Vehicle Insurance Guaranty Corporation, based on the Federal Deposit Insurance Corporation Act.	No Action
	H.R. 1376	Same as Above	No Action
	H.R. 2656	Same as Above	No Action
	H.R. 3671	Same as Above	No Action
	H.R. 6475	Same as Above	No Action
	Senate 2236	Would create the Federal Insurance Guaranty Corporation, applicable to all lines other than life, accident and health and title. Pre-assessment.	Hearings scheduled for November 12, 19, and 20.
	H.R. 13428	Same as Above	No Action

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Property & Liability Security Funds

California - California Insurance Guaranty Association to which all insurers except those writing exclusively surety, credit, ocean, marine, life, title and certain other lines, must belong for purpose of providing each member with insolvency insurance. Post assessment, not more than 1% of net direct premium written in category (compensation, auto, other) in the State (Chapter 1347, Laws of 1969)

Maryland - Motor Vehicle Security Fund - for payment of allowed claims of injured parties and policyholders arising out of motor vehicle accidents by reason of insolvency or inability of insurer to meet its insurance obligations. Preassessment 1/4 of 1% net direct written auto liability and physical damage premiums. (§482A of Art. 48A, Annotated Code of Maryland)

Michigan - Property & Casualty Guaranty Association maintained by all authorized insurers, except life, which shall discharge obligations of insolvent insurers arising out of contracts issued or payable to residents Policy contracts covered: Auto insurance, workmen's compensation, basic property insurance, homeowners, farm owners and commercial multiple peril. Post-assessment not to exceed 1% of net direct premiums during previous calendar year. (Act 277, Acts of 1969)

New Hampshire - Auto Assessment Association to which all auto insurers are required to belong. Post insolvency assessment for payment to residents

of bodily injury liability, property damage, medical payments, U.M., physical damage and claims for unearned premiums. Maximum assessment in any calendar year shall not exceed 3% of total amount of all net direct premiums written by all licensed auto insurers having such business in the State in said calendar year. (Chapter 349, Laws of 1969, effective June 30, 1969)

New Jersey - Motor Vehicle Liability Security Fund for purpose of securing the benefits under policies of motor vehicle liability insurance by reason of the default of an insurer which becomes insolvent - 1/2% of direct gross motor vehicle premiums; ceases when net value of Fund reaches $6,000,000; resumes when Fund falls below such amount.(§§39:6-92 - 39:6-104 NJSA)

New York - Property & Liability Insurance Security Fund to be used in payment of allowed claims of residents by reason of the inability due to insolvency of an authorized insurer to meet its insurance obligations under generally all property and liability lines. Pre-assessment: 1% net direct written premiums until Fund reaches $200,000,000. (§334 N.Y. Insurance Law, as amended by Chapter 189, Laws of 1969)

Wisconsin - Wisconsin Insurance Security Fund - Applicable generally to all lines. Fund divided into three separate accounts, life, disability and all other covered insurance, for purpose of paying claims of residents arising out of policy issued by authorized insurer and which claim has been approved in the liquidation of the insurer issuing the policy. Post assessment, maximum 2% of the assessable premiums (Chapter 144, Laws of 1969, effective 8/22/69)

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Justice work copy

Fritz Div of Insurance

Introduced: 3/11/70
Referred: Commerce and Judiciary

IN THE HOUSE BY THE COMMERCE COMMITTEE

HOUSE BILL NO. 782

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to guaranteeing certain insurance contracts."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 21 is amended by adding a new chapter to read:

CHAPTER 80. ALASKA INSURANCE GUARANTY ASSOCIATION ACT.

Sec. 21.80.010. PURPOSE. The purpose of this chapter is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of this protection among insurers.

Sec. 21.80.020. SCOPE. This chapter applies to all kinds of direct insurance, except life, title, surety, disability, credit, mortgage guaranty, and ocean marine insurance.

Sec. 21.80.030. CONSTRUCTION. This chapter shall be liberally construed to effect the purpose under sec. 10 of this chapter which constitute an aid and guide to interpretation.

Sec. 21.80.040. CREATION OF ASSOCIATION. There is created a nonprofit incorporated legal entity to be known as the Alaska Insurance Guaranty Association. All insurers defined as member insurers in sec. 190(6) of this chapter shall be and remain members of the association as a condition of their authority to transact insurance in this state. The association shall perform its functions under a plan of operation

established and approved under sec. 70 of this chapter and shall exercise its powers through a board of directors established under sec. 50 of this chapter. For purposes of administration and assessment, the association shall be divided into three separate accounts; the workmen's compensation insurance account; the automobile insurance account; and the account for all other insurance to which this chapter applies.

Sec. 21.80.050. BOARD OF DIRECTORS. (a) The board of directors of the association shall consist of not less than five nor more than nine persons serving terms as established in the plan of operation. The members of the board shall be selected by member insurers subject to the approval of the commissioner. Vacancies of the board shall be filled for the remaining period of the term in the same manner as initial appointments. If no members are selected within 60 days after the effective date of this chapter, the commissioner may appoint the initial members of the board of directors.

(b) In approving selections to the board, the commissioner shall consider among other things whether all member insurers are fairly represented.

(c) Members of the board may be reimbursed from the assets of the association for expenses incurred by them as members of the board of directors.

Sec. 21.80.060. POWERS AND DUTIES OF THE ASSOCIATION. (a) The association shall

(1) be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination, but this obligation shall include

only that amount of each covered claim which is in excess of $100 and is less than $300,000, except that the association shall pay the full amount of any covered claim arising out of a workmen's compensation policy; in no event shall the association be obligated to a policy holder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy form which the claim arises;

(2) be considered the insurer to the extent of its obligation on the covered claims and to that extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent;

(3) allocate claims paid and expenses incurred among the three accounts separately, and assess member insurers separately for each account amounts necessary to pay the obligation of the association under (a)(1) of this section subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, the cost of examinations under sec. 110 of this chapter and other expenses authorized by this chapter; the assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year on the kinds of insurance in the account bears to the net direct written premiums of all member insurers for the preceding calendar year on the kinds of insurance in the account; each member insurer shall be notified of the assessment not later than 30 days before it is due; no member insurer may be assessed in any year on any account an amount greater than two per cent of the member insurer's net direct written premiums for the preceding calendar year on the kinds of insurance in the account. If the maximum assessment, together with the other assets of the association in any account, does not provide in any one year in any account an amount sufficient to make all necessary payments from that account, the funds available shall be

prorated and the unpaid portion shall be paid as soon thereafter as funds become available; the association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance; each member insurer may set off against an assessment, authorized payments made on covered claims and expenses incurred in the payment of these claims by the member insurer if they are chargeable to the account for which the assessment is made;

(4) investigate claims brought against the association and adjust, compromise, settle and pay covered claims to the extent of the association's obligation and deny all other claims and may review settlements, releases and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which settlements, releases and judgments may be properly contested;

(5) notify persons as the commissioner directs under sec. 80(b)(1) of this chapter;

(6) handle claims through its employees or through one or more insurers or other persons designated as servicing facilities; designation of a servicing facility is subject to the approval of the commissioner, but designation may be declined by a member insurer;

(7) reimburse each servicing facility for obligations of the association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the association and shall pay the other expenses of the association authorized by this chapter.

(b) The association may

(1) employ or retain those persons necessary to handle

claims and perform other duties of the association;

(2) borrow funds necessary to effect the purposes of this chapter in accord with the plan of operation;

(3) sue or be sued;

(4) negotiate and become a party to those contracts as are necessary to carry out the purposes of this chapter;

(5) perform all other acts necessary or proper to effectuate the purposes of this chapter;

(6) refund to the member insurers in proportion to the contribution of each member insurer to that account that amount by which the assets of the account exceed the liabilities if, at the end of any calendar year, the board of directors finds that the assets of the association in any account exceed the liabilities of that account as estimated by the board of directors for the coming year;

(7) appear in, defend, and appeal any action on a claim brought against the association.

Sec. 21.80.070. PLAN OF OPERATION. (a) The association shall submit to the commissioner a plan of operation and any amendments necessary or suitable to assure the fair, reasonable, and equitable administration of the association. The plan of operation and amendments shall become effective upon approval in writing by the commissioner. If the association fails to submit a suitable plan of operation within 90 days following the effective date of this chapter or if at any subsequent time the association fails to submit suitable amendments to the plan, the commissioner shall, after notice and hearing, adopt and promulgate reasonable rules necessary or advisable to effectuate the provisions of this chapter. These rules shall continue in force until modified by the commissioner or superceded by a plan submitted by the association and approved by the commissioner.

(b) All member insurers shall comply with the plan of operation.

(c) The plan of operation shall

(1) establish the procedures whereby all the powers and duties of the association under sec. 60 of this chapter will be performed;

(2) establish procedures for handling assets of the association;

(3) establish the amount and method of reimbursing members of the board of directors under sec. 50 of this chapter;

(4) establish procedures by which claims may be filed with the association and establish acceptable forms of proof of covered claims; notice of claims to the receiver or liquidator of the insolvent insurer shall be deemed notice to the association or its agent and a list of these claims shall be periodically submitted to the association or similar organization in another state by the receiver or liquidator;

(5) establish regular places and times for meetings of the board of directors;

(6) establish procedures for records to be kept of all financial transactions of the association, its agents, and the board of directors;

(7) provide that any member insurer aggrieved by a final action or decision of the association may appeal to the commissioner within 30 days after the action or decision;

(8) establish the procedures whereby selections for the board of directors will be submitted to the commissioner;

(9) contain additional provisions necessary or proper for the execution of the powers and duties of the association.

(d) The plan of operation may provide that any or all powers and duties of the association, except those under secs. 60(a)(3) and

60(b)(2) are delegated to a corporation, association, or other organization which performs or will perform functions similar to those of this association, or its equivalent, in two or more states. Such a corporation, association or organization shall be reimbursed as a servicing facility would be reimbursed and shall be paid for its performance of any other functions of the association. A delegation under this subsection shall take effect only with the approval of both the board of directors and the commissioner, and may be made only to a corporation, association, or organization which extends protection not substantially less favorable and effective than that provided by this chapter.

Sec. 21.80.080. DUTIES AND POWERS OF THE COMMISSIONER. (a) The commissioner shall

(1) notify the association of the existence of an insolvent insurer no later than three days after he receives notice of the determination of the insolvency;

(2) upon request of the board of directors, provide the association with a statement of the net direct written premiums of each member insurer.

(b) The commissioner may

(1) require that the association notify the insureds of the insolvent insurer and any other interested parties of the determination of insolvency and of their rights under this chapter; this notification shall be by mail at their last known address, when available, but if sufficient information for notification by mail is not available, notice by publication in a newspaper of general circulation shall be sufficient;

(2) suspend or revoke, after notice and hearing, the certificate of authority to transact insurance in this state of any

member insurer which fails to pay an assessment when due or fails to comply with the plan of operation. As an alternative, the commissioner may levy a fine on any member insurer which fails to pay an assessment when due; this fine may not exceed five per cent of the unpaid assessment per month, except that no fine may be less than $100 a month;

(3) revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily.

Sec. 21.80.090. EFFECT OF PAID CLAIMS. (a) A person recovering under this chapter shall be considered to have assigned his rights under the policy to the association to the extent of his recovery from the association. Every insured or claimant seeking the protection of this chapter shall cooperate with the association to the same extent as the person would have been required to cooperate with the insolvent insurer. The association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except those causes of action as the insolvent insurer would have had if the sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the association shall not operate to reduce the liability of insured to the receiver, liquidator, or statutory successor for unpaid assessments.

(b) The receiver, liquidator, or statutory successor of an insolvent insurer shall be bound by settlements of covered claims by the association or a similar organization in another state. The court having jurisdiction shall grant these claims priority equal to that which the claimant would have been entitled in the absence of this chapter against the assets of the insolvent insurer. The expenses of the association or similar organization in handling claims shall be accorded the same priority as the liquidator's expenses.

(c) The association shall periodically file with the receiver or

liquidator of the insolvent insurer statements of the covered claims paid by the association and estimates of anticipated claims on the association which shall preserve the rights of the association against the assets of the insolvent insurer.

Sec. 21.80.100. NONDUPLICATION OF RECOVERY. (a) A person having a claim against an insurer under a provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under the policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of recovery under the insurance policy.

(b) A person having a claim which may be recovered under more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property, and if it is a workmen's compensation claim, he shall seek recovery first from the association of the residence of the claimant. A recovery under this chapter shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

Sec. 21.80.110. PREVENTION AND DETECTION OF INSOLVENCIES. (a) It is the duty of the board of directors, upon majority vote, to notify the commissioner of information indicating that a member insurer may be insolvent or in a financial condition hazardous to the policyholders or the public.

(b) The board of directors may, upon majority vote, request that the commissioner order an examination of a member insurer which the board in good faith believes may be in a financial condition hazardous to the policyholders or the public. Within 30 days of the receipt of

the request, the commissioner shall begin the examination. The examination may be conducted as a National Association of Insurance Commissioners Examination or may be conducted by those persons the commissioner designates. The cost of the examination shall be paid by the association and the examination report shall be treated as are other examination reports. In no event may the examination report be released to the board of directors before its release to the public, but this does not preclude the commissioner from complying with (c) of this section. The commissioner shall notify the board of directors when the examination is completed. The request for an examination shall be kept on file by the commissioner but it shall not be open to public inspection before the release of the examination report to the public.

(c) It is the duty of the commissioner to report to the board of directors when he has reasonable cause to believe that a member insurer examined or being examined at the request of the board of directors may be insolvent or in a financial condition hazardous to the policyholders or the public.

(d) The board of directors may, upon majority vote, make reports and recommendations to the commissioner upon any matter germane to the solvency, liquidation, rehabilitation or conservation of a member insurer. These reports and recommendations shall not be considered public documents.

(e) The board of directors may, upon majority vote, make recommendations to the commissioner for the detection and prevention of insurer insolvencies.

(f) The board of directors shall, at the conclusion of an insurer insolvency in which the association was obligated to pay covered claims, prepare a report on the history and causes of the insolvency, based on the information available to the association, and submit this report

to the commissioner.

Sec. 21.80.120. EXAMINATION OF THE ASSOCIATION. The association shall be subject to examination and regulation by the commissioner. The board of directors shall submit, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the commissioner.

Sec. 21.80.130. TAX EXEMPTION. The association shall be exempt from payment of all fees and all taxes levied by the state or any of its subdivisions except taxes levied on real or personal property.

Sec. 21.80.140. RECOGNITION OF ASSESSMENTS IN RATES. The rates and premiums charged for insurance policies to which this chapter applies shall include amounts sufficient to recoup a sum equal to the amounts paid to the association by the member insurer less any amounts returned to the member insurer by the association and these rates shall not be considered excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer.

Sec. 21.80.150. IMMUNITY. There shall be no liability on the part of and no cause of action of any nature shall arise against a member insurer, the association or its agents or employees, the board of directors, or the commissioner or his representatives for action taken by them in the performance of their powers and duties under this chapter.

Sec. 21.80.160. STAY OF PROCEEDINGS AND REOPENING OF DEFAULT JUDGMENTS. All proceedings in which the insolvent insurer is a party or is obligated to defend a party in a court in this state shall be stayed for 60 days from the date the insolvency is determined to permit proper defense by the association for all pending causes of action as to any covered claims arising from a judgment under a decision, verdict or fi[illegible]based on the default of the insolvent insurer or its failure

to defend an insured. The association either on its own behalf or on behalf of the insured may apply to have this judgment, order, decision, verdict or finding set aside by the same court or administrator that ma d the judgment, order, decision, verdict or finding and shall be permitted to defend against the claim on the merits.

Sec. 21.80.170. TERMINATION AND DISTRIBUTION OF FUNDS. (a) The commissioner shall by order terminate the operation of the Alaska Insurance Guaranty Association as to any kind of insurance covered by this chapter with respect to which he has found, after hearing, that there is in effect a statutory or voluntary plan which

(1) is a permanent plan which is adequately funded or for which adequate funding is provided; and

(2) extends, or will extend to the Alaska policyholders and residents protection and benefits with respect to insolvent insurers not substantially less favorable and effective to the policyholders and residents than the protection and benefits provided with respect to the kinds of insurance under this chapter.

(b) The commissioner shall by the same order authorize discontinuance of future payments by insurers to the Alaska Insurance Guaranty Association with respect to the same kinds of insurance so long as the assessments and payments continue, as necessary, to liquidate covered claims of insurers adjudged insolvent before the order and the related expenses not covered by the other plan.

(c) If the operation of the Alaska Insurance Guaranty Association is terminated as to all kinds of insurance otherwise within its scope, the association, as soon as possible thereafter, shall distribute the balance of money and assets remaining (after discharge of the functions of the association with respect to prior insurer insolvencies not covered by the other plan, together with related expenses) to the

insurers which are then writing in this state policies of the kinds of insurance covered by this chapter and which had made payments to the association, pro rata upon the basis of the aggregate of the payments made by the respective insurers during the period of five years next preceding the date of the termination order. Upon completion of this distribution with respect to all of the kinds of insurance covered by this chapter, this chapter shall be considered to have expired.

Sec. 21.80.180. TITLE. This chapter may be known and cited as the Alaska Insurance Guaranty Association Act.

Sec. 21.80.190. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "account" means any one of the three accounts created by sec. 40 of this chapter;

(2) "association" means the Alaska Insurance Guaranty Association;

(3) "commissioner" means the commissioner of the Department of Commerce or his representative;

(4) "covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer becomes an insolvent insurer after the effective date of this chapter and (A) the claimant or insured is a resident of this state at the time of the insured event; or (B) the property from which the claim arises is permanently located in this state; "covered claim" does not include any amount due a reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise;

(5) "insolvent insurer" means an insurer (A) authorized to transact insurance in this state either at the time the policy was

issued or when the insured event occurred and (B) determined to be insolvent by a court of competent jurisdiction;

(6) "member insurer" means a person who (A) writes any kind of insurance to which this chapter applies under sec. 20 of this chapter including the exchange of reciprocal or inter-insurance contracts, and (B) is licensed to transact insurance in this state;

(7) "net direct written premiums" means direct gross premiums written in this state on insurance policies to which this chapter applies, less return premiums thereon and dividends paid or credited to policyholders on direct business; "net direct written premiums" does not include premiums on contracts between insurers or re-insurers.

SB
589

Alaska State Legislature

House

JUNEAU ALASKA

May 26, 1970

Mr. John M. Elliott
Executive Director
Legislative Affairs Agency
Pouch Y
Juneau, Alaska 99801

Dear John:

Committee Substitute for Senate Bill 589 amended contains sections 19.40.034 through 19.40.037, relating to an oil and gas severance tax. Wording of these provisions of the bill has caused concern among several members of the House that the provisions are either unconstitutional or present serious legal ramifications. Among the more significant questions raised are the following:

1. Do the provisions violate the equal protection or due process clauses of the state and federal constitution by imposing a tax on all oil and gas production regardless of whether or not the producer benefits from the proposed pipeline or the road?

2. Are the provisions defective because of vagueness; i.e.,
   (a) Is the tax on North Slope production only or on all production in the state?

   (b) Does the tax terminate when the amount reimbursed plus interest is paid or the amount not reimbursed plus interest is paid?

3. If the tax is levied to obtain reimbursement of funds not required to be reimbursed by an agreement, does the tax constitute a breach of the agreement by the state?

4. Since the tax is imposed on all producers, if the road contractor does not make reimbursement does this constitute delegation of the state's taxing authority?

5. Does the tax constitute a violation of Article 9, section 7, relating to dedicated funds?

I would appreciate your immediate response to these questions in particular and your comments on these provisions of the bill in general.

Very truly yours,

Chancy Croft
State Representative

QUESTIONS SUBMITTED BY MEMBERS OF THE LEGISLATURE
ON THE LEGAL ASPECTS OF THE N.S. ROAD

1. What are the plans of the Department of Interior with regard to the pending litigation that has been brought by both the Wilderness Society and others, and Stevens Village and others, that is, those in the District of Columbia courts, with respect to the proposal by the State to build the road? This is to include both the right-of-way and any permits that may be necessary.

2. Whether it is the position of the department that the injuncti ns that have been issued in any way would affect the right of the state to proceed to accept the right-of-way under the statute and whether or not the injunctions would in any way affect the right of the Secretary of Interior to grant permits for airports or for gravel, incident to the construccion of the road?

3. Whether the Secretary of the Department sees any difficulty in obtaining a change in the Rampart withdrawal?

4. Aside from litigation, what time frame may be involved in the permits themselves?

5. Whether or not the department expects to have to consult with the Interior and Insular Affairs Committee on any phase of the state road? If so , what phase?

6. Would it be legally possible for the Secretary to, in a case of this kind, modify the land freeze order to the extent that it would cover the route of the proposed road where it would be crossing federal lands?

7. When someone buys or takes property from the federal government they theoretically have access afforded to cross intervening federal lands to that property, do they not? (In this case the state has

obtained lands in the Prudhoe Bay area.) Wouldn't the state have road access across federal intervening lands to get to the state lands?

8. I have seen the theory that the 1866 Act is not applicable to lands to which there is Indian title. If this is so, in the absence of the law suit brought by the Indians on their land claims, what would be the position of the Secretary as guardian to allow effective acceptance of the offer as in the statute? Obviously he can't do anything under the statute, but, perhaps he could refuse to give permits for gravel and airports?

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAY 22 1970

Honorable Barry W. Jackson
Chairman
Judicial Committee
Alaska House of Representatives
Juneau, Alaska 99801

Dear Mr. Chairman:

This letter is in reply to the several telegrams we have received from your Committee and specifically to the eight questions which you presented to our Regional Solicitor on May 7 in Juneau.

With respect to the first question, we anticipate that the Justice Department, which represents this Department in the actions brought by the Native Village of Allakaket et. al. and by The Wilderness Society et. al., will bring the matter of the State of Alaska proposal for a road from the Yukon River to Prudhoe Bay to the attention of the Court, by appropriate motions, at such time as we have a definite and specific factual situation to present to the Court for a ruling. We do not believe that the matter of the road is now in a posture sufficient for presentation to the Court.

With respect to your second question, we do not believe that the injunction in either the Wilderness case or the Allakaket case would in any way affect the right of Alaska to proceed under R. S. 2477. The State is not a party to either action. We do believe, however, that the injunctions, and particularly that in The Wilderness Society case, may affect the right of the Secretary to grant permits for airports or gravel incident to the construction of the road. We will not be able to reach any final conclusion in this regard, however, until the State has taken final action on the road.

In answer to the third question, we do not at this time foresee any difficulty in obtaining a change in the Rampart withdrawal.

In answer to the fourth question, we are not in a position to give any meaningful estimate as to when the pipeline right-of-way will be issued. The Trans Alaska Pipeline system is providing us with additional information which will have to be evaluated before we can make such an estimate.

In reply to your fifth question, we believe that, pursuant to Secretary Hickel's commitment to the Interior Committees of the Senate and House of Representatives, we will have to consult with those Committees with respect to any modifications of PLO 4582 for gravel for the road or any other matter relating to the road.

In answer to the sixth question, it is legally possible for the Secretary to modify the land freeze order.

We do not believe we are in a position, at this time, to provide answers to the seventh and eighth questions. They raise particularly complex and difficult legal issues that can best be answered only in the context of a specific factual situation.

Sincerely yours,

Solicitor

Rough Draft

QUESTIONS SUBMITTED BY MEMBERS OF THE LEGISLATURE

ON THE LEGAL ASPECTS OF THE N.S. ROAD

1. What are the plans of the Department of Interior with regard to the pending litigation that has been brought by both the Wilderness Society and others, and Stevens Village and others~~?~~, ~~t~~hat is, those in the District of Columbia courts, with respect to the proposal by the State to build the road? This is to include both the right-of-way and any permits that may be necessary.

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Points to clarify by legislation or amendment of memorandum

1. General contractor
   1. no profit
   2. s/h to bear overhead
   3. only payment to GC is to be passed through

2. Time in which state is to obtain permits — ~~etc~~ specify date?

3. Payment of excess above $120M limited to payments from participants

4. Clause in appropriation bill to provide pass through (esp. as to excess of 120M

5. Post June 1, 71 pipeline payment by participant and
   but 1) if pipeline carries gas of other participants w/ in 5 years of builder increase % accordingly
   2) if other participant acquires equity w/ in 10 years then it pays

Or change reimbursement formula to proportion of cost of pipeline (if less than $1.2 B) as to 1.2 B
eg if 600M pipeline then pay 60M on road

6. Guarantee ~~pe~~ limited public use of road during pipeline construction

7. Clearly provide TAPs or Corp
in responsible for maintenance
of highway during const. of TAPs

8. Provide for state acceptance of
road upon its completion

9. Redefine legally defensible
strike "immediate"
insert ~~after~~ "initiation of"
~~after Col~~
" after Pipeline
~~before June 1, 1977~~
June 1, 1977
within one year(?) after
issuance of the permits

10. Economically feasible
insert percentage change
on cost
(not routing or design

11. ~~H~~ 7
use ... for construction & operation ...
w/o incurring any state imposed costs
amend to " like or less
or, except as to those imposed
on all other private persons ~~other~~
using the road, other costs for
use of the road.

12. Correct major gap
Pipeline after June 1 71
by part of participants
over part of route
Now - no reimbursement
(Compare bottom of p 6
w/ page 7

13. Consider yesterday 1971 + 1973
data

Points to clarify by legislation or amendment of memorandum:

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    but 1. if pipeline carries oil of other participants within five years - increase percent of builder accordingly

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7. Clearly provide TAPS or Corp is responsible for maintenance of highway during construction of TAPS
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    strike "immediate"
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insert after pipeline

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(not routing or design)

11. Paragraph 7 -

Use----for construction and operation------

without incurring any state imposed costs

amend to tolls and fees, or, except as to those imposed on all other private persons using the road, other costs for use of the road.

12. Correct major gap

pipeline after June 1, 1971

by <u>part</u> of participants over part of route

Now ----- no reimbursement

(Compare bottom of page 6 with page 6)

13. Consider extending 1971 and 1973 dates

JOURNAL

SUPPLEMENT

SENATE AND HOUSE - SUPPLEMENT NO. 6 May 5, 1970

REMARKS BY GOVERNOR KEITH H. MILLER

BEFORE A JOINT SESSION OF THE ALASKA LEGISLATURE

"Mr. President, Mr. Speaker, members of the Sixth Alaska Legislature:

I have come here today to request that you appropriate up to $120 million from the general fund for the construction of a permanent highway from the very heart of Alaska north to the rim of the North American Continent.

It is an unprecedented request and one warranted by the unprecedented circumstances that exist in Alaska today.

The Constitution of the State of Alaska states that 'it is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.'

I want the state to build a highway from the Yukon River to the Arctic Ocean because I believe that no other highway in Alaska's history is so much in the public interest.

This highway, stretching north through the Arctic, will begin to open up a practically untouched third of the state. It will provide access to vast wealth we know to be there; to wealth we strongly suspect is there; and, if recent experience be a guide, wealth beyond our present hopes and dreams.

It will promote the convenience of public travel above the Arctic Circle and provide for orderly development and conservation of the Arctic. It will provide access to state lands and facilitate better environmental control of the same lands.

It will expedite and augment the state's revenues.

But, more than this, we know that the highway is an integral part of the trans Alaska pipeline system that must be built if the oil from the North Slope is to move to market through Alaska.

Because of a deep and continuing concern over the effects on Alaska and her people of the delays that have plagued the proposed pipeline, my administration has been working for months to facilitate the project. It is that deep concern that brings me before you today.

We have spared no energy or time in our efforts to get on with this project that is so vital to Alaska's future.

Last week at this time I was in Washington, D.C., with a distinguished group of Alaskans -- legislators, business, labor and conservation leaders who compromised my emergency task force.

I cannot praise those people highly enough. They deserve the thanks of all Alaskans for the outstanding job they did in going about their assigned duties in the nation's capital.

We went to Washington with a story to tell; we told our story and also listened to the other side and Alaska is better off today because we made that trip.

My request of you today is that you appropriate up to $120 million to construct the permanent highway north and that you authorize the state to build it by contracting with a corporation formed by the Trans Alaska Pipeline System.

The state is to be reimbursed by TAPS for the $120 million, or the actual cost of the construction, whichever is lesser.

It is only by contracting with the TAPS corporation that we can take advantage of the engineering work and mobilization that already has been done.

We must remember that we are actually talking about a highway to the Arctic Ocean from Livengood. The first section of that road, from Livengood to the Yukon River, has been completed by TAPS at a cost of $19.4 million.

As I said earlier, unprecedented circumstances exist in Alaska today.

Without the permanent highway, and the construction of the pipeline, Alaska's future social, economic growth and financial stability could be severely damaged.

Let us look at some particulars.

Work stoppage on the North Slope highway and pipeline will result in immediate significantly increased unemployment in central and southcentral Alaska. Monthly unemployment rates will be from 50 per cent to 100 per cent higher than normal, depending on the slack picked up by offsetting construction projects.

Alaska, statewide, would lose employment growth of about 2,400 in 1970, 3,300 in 1971, and 4,300 in 1972. Projected population growth loss would be 3,900 in the first year, rising to 12,800 with a three-year delay. Total dollar loss to Alaska's economy is estimated to be $60 million after one year, rising to over $400 million after three years.

Two or three years ago, faced with these circumstances, Alaska would have been powerless to turn the tide.

Times have changed somewhat. True, we cannot authorize construction of the pipeline at this time; but we can get on with the building of the highway to forestall the disastrous economic consequences that are sure to result if it is not built.

A copy of the agreement between the state and TAPS has been given to the Senate President and Speaker this morning.

However, even if there were no reimbursement agreement, I would still recommend the building of this highway.

Some possible difficulties remain concerning gravel sites, but I am confident they can be resolved in a short time. The administration will continue to work on these points while you consider the proposal.

There are those who do not believe the state should build such a highway. They say the state's resources should be used almost solely for sewer and water facilities, schools, and housing.

The budget and the package of investment legislation which I proposed both provide for extensive upgrading of such facilities throughout Alaska.

I have reviewed the budget I submitted to you in January and I find no reason to propose changes in that document or any of the other administration investment proposals.

I am asking simply that we take $120 million out of the general fund to build a highway to state secondary specifications. That money is to be returned to the state and will go back into the general fund to be invested. The loss of interest revenue that would accrue from the investment of these funds will be more than offset by increased tax revenues and other numerous benefits resulting from the project.

At this crucial time in our history, we must give our full measure to the establishment of a firm economic base that will allow for steady economic and social growth.

To do any less would be to betray the public trust and confidence that has been placed in us.

It is not acceptable to me to have the cities of Anchorage Fairbanks and Valdez and the rest of the state poised for the promised economic boom only to have it delayed time and time again.

The uncertainty places us in a sort of limbo where planning and developing for the needs of the future is almost impossible.

For the first time since statehood, we have the means to propel ourselves out of the limbo and we cannot do any less.

We have been assured that the pipeline will indeed be built, but we must not sit idly by and wait. Let's get on with the building of the highway so there won't be any more delay necessary once the construction permit is granted.

If the highway is not built before the pipeline construction permit is granted, the completion of the pipeline will be delayed by a year. That delay will result in the loss of millions of dollars to the state in royalties and severance taxes.

We have been assured by Secretary Hickel and officials of the companies involved that no major route change for the pipeline is contemplated or necessary so that should pose no problem for the highway construction.

The highway will conform to the stipulations agreed upon between the interior department and TAPS, and will further conform to state secondary highway standards as approved by the Bureau of Public Roads.

Ever since last January 12, when the second session of the Sixth Alaska Legislature convened, we have heard it said over and over again that this is the most important legislative session in Alaska's history. Certainly nobody here quarrels with that assessment.

We have recognized that the needs of Alaskans lie far beyond the scope of any single party and I am confident we will continue to work together in a spirit of cooperation to meet those needs.

We are determined to do that which is right as well as that which is necessary.

I urge your favorable and speedy approval of this proposal.

Thank You."

Mr. Jackson:

I talked with Dick Bradley re N.S. Road public hearing and the desire to have answers to our questions by then. He suggested calling Sol. Mitchell Melick in Washington, D.C., but didn't think they could have answers by then. I got the numbers for both Mr. Melick and Mr. Wade - in Anchorage. What is your wish?

Merle

202-343-2134 - Wash. D.C.

277-0596 - Wade in Anchorage

~~ROUGH DRAFT~~

Straight wire
sent 11:55 a.m. 5-11-70

Mr. Mitchell Melich
Solicitor, Department
of Interior
Washington, D. C. 20240
202-343-2134

THE HOUSE JUDICIARY COMMITTEE IS HOLDING A PUBLIC HEARING ON THE LEGAL ASPECTS OF THE NORTH SLOPE ROAD AND THE PROPOSED CONTRACTS FOR CONSTRUCTION ON THURSDAY, MAY 14.

MR. HUGH WADE, SOLICITOR, FROM ANCHORAGE, APPEARED BEFORE THE COMMITTEE ON THURSDAY, MAY 7, AT WHICH TIME HE WAS PRESENTED WITH QUESTIONS FROM THE COMMITTEE. HE HAS SUBMITTED THESE QUESTIONS TO YOUR OFFICE FOR ANSWERS. WE WOULD APPRECIATE RECEIVING ANSWERS TO THESE QUESTIONS PRIOR TO OUR MEETING AT 4:00 P.M., THURSDAY, MAY 14, REALIZING THAT YOU MAY NOT HAVE DEFINITIVE AND DETAILED ANSWERS ~~AT THIS~~ BY THAT TIME.

HOUSE JUDICIARY COMMITTEE
BARRY W. JACKSON, CHAIRMAN

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
308 "G" STREET, SUITE 313
ANCHORAGE, ALASKA 99501
TELEPHONE 272-9431

WILLIAM H. JACOBS
EXECUTIVE DIRECTOR

PHILIP B. BYRNE
DEPUTY DIRECTOR
JOHN S. HEDLAND
LITIGATION SUPERVISOR

April 29, 1970

Representative Barry Jackson
c/o Judiciary Committee
Pouch "V"
Juneau, Alaska 99801

Dear Representative Jackson:

Enclosed are five copies of a memorandum regarding the legality of state construction of the TAPS road which we have prepared at the request of Art Peterson. I would appreciate it very much if you would send me copies or memoranda prepared by any other parties on this question.

Please let me know if we can be of further assistance to the Committee.

Sincerely,

ALASKA LEGAL SERVICES CORPORATION

John S. Hedland
Director of Litigation

JSH/dp

Enclosures [5]

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MEMORANDUM

TO: Representative Barry Jackson
Chairman, House Committee on
the Judiciary

DATE: April 29, 1970

FROM: John S. Hedland
Director of Litigation
Alaska Legal Services Corporation

Mr. Art Peterson of the Judiciary Committee's staff has requested that Alaska Legal Services, along with various other organizations, present its views as to the legality of state construction of an access road for the Trans Alaska Pipeline System. Since the Committee is presumably considering legislation which would provide a sufficient framework of state law for such a project, these comments are limited to whether such action would contravene any provisions of federal law. In addition, they are not directed to the fiscal or other propriety of such action. Finally, it should be noted that this office represents clients whose vital interests would be affected by any action or non-action with respect to construction of a TAPS road, and these comments are necessarily offered in that context. In this regard, it should also be noted that we have previously supplied a special subcommittee of this committee, chaired by Representative Fink, with a complaint filed by this office in Village of Allakaket, et al. v. Miller, et al., U.S. District Court, District of Alaska, No. A-45-70. This case raises some of the questions within the scope of this memorandum.

Simply put, the question of the state's proposed action is whether there is any provision in federal law authorizing state construction of a road, acquisition of a right-of-way, or conveyance to a third party of a right-of-way over land which is (1) federally owned and (2) subject to "Indian title" or the right of aboriginal use and occupancy. The only provisions relating to state acquisition of rights of way over federal or Indian land of which we are aware are 25 U.S.C. §357 and 43 U.S.C. §932.

25 U.S.C. §357 provides for state condemnation, with the award of just compensation, of "(l)ands alloted in severalty to Indians." This statute is inapplicable to "Indian title" lands, and could conceivably provide for state acquisition of a right of way only over isolated portions of the TAPS route which traversed Native allotments. Even as to such lands, the statute is probably unavail-

able at present, due to the land freeze. See discussion, infra.

43 U.S.C. §932 provides as follows:

> The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Section 932 is a federal offer of a right of way which must be accepted by the state in accordance with state law. 43 C.F.R. §2234. 2-5(b). This section is inapplicable to lands held in "Indian title" by Natives, and does not authorize extinguishment of "Indian title." Bennett County v. United States, 394 F.2d 8 (8th Cir. 1968). Moreover, the section is inapplicable at present with respect to any federally owned lands--whether or not subject to "Indian title--because of the land freeze, P.L.O. 4582, 43 C.F.R. Ch. 1, Appendix. The land freeze withdraws, until the end of 1970, all otherwise available federal land in Alaska

> from all forms of appropriation under the public land laws (except locations for metalliferous minerals) . . . for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska.

Modifications to the land freeze by the Interior Secretary are authorized, but none have been made which would permit state construction of the TAPS road. On January 7, 1970, Secretary Hickel issued P.L.O. 4760 (35 Fed. Reg. 424) which modified P.L.O. 4582 so as to permit him to issue such a right-of-way, which he has not yet done. Nor does a "Notice of Proposed Classification of Lands for Multiple Use Management" at 35 Fed. Reg. 16-17, creating a "utility and transportation corridor" in northern Alaska, have the effect of lifting the land freeze. The effect of the corridor's creation was merely to segregate the land from location under various homestead, allotment and mining laws, and the notice expressly provides that it

> will not affect . . . the determination and protection of the rights of the Native Aleuts, Eskimos and Indians of Alaska.

Finally, part of the proposed TAPS route, in the Stevens Village and Rampart areas, crosses land classified as a "powersite" for the Rampart Dam project by PLO 3520 (30 Fed. Reg. 271); see also 28 Fed. Reg. 2826-31, 3558, and 4040. Such lands are not "public lands, not reserved by public uses" within the meaning of section 932. 16 U.S.C. §818 provides that lands classified as a powersite are reserved "from entry, location or other disposal under the laws of the United States" unless permitted by the Federal Power Commission

or by Congress. No such permission has been given.

It should be pointed out that the existing Livengood road (south of the Yukon) was constructed under the authority of 43 U.S.C. §932. In that case, both the land freeze (PLO 4582) and the power-site classification (PLO 3520) were expressly modified by the Interior Secretary to permit state acquisition of a right-of-way under §932. See RLO 4717 (34 Fed. Reg. 17170) and PLO 4676 (34 Fed. Reg. 13415). Neither has been so modified with respect to the proposed extension north of the Yukon. Moreover, as to the Stevens Village protest area, which lies along its route, the Secretary appears to be enjoined from so doing by the terms of a preliminary injunction entered April 3, 1970, in Native Village of Allakaket, et al., v. Hickel, (U.S. District Court, District of Columbia, No. 706-70) This order enjoins the Secretary:

> from directly or indirectly: Issuing or granting any person or corporation a right-of-way for either a pipeline or a road through (the Stevens Village protest area) without the consent of the proper tribal and/or band officials of Stevens Village.

JSH/dp

Alaska State Legislature

House

JUNEAU ALASKA

May 26, 1970

Mr. John M. Elliott
Executive Director
Legislative Affairs Agency
Pouch Y
Juneau, Alaska 99801

Dear John:

Committee Substitute for Senate Bill 589 amended contains sections 19.40.034 through 19.40.037, relating to an oil and gas severance tax. Wording of these provisions of the bill has caused concern among several members of the House that the provisions are either unconstitutional or present serious legal ramifications. Among the more significant questions raised are the following:

1. Do the provisions violate the equal protection or due process clauses of the state and federal constitution by imposing a tax on all oil and gas production regardless of whether or not the producer benefits from the proposed pipeline or the road?

2. Are the provisions of section 19.40.034 discriminatory because of variances; i.e.,
   (a) Is the tax on North Slope production only or on all production in the state?

   (b) Does the tax terminate when the amount reimbursed plus interest is paid or the amount not reimbursed plus interest is paid?

3. If the tax is levied to obtain reimbursement of funds not required to be reimbursed by an agreement, does the tax constitute a breach of the agreement by the state?

4. Since the tax is imposed on all producers, if the road contractor does not make reimbursement does this constitute delegation of the state's taxing authority?

5. Does the tax constitute a violation of Article 9, section 7, relating to dedicated funds?

I would appreciate your immediate response to these questions in particular and your comments on these provisions of the bill in general.

Very truly yours,

Chancy Croft
State Representative

IN REPLY REFER TO

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAY 22 1970

Honorable Barry W. Jackson
Chairman
Judicial Committee
Alaska House of Representatives
Juneau, Alaska 99801

Dear Mr. Chairman:

This letter is in reply to the several telegrams we have received from your Committee and specifically to the eight questions which you presented to our Regional Solicitor on May 7 in Juneau.

With respect to the first question, we anticipate that the Justice Department, which represents this Department in the actions brought by the Native Village of Allakaket et. al. and by The Wilderness Society et. al., will bring the matter of the State of Alaska proposal for a road from the Yukon River to Prudhoe Bay to the attention of the Court, by appropriate motions, at such time as we have a definite and specific factual situation to present to the Court for a ruling. We do not believe that the matter of the road is now in a posture sufficient for presentation to the Court.

With respect to your second question, we do not believe that the injunction in either the Wilderness case or the Allakaket case would in any way affect the right of Alaska to proceed under R. S. 2477. The State is not a party to either action. We do believe, however, that the injunctions, and particularly that in The Wilderness Society case, may affect the right of the Secretary to grant permits for airports or gravel incident to the construction of the road. We will not be able to reach any final conclusion in this regard, however, until the State has taken final action on the road.

In answer to the third question, we do not at this time foresee any difficulty in obtaining a change in the Rampart withdrawal.

In answer to the fourth question, we are not in a position to give any meaningful estimate as to when the pipeline right-of-way will be issued. The Trans Alaska Pipeline system is providing us with additional information which will have to be evaluated before we can make such an estimate.

In reply to your fifth question, we believe that, pursuant to Secretary Hickel's commitment to the Interior Committees of the Senate and House of Representatives, we will have to consult with those Committees with respect to any modifications of PLO 4582 for gravel for the road or any other matter relating to the road.

In answer to the sixth question, it is legally possible for the Secretary to modify the land freeze order.

We do not believe we are in a position, at this time, to provide answers to the seventh and eighth questions. They raise particularly complex and difficult legal issues that can best be answered only in the context of a specific factual situation.

Sincerely yours,

Solicitor

QUESTIONS SUBMITTED BY MEMBERS OF THE LEGISLATURE ON THE LEGAL ASPECTS OF THE N.S. ROAD

1. What are the plans of the Department of Interior with regard to the pending litigation that has been brought by both the Wilderness Society and others, and Stevens Village and others, that is, those in the District of Columbia courts, with respect to the proposal by the State to build the road? This is to include both the right-of-way and any permits that may be necessary.

2. Whether it is the position of the department that the injunctions that have been issued in any way would affect the right of the state to proceed to accept the right-of-way under the statute and whether or not the injunctions would in any way affect the right of the Secretary of Interior to grant permits for airports or for gravel, incident to the construction of the road?

3. Whether the Secretary of the Department sees any difficulty in obtaining a change in the Rampart withdrawal?

4. Aside from litigation, what time frame may be involved in the permits themselves?

5. Whether or not the department expects to have to consult with the Interior and Insular Affairs Committee on any phase of the state road? If so , what phase?

6. Would it be legally possible for the Secretary to, in a case of this kind, modify the land freeze order to the extent that it would cover the route of the proposed road where it would be crossing federal lands?

7. When someone buys or takes property from the federal government they theoretically have access afforded to cross intervening federal lands to that property, do they not? (In this case the state has

obtained lands in the Prudhoe Bay area.) Wouldn't the state have road access across federal intervening lands to get to the state lands?

8. I have seen the theory that the 1866 Act is not applicable to lands to which there is Indian title. If this is so, in the absence of the law suit brought by the Indians on their land claims, what would be the position of the Secretary as guardian to allow effective acceptance of the offer as in the statute? Obviously he can't do anything under the statute, but, perhaps he could refuse to give permits for gravel and airports?

HOUSE AND SENATE JOINT JUDICIARY COMMITTEE MEETING
MINUTES OF THE MEETING
MAY 6, 1970

Meeting was called to order at 8:10 p.m. by Chiarman Barry Jackson of the House Judiciary Committee. Present were: Banfield, Harris, Metcalf, Orbeck, Rettig, Cornelius, Fink, Senator Miller, Lewis, Palmer, Merdes, and Rader. Senators Begich and Josephson were also in attendance.

Mr. Jackson gave an outline of the program by saying that the hearing would commence with Robert Ward, Secretary of State, being first on the program; followed by Commissioner Beardsley and his staff. Mr. Robert Price, for the AG's office, would give his testimony following this.

Robert Ward: I do not have a formal presentation tonight. Our purpose is to react to the wishes of your committee. In this regard, we did furnish the basic framework of the memoranda of agreement with TAPS. The TAPS people left on Friday to circulate this among their own people and will be back Monday, Tuesday, or Wednesday of this week. As yet we have not received their signed copies of this agreement. We have received confirmation by wire from the major participants Since that time, we have been finalizing construction contracts. We do not have copies available but can discuss the provision of those contracts with you tonight. Tomorrow there will be hearings held with State Affairs and TAPS. I would like to point out that we have with us tonight Mr. Bob Price, from the AG's office. Besides myself, Mr. Price, Commissioner Beardsley, Deputy Commissioner Scougal, Commissioner Kelly, and Henry Pratt were on the negotiating team. John Becker, Chief Design Engineer, is also with us tonight. These people will be available to respond to your questions.

Senator Josephson: Question that occurs to me is in regard to Senator Rader's making a public proposal that the reimbursement on the road construction be done by adding to the severance tax on the North Slope production. What is your feeling on this?

Robert Ward: The governor felt the road was necessary whether or not the state got the money back.

Senator Josephson: I am interested in whether or not the administration had made an economic study of the effect of the state picking up the entire cost and not asking for reimbursement. What difference would this make? Particularly participating on an equity basis? Mr. Jackson did not want to pursue this line of questioning at this point.

Representative Cornelius: If it works out that the participants cannot agree on the memoranda, is the state prepared to go ahead and build the road without the pipeline participants?

Robert Ward: We don't think there will be basic disagreement on this.

Rep. Fink: I think Cornelius' question was that if the oil companies do not care to sign this agreement, would you change your position?

Robert Ward: No, because they have already agreed to sign.

Rep. Cornelius: Do we need this road regardless of whether the oil companies participate or not?

Robert Ward: Yes.

Mr. Beardsley and Mr. Price were asked to testify at this time. Mr. Jackson related that he had a memo from Alaska Legal Services that he had requested from them. He handed these out to the members that were seated at the table.

Mr. Price asked to explain that he was testifying for Attorney General Edwards. He also wanted to briefly explain their reaction to the memo that was furnished to him by Mr. Jackson. The position of the AG is that this memo from John Hedland, copy of which was addressed to Barry Jackson at his request, discusses certain questions which are at present in litigation in the courts. The question which is raised in the memo, the ethics question, is raised by the cannons of ethics which govern the testimony which I may give tonight. This would prohibit an attorney, expeically in the AG's office, from discussing questions that are presently under litigation. He read from a supreme court decision of 1959 to back this position. Generally speaking it is improper and contrary to the code of ethics for any attorney to publicly discuss a case in which he is or maybe interested. In that respect, the AG is under no less of an obligation than any other attorney. I would like to point out to the committee that if they wish me to testify with reference to the memo and answer the questions raised by Mr. Hedland, it should be done in executive session, or under conditions where this testimony will not be made public. ----------or that I have been specifically asked to testify. Mr. Jackson after consultation with committee members requested Mr. Price to testify. Mr. Price also stated that circumstances would require him to comment before a legislative committee. The committee does request Mr. Price to comment on these issues.

Commissioner Beardsley will testify first--Most of what I have prepared related more to the merits of the case rather than the legal aspects. I may be able to answer questions.

Rep. Jackson: You do have a full set of the drawings and documents that were referred to in the ----------. Have you had adequate opportunity to review them?

Beardsley: Yes, sir. I became aware in the late fall last year. I requested my chief engineer, John Becker, to review the designs to that point and to make any suggestions for the design that would be more in conformity with out own designs. A number of meetings were held and some changes were made. The design that we are considering is not a snap decision. This is the result of 3-5 months study. It became apparent that it could become a part of our state system.

Rep. Jackson: Do the drawings substantially meet the standards of secondary highways?

Beardsley: State secondary highway standards are not hard and fast criteria. They are living criteria by continually being under change. They are based on the American Association of State Highways recommendations designed for the lower "48". They are modified by our staff in accord with Alaskan conditions. They are designed with the objective of getting the State of Alaska under the Federal Highway Aid Program. Our standards must be concurred in and approved by the BPR. Under normal procedure this is done on a project by project basis. These are not fixed standards. With the company design consultants for TAPS we tried to bring their design in as close conformity with our normal practice of constructing secondary state highways as possible. We have conditions like the Brooks Range. This range has never been traversed with highways before so we don't know all the problems that we will encounter. For all practical purposes and from review plans and field notes and documents along with aerial inspection, we are satisfied that in excess of 90 per cent of this project will be no more difficult than the 50 miles of existent highway. Grades will be no greater than 9 per cent. These construction people in the field may encounter special problems. These have to be acceptable in highway construction. The fact is that since there will be no federal monies involved---------.

Jackson: If federal money were involved, do you think that all sections would meet federal standards? (Just give your own opinion.)

Beardsley: In my expert opinion, nearly all would receive the concurrence of the BPR. Although there will be some field changes.

Jackson: Have you considered culvert size problems?

Beardsley: What the designers have done is size the culverts knowing that some will have to be changed. We will be influenced from our Fish and Game Department and the Department of Interior. The TAPS peopls have already sent up a ----- what they expect to encounter. This is normal practice. Some will have to be changed. We will probably have some surplus culvert.

Jackson: Has your department and TAPS been in contact with State Fish and Wildlife?

Beardsley: Yes.

Jackson: In the memo it says that the state will not be responsible for maintenance during the time it is being used by TAPS. Will there be any commitment that they would be maintaining it?

Beardsley: The contractors working under this agreement will provide maintenance of the highway. Following this, we don't exactly know when the pipeline construction will occur. Before the road, then the maintenance of the road will be continued by the subcontractors. As long as we haven't accepted the road it will be maintained by the subcontractors. The state will not be obligated for maintenance and implies that TAPS will be. It is my understanding that they will.

Begich: Do you have the construction contract and the corporation to be formed?

Beardsley: We will furnish copies as soon as they are available.

Jackson: Will you have serious routing problems? Movement of earth; slide areas; etc. Do you anticipate necessary field changes in construction?

Beardsley: They are provided for. The first 57 miles will be as difficult as any construction problems that will be encountered. We have established as a joint team with TAPS design consultants and BLM, Fish and Game, to protect the environment and to cause this construction to become what is now cited as a model of construction in the Arctic. We have learned from this and can qualify that by saying the contractors made and we have worked out new techniques and the arrangement by which we determine having field changes.

Jackson: Is the general routing dictated by the pipeline routing? There has to be a comparison over another routing if there are no other considerations involved, especially in construction or future maintenance cost and utility for an all year round road. Do you have any comments on that?

Beardsley: I would like to correct an impression. The pipeline was seeking in its constructive design the same kind of materials and security that a road would seek. And, in fact, TAPS investigators did a great deal of work that was a great assistance to the highway department. It is a fact that the highways department favors the route that TAPS has picked. This general route is the most favorable route. The Anatuvik Pass, the winter road, is different than an all year round road. This first one is good for a winter road or trail, but when you are seeking to build a permanent road, that is another matter. North of Anatuvik Pass there are a great many problems, such as overflowing streams, etc. This is a traditional route, especially as a winter trail. The difference in elevation in the other route, but we feel that the TAPS suggestion is favored.

Jackson: Is there any opportunity for federal assistance on this route:

Beardsley: This is a definite point. Nearly all of our federal apportionment is already listed to the upgrading of the existing highway system. We have succeeded in completing 1/3 of this program. The monies that we have diverted have been nominal. We have only extended the highway system by 10 per cent. If we take our federal aid monies and devote them to this top priority program and improve our maintenance factor, we have a 15-year program ahead of us. What I am saying is that the hard facts are--we don't have federal monies fo this highway.

T. Miller: What would be your best guess after the legislature appropriates money, what mechanical things would than happen?

Beardsley: The first thing is to send a team headed by John Becker and including Woody Johanson to conduct an on the ground and aerial survey of the route to satisfy that there are no field problems readily seen. Probably assign two construction inspectors to each segment of the highway. There will be seven, I believe. Then the field changes that are necessary will be made. We anticipate that this would be the first phase, and it would take approximately ten days.

Senator Miller: Do you anticipate fairly quick action here? Would you be able to move rather quickly? Fink asked that if it weren't for the pipeline, would you be recommending this road to be built?

Beardsley: I would work in this direction. This isn't part of our five-year highway program.

Fink: Isn't it true that the primary reason is because of the pipeline?

Beardsley: The five-year program is for reconstruction of our existing highway network. If we had an expansion program, this would be our first priority. TAPS is to reimburse us less any federal funds.

B----: Is there any reason that this is not in the contract?
.....

Beardsley: If we wanted to dilute our present programs, we could go ahead and build this.

.... You have mentioned several times that BPR doesn't have anything to do with this road. Do you anticipate that they will have any inspectors on the road at all? TAPS is using it .....that the state doesn't have any obligation to maintain it? If it is a public road for public use and when will it become available for public use?

Beardsley: After we accept it. I still have the right to close it for safety purposes. We will have to have some means for safe travel on the highways. If there is no pipeline, then we will have to make special provision for safety on the highway.

..... TAPS as a cooperative matter.

Beardsley: I can't give you a concrete answer to that question.

.....Do you believe that the road will be able to be used simultaneously along with TAPS? If the public is using it, the state then has the obligation to maintain the road?

Beardsley: TAPS will be required to maintain it.

.... In regard to the bills sent down---one eliminates the authorization of contract by bid, why?

Beardsley: Two reasons: (1) It appears that we should deal with the existing contractors through TAPS. Subcontractors through TAPS have already gone through a bidding procedure. They are there because they are successful bidders. This is not under state procedures but they

are selected and evaluated as providing the most road for the least amount of dollars. The intent of the law would be threatened in this case. We get into a mish-mash of renegotiation between the new contractors and the ones existing there. There wouldn't be any construction season left. We felt that they were there and that their existing arrangement with TAPS should be honored.

.... cost plus contract? Set fee?

Beardsley: The contract limits the state's obligation to $120 M; if the cost is less we pay this amount. If the cost exceeds $120 M TAPS will pick up the rest. Two types of contractors--target contract and the other is a unit contract. Because of the scope, the cost will fluctuate. There will be a new corporation formed which in turn will pick up the contractor with the prime bid ers on the road.

Jackson: This appears to be a contract on a cost only basis. No profit provided for that corporation. Is this, then, a nonprofit corporation?

Fink: As of this moment, does the state have any environment stipulations?

Beardsley: There will be a number of state departments involved besides highways. HW and Fish and Game. They were also involved in the first 57 miles.

Fink: At this stage, do you anticipate any federal people on the road? Especially in regard to federal stipulations?

Beardsley: BLM people will be up there. They were also there for the first 57 miles. We have a good working basis with these people.

Merdes: His question related how to determine what was "economically feasible"? Defines that as a permit to build the pipeline with TAPS routing currently in existence.

Mr. Price: ..... sum of the money that might be termed cost--whether or not TAPS organization has a sum which is its proposed cost which makes it economically feasible. The latest figure is $1,300,000,000. There are a couple of factors that should be brought out. This is planned for underground pipeline. They are getting serious about above ground construction. The factor of whether or not it will be above or below might make a difference. I can't speak to the question. You might ask TAPS representatives. When the governor told the Legislature that the highway would further conform to state secondary highway system..... The Governor was in error in referring to BPR. Those are the design that we had.

Senator Josephson: Have these drawings been agreed upon by the Department of Interior and TAPS? Fink mentioned that there would be difficulty on gravel pits. What difficulties, and how much gravel?

Price: The question that you are raising, Senator, relating to the gravel permits is the question that is raised in the litigation back in Washington, D. C., in the Wilderness Society versus Hickel. In that action a preliminary injunction was issued by Judge Hart 23 April 1970. It would be helpful if I read from that and discussed it a bit more fully. (Read from the case.).....hereby enjoined from issuing a permit with the TAPS system to any person or corporations. .....Construction of a haul-road over public lands of the United States from Prudhoe Bay to the Yukon. .....to the use of gravel for such a road. .....perhaps it should differ on the haul-road. This is in the case against Governor Miller--gravel from public lands. The language of the injunction states that it is deposited on a dedication of the road with the pipeline, however, if the state constructs a road independently of the pipeline system the two are split off. You have a changed condition. At the present time the Secretary of Interior is enjoined from issuing to any persor or corporations.... This referred to TAPS. The use of gravel from public lands is cited. What are public lands, when you consider the 1866 Road Act? The permits for gravel did not require a permit, furthermore, there is also the possibility that gravel found in navigable waters that belong to the state already belong to the state.

Josephson: Some people are concerned that ....they think we have done something. Doesn't the state have any plan to test the theories that you have recited so that the legislature can be sure that the passage of the Governor's program would be barred?

Price: There would be different ways for this to take place. Request the court to reconsider its preliminary injunction on the basis of changed conditions. .....draw rest in litigation filed by ALS in the Anchorage District Court where the state is preparing an answer. I am not sure when this will be filed.

Josephson: Commissioner, normally if there were problems in the field the contractor can process claims on the job. .....with the fact that we are relying on design by the parties in the general contractors corporations. Our liability is limited to $120 M. There is a claims section.

Price: In the target contracts..... In the two contracts that are set units there will be a clause in it. Commonly found in government contracts.

Beardsley: If total cost came below $120 M there would be the possibility of increasing that cost by such claims above the $120 M. After having reviewed their construction quotes that we had in, it would be fortunate to build this road for under $120 M.

Cornelius: You have indicated that the construction problems north of the Yukon would be much the same as south of the Yukon.

Beardsley: No, south of the Yukon is similar to other roads already built. When you are out of the mountain range they are similar to the section of Livengood and the Yukon Road. The cost per mile for the 57 miles was 19.4 M dollars. $340 per mile. We anticipate $327,000 per mile projection for the entire road.

Cornelius: Fink asked about your 5-year program. Did TAPS propose to build a road to Prudhoe Bay? Would your office have considered building a road into that area?

Beardsley: The problem is involved. Basically you have to envision a projected need. Then you have to remember that the 5-year program is for reconstruction of existing highways. No extension of new roads was in the new program.

Cornelius: On Page 14 there is a reference to a possibility that the federal program may pick up part of the cost. Are you going to go ahead with plans to try and get federal participation?

Beardsley: I am concerned that we are so limited that to do the job we have at hand that I would consider it not prudent to devote any federal money to new highways.

.....If you follow the general federal requirements would it be possible at a later time to make an application for funds to reimburse the state for a percentage of the costs involved?

Beardsley: I read the contract that I can't see how this could be done. It will be part of the highway system. It can be improved with federal highway funds at a later date.

..... What I am getting at, we can't make an application with BPR but is it possible to go ahead and use what we have ....and then get that approved at a later date and also get reimbursed at a later date.

Beardsley: I talked with the District Engineer. He thought that it would be difficult. Mr. Fink already asked about the maintenance. The state is responsible because it was a state road. The question arose that in the contract the state will not be responsible.

.....Can't the state contract with TAPS to maintain this?

Beardsley: This was done this winter.

Orbeck: There seems to be a lot of confusion. Isn't it true that they were bid under unit cost system? On the unit cost basis?

Beardsley: .....1-5 year bid on a target brief and the subcontractors benefits vary.

Orbeck: Isn't it cost plus? Isn't it true then that Livengood cost was high because it was started in the winter.

Beardsley: This road would be built in the summer and should cost less.

Senator Palmer: You thought that you would be surprised if it cost less than $120 M. I have hear that it might cost $250 M.

Beardsley: Anything in excess would be paid by TAPS. This would be whether the permit was granted or not.

Beardsley: Let me state that I understand it that there is somethink under $40 M in mobilization cost and administrative costs in addition to this, anything in excess they will pick up the remainder. This does not include $19 M they spent on the Livengood Road.

Rader: Do you feel that the route of the pipeline is certain now?

Beardsley: This isn't my area to judge.

Rader: I notice that the contract provides that if it goes an alternate route there would be no repayment. Are we taking the pipeline companies word on that?

Secretary of State Ward: This gets into policy--major deviations could negate their having to reimburse the state. We have had a strong assurance as we can get and have indicated that there was no change in their plans and the route that they favored was the route throught the Detrick Pass. ....no desire to move the pipeline. If they got a permit that said you cannot construct it through the other pass instead of the Detrick and they are not party to that then their agreement says that the state would be reimbursed on the road that did follow the pipeline route.

Rader: Doesn't this make a different a state ris and not a pipeline risk? They specifically have it..... We are relying on the pipeline for the route and we don't have a choice. Is the state taking the risk or the pipeline?

Secretary of State Ward: The realities of the situation is that they will go along that route. They already follow that.

Jackson: To close this line of thinking--let us return to Commissioner Beardsley.

Metcalf: Do you intend to let the public use the road?

Beardsley: This will be maintained 12 months out of the year--when the state takes it over. Use would be based on volume of traffic.

Metcalf: Do you have an estimate of maintanance--such as $2,000 or $2,500 per mile?

Fink: Federal government allows so many dollars which comes from highway user taxes. This is divided among the states according to population and other factors. Most are apportioned in the neighborhood of 94% to 6% for state dollars. There are certain things they will not participate in. In other areas you will find 88% federal dolaars to 12% state dollars. The ratio is so high because of your high precentage of federal lands. This amounts to $48 M per year.

Fink: Any federal funds that we apply to the road have to be taken away from other programs.

Beardsley: We can use it any way that we see fit. Any federal funds

that we put on the road will have to come from other programs. Livingood is not a public road today. Until the pipeline is completed in accordance with the agreement with TAPS.

Fink: What about North of the Yukon to Prudhoe Bay?

Beardsley: It will be a public road. You have no way to get to it until such time as the pipeline is completed. If the pipeline construction is in the picture. Before the pipeline is completed it is almost a fair statement to say that it is not a state road. It will be limited public use.

Jackson: Do you anticipate that there will be limited public use from Livengood to Yukon.

Beardsley: We have discussed this with them. We have merely agreed that there was a problem but we don't have that worked out.

Jackson: Who will provide the Yukon crossing?

Beardsley: There will be an ice bridge in the winter and a ferry in the summer, both operated by TAPS. Following that we will negotiate with TAPS.

Jackson: How many months out of the year do you expect to be able to use this road?

Beardsley: 10 months.

Robert Ward: .....federal provision in the contract.....
The inclusion for repayment to TAPS if any federal funds were received by the state. Our original draft did not have that in there.....not devote any funds available and not jeopardize the construction of this road. The participants asked if we would object in the event that we would get any reimbursement. That is why it is in there.

Senator Miller: What general braod public policies bind public roads. As Commissioner do you feel that the North Slope Road has a value as a logistic notwithstanding the pipeline? Do you feel that the state would feel justified to build this road even if the pipeline were not built? Should the state bear the risk rather than the companies in the route deviations?

Beardsley: This might not be an important consideration. First on the value of logistics rather than a tool to build the pipeline. The risk isn't too great then because the state can recover because of the.....

Robert Ward: I would like to put any businessman's mind at ease as to where the risks lie. Every program that we have invested in whether by the administration or legislature sponsored, in any case, it requires an appropriation of funds. It requires a lot of money. If it is to be done in an orderly fashion. The administration and the legislature have recognized that we have to have continuing revenue. Oil is the number one thing now. Along with that in marketing the oil we can accomplish that and get the road too. If it is the administration and the commissioner that the

road will serve a basic purpose besides the pipeline then some of these questions in terms of broad policy and other methods that the state can use to recover its cost if this agreement doesn't work out.

Senator Hammond: The states liability would not exceed $120 million regardless.

Ward: We are assured that TAPS will underwrite a road regardless of cost.

Hammond: Or does this mean at TAPS option? They will say we don't want the road to go any further. Is it assuredly going to go from point "A" to point "B"?

Cornelius: Fink brought out an interesting point about public highways in regard to Livengood to the Yukon. The basic reason that we would appropriate for this road without an absolute guarantee from TAPS is because it is important for supplying the oil fields by the trucking industry. Don't you think it is important that at the time for scheduled completion of the road north of the Yukon be a public road the same as south of the Yukon?

Beardsley: We have not reached any formal agreement on this yet. Isn't any real strong... .of making both parts a public road at the same time. I mean on the part of TAPS.

Cornelius: Why couldn't this be included in the agreement?

Beardsley: We have discussed this but there has been no agreement at the present time. We don't know what the safety standards will be. If we can work out this arrangement without impeding the construction..... Traditionally the highway program has used about 15% of the budget. The $120 million is roughly 15% of the $900 million.

Rettig: According to the timetable expressed in the agreement, sometime before June, 1971 the road is finished, the state is reimbursed, and then they finish the pipeline. At that point, who owns the road?

Beardsley: The state owns the road.

Rettig: How about maintenance equipment along the road. Is that part of the transfer to the state?

Beardsley: No, that would be TAPS construction equipment.

Rettig: How much does it cost to put in the ice bridge?

Beardsley: $25,000 per year. .....That is our part of the road.

Rettig: Would the ferry be part of the road system?

Beardsley: I will be negotiating with them.

Rettig: Did I understand that the participants are to use their best interests to get their permit. After that they are not obligated to try anymore.

Rader: The road has other purposes. Assume that the road was built to Anatuvik Pass. Would a second road to the slope be authorized?

Beardsley: Yes, this opens a great recreational area.

Rader: If TAPS built a road to Anatuvik Pass, would you suggest a parallel road?

Beardsley: If we built a road over the route, we are talking about the state taking one route and TAPS another route, then we would have two routes to the slope. This would be a duplication. Thi: would not be a permanent road. It would be impossible to maintain this road.

Rader: Do you think that two roads would be justified?

Beardsley: At least part way. 'p to the vicinity of Anatuvik Pass. It will open up a new area there.

(Five minute recess)

Price: We have exempted the monies from state income tax. The corporation is not exempt from state tax.

Jackson: The contract would be written that this would not be a profit corporation.

Ward: Overhead is a part of the $120 million. The state.....

Jackson: Mention of airports at three locations. Are they to be state airports? Also what legal problems are involved in getting land for the airports?

Price: I may have some answers to these. As I understand the modifications to the land freeze, there have already been arrangements made for airports. I don't know whether or not they apply. There would have to be appropriate modification made for these airports. Or, if they are tied to the pipeline they would be covered by present exemption.

Ward: TAPS corporation has shown.....as part of the pipeline. Total number needed for the pipeline. This is for the airports not necessary to the road construction.

Jackson: Last sentence refers to the environmental provisions of the state. Could you provide us with a copy of those.

Price: I can provide a copy. Parties to the agreement anticipate that it may be necessary to get further modification in he land right-of-way under (USCA 932). It may be necessary to get permits from the federal government for gravel and other materials.

Jackson: What problems may be encountered?

Price: It may be necessary to get modifications from the land freeze to use these materials. It is a question of whether the.....with material necessary to have a further modification of the freeze or whether it is unnecessary because of the present modifications which we have.

Jackson: Would it be necessary to have Judge Hart modify his preliminary injunction?

Price: At the present time there is just different schools of what to do. Probably go to Judge Hart and ask that he modify his injunction in regard to the gravel sites. I think the changes are fairly good. Secretary Hickel has.....

Jackson: Question of the withdrawal for the Rampart Dam site.

Price: There has been an early modification of the Rampart site withdrawal for the road from Livengood to the Yukon River. There is still a portion which is in the withdrawal and we have assurances that there will be no problem in getting a modification on this. Power Commission and Secretary of Interior must act of this. This provides that once there has been a modification, the state has the first opportunity to take advantage of the power site withdrawal for the purposes of right-of-way.

Jackson: In a particular statute?

Price: I will furnish that after the hearing.

Jackson: It has also been suggested that even after that the land order is necessary to obtain right-of-way with or without being pushed by Native groups. This may present a problem.

Price: The state is involved in the litigation, we have no way of saying about those villages north of the Yukon. This is the only suit in which the state is presently involved. The suits in Washington D. C. and the other suit in Anchorage only involves TAPS or the Secretary of Interior, therefore, what I discuss would relate to the suits that have been filed..... Land freeze when the question was presented to the Senate Committee on Insular Affairs they did not feel that they.....for a road and the.....in no way affected the native land claims. I am not sure whether you want me to go into details of the litigation in Anchorage. It might take up more time than you would like to have occupied by a legal commentary on a memo.

Jackson: I will leave that up to the committee. Assuming that the suit was withdrawn, would there still be a problem as to whether or not you could obtain a right-of-way because of the comments in the memo?

Price: I don't see any. If there were necessity for a native village to pass through a tribe organized under the Indian Organization Act. It may sound that there were a number of hypothesis that had to be overcome.

Jackson: In paragraph 4--In that the company would pay all costs over $120 million rather than the state would have to pay this without reimbursement. That appears not to be in intent. I suggested that the

language in the section should be amended to make it clear that while the state is agreeing to pay the corporations for additional costs it is limited solely to the funds that are advanced by TAPS.

Price: I think you are referring to the sentence in the event..... It is anticipated by that clause that if for example there is a cost overrun over $120 million that the participants of TAPS will furnish the money to the state to continue its payment to the general contractor who in turn will furnish it to his subs.

Jackson: Is that obligation on the part of TAPS without the limits or.....Nothing to do with the granting of the permits on the pipeline itself. Reimbursement of the state? Why the date June 1, 1971, was selected as a cut off date and what its purpose was?

Ward: I think the original discussion was to time that to the end of the road construction besides that the TAPS people would be binding upon them. Originally they didn't think it should be taking long.... time to the completion of the road. That is the main reason for that date.

Jackson: What happens if the permit is granted after that date?

Ward: If TAPS builds the pipeline then along the same route within two years after this date, they would reimburse under this agreement.

Jackson: The participants but not the total corporations then, they would be reimbursed according to the percent of their participation?

Ward: All of this gets tied up in the economically feasible permit. Definition, of course, if they get a permit that they agree to, that is when they June 1, 1971. They reimburse whether they build the pipeline or not. If they don't agree--this is the permit and the condition so onerous they say we can't build a pipeline. They would not be required to follow this. As long as they agree that it would be economically feasible is one thing and the permit is favorable they are forced to pay.

Jackson: For other reasons they do not want to build. There is no builtin incentive for them to continue. Even up until then. How do you define "good faith" and "best efforts"?

Ward: No provision for changes in the participation among the members of TAPS. Whether or not that may not present a problem.....especially if the pipeline is commenced after 1971. Then the provision is for the participation in accordance with the percentage of participation with TAPS. They are bound until then.

Jackson: I am confused on the last sentence on page 6. On the paragraph beginning "after the listing of the participants and on through page 7.

Ward: What you have are different alternatives--covered by the sentences that you referred to. If there is a legally defensible and economically feasible permit by 1971. Next constructing a pipeline basically along

the same route from 1971-73. Participate in the reimbursement to the state with the percentage set out in the first paragraph on page 7. In the three...If they received the permit prior to 1971 for a different route than what they applied for, the state would only be reimbursed as to the portion that followed the pipeline.

Jackson: Why are you using the term "tax fees" permits and not used on page 6?

Ward: This is to cover the last question that you raised. Along about two years or three we wouldn't have the last sentence. We raised the question that if on July 1 you began to build the pipeline.....From then we started the two years. etc. We would get as much reimbursement as we could.

Jackson: On the definition section--Legally defensible. Permit the immediate construction of the TAPS. This raises the question in my mind, what if the permit is issued but there is litigation that holds up construction? Does this let the company off the hook? and they do proceed with the construction of the pipeline.

Price: If there were litigation which madethe permit grant invalid at the end of that litigation then the permit would have been one that would not have been legally defensible. This in no way makes the permit on that wasn't legally indefensible.

Jackson: I raised that question because on page 6 you have a good clause that one or more of the participants commences the pipeline. You are covered. If a permit is issued in the near future but litigation does hold up the construction of the pipeline until early 1971, what then? It seems to me that a strict reading of this language would let them off the hook.

Ward: There is strong concern for us too. They were to guard against what even though a remote possibility that perhaps by Congressional action it would not be legally possible. Economically feasible-- when the terms would be unable to be met by TAPS.

Jackson: The word immediate construction should be made to allow construction to be started by June 1, 1971. The other problem I have is.....the point has been raised about the design and cost. .....will not meet the Department of Interior requirements. There will have to be some major changes. What does this do to the plans we have now?

Beardsley: Suggested that the actual cost may not be any greater. I am reluctant to delve too deeply into this and TAPS people will be here tomorrow. In view of this, I think TAPS and the Department of Interior..... Their main hangup was they hadn't heard about how to build the pipeline above ground. TAPS would get engineering requirements for building above ground. They do have the designs ready now. The main difference was how much above the ground. They had room to move.....toward the limits of the possibilities of the Department of Interior.

Senator:
Earlier you indicated the state owns the gravel under the waters of the state. To use that gravel does the state have to get anyone's permission? Such as Corps of Engineers?

Beardsley: No, Senator, on the beds of submerged bodies of waters. There is a question about navigable. Once the beds of navigable waters have been defined.....

Senator: Are there adequate gravel beds under water between Prudhoe Bay and the Yukon?

Beardsley: At this time, we are not sure.

Senator: What steps did you take? Before the new corporation goes into operation?

Price: Right-of-way is all right now. No action is necessary. He read from the regulation--a federal code. 1866 Act. .....reference to a right-of-way by anyone under the 1866 statute. "No application should be filed under RS.....2777.....As no action on the part of government is necessary."

Fink: Is there a standing offer from the federal government to anyone?

Beardsley: You would have to get permits to use the gravel. There would have to be permits.

Fink: Contract, gravel permits, 200' right-of-way. If you aren't about to come up with the permits, do you consider this a legally binding contract?

Price: This will not be binding until you pass legislation. It is an agreement.

Fink: Could they go to court and sue on this.

Price: Yes. It is legal.

Fink: Is Employment Security Contribution a tax?

Price: This is more general than the language in the proposed bill. Advance payments.....it is always an advance against something. It is clear enough that they are paying some other money that they owe us. Monthly advance payments. When you advance something, you are paying something that will be due. They are giving us money which we will give to the general contractor who will use it for something else.

Borer: Roughly what is the cost of the road that you are presently .....road from Palmer to Fairbanks?

Beardsley: This is not available. I would say about $250 to $350 thousand per mile. This is my estimate.

Jackson: One point. I suggested to you that it will be necessary to put a clause to cover these additional payments beyond the $120 million. If they are paid to the state and intend to be funnelled.....to be..... subject to appropriation. We do this with certain federal actions with a wild card clause.

Price: It is in the appropriate act. There is a paragraph which is entitled "For reimbursement" which might cover that.

Rettig: Page 6 (1).....for all cost incurred if the permit is received by June 1, 1971. What is the implication of related.....Is this overhead type costs?

Beardsley: Primarily.

Jackson: Would the department be paid its overhead?

Beardsley: The department expects the pay or portion out of state funds.

Jackson: Does this mean that you would allocate up to the $120 million limit? A certain portio.. of department operations as they are related to the pipeline? Is that what it says?

Beardsley: The costs are defined in the construction contract which you will have shortly. They do not expect to pick up state costs. Costs related to and necessary for the construction. Not direct costs for moving gravel, say. Camp maintenance would be another one.

Price: The construction contract is incorporated by reference into this agreement. There is no one overriding document.

Jackson: Has this been signed by all of the parties?

Ward: No, it has not been signed by all parties.

Rettig: (2) Advance payment. Say, May 31, 1971. They have two years to come under this paragraph. 2% to 3 1/4%. Say if Home Pipeline construction undertook the job. 2% of $120 million isn't very much. .....if one can be completed at all.

Ward: That is on the basis of this agreement. Only to the percentage of their participation with TAPS.

Rettig: Doesn't the state have to take the risk of the dissolution of TAPS?

Ward: TAPS has indicated quite clearly that they would not.

Rettig: If I am reading it properly, this is binding on TAPS on June 1, 1971. After they decide.....this they do not have to pursue it any longer. It seems to me that it would be very easy for one of these participants to undertake construction on his own and allow the others to get off the hook. In which case none of the others would have to participate and then only to the percentage of their participation.

Ward: This agreement would bind them to the consortium.

Cornelius: One of the minorities to go and construct it by themselves and that way the state would be reimbursed only to the state as say 2% of the cost. Then sell its interest to the other companies and they have voided reimbursing the state within that two year period. They would not have proceeded in "good faith".....in order to get two more years.

Ward: There is no "good faith" requirements on the extra two years. This is only up until the 1971 date. We might consider putting that in there.

Cornelius: As you know there is a tremendous amount of money involved. There aren't any nice guys. In respect to Judge Hart's order, would you please read that portion again?

Ward: "order that the defendant agent's attorneys.....any persons in the act of consortium enjoined until final determination for an injunction and other relief from issuing a permit to the TAPS system. ..... Constructing a haul-road over public roads from Prudhoe to Yukon River.... to the use of gravel from public lands of the United States for such a road."

Cornelius: Wouldn't it be possible for the Secretary of Interior in case this injunction were interpreted to the uses, could he modify the land freeze and allow the state to select these lands so that it would be state lands instead of federal lands?

Price: This is one possibility.

Cornelius: Would that be a possible alternative in case legal problems developed.

Senator Josephson: I thought that state land should be in compact continuous tracts. Do you mean that we could select a 200' strip of land?

Price: It is compact. The state department of law is involved with a department of justice in the matter of the cases before Judge Hart in Washington, D. C.

Josephson: Are we a party?

Price: No, we are not a party. The Justice Department has made its offices available to us. They do not cost anything. Our interests are compatible. We do have law suits that involved the department of justice.

.....I have heard from others that your department has elected not to intervene in either case before Judge Hart.

Price: At the present time we have not intervened.

.....Do you have any expectations of the outcome of those cases as to whether the department of law would be.....

Price: I think Judge Hart was wrong He said that he would reconsider his ruling because he could be wrong. In our brief in Washington the

Justice Department had not applied because they had no new arguments to present. They have not yet chosen to request Judge Hart to reconsider his decision. The reason I ask is that the matter I raised initially, the logic of his decision still plagues the road program. Some action has to be taken. You replied that the Interior and Insular Affairs Committee has responded affirmatively to the request by Secretary Hickel on whether or not the state had the authority under 1866 statute to construct a highway over public lands. Do you think that that affects Judge Hart's decision.

Price: It is possible to cite the House Committee on their modification. This was approved by the House Committee. This carries a certain amount of weight with the Judge.

.....Feeling that way, does the department have any present plans while the legislature is still here to clarify the claimed right of the state to proceed under the.....?

Price: The AG attorneys will be here tomorrow. If there were action by the legislature that indicates an intention to go along and set up authorization and appropriate this would come in the argument to Judge Hart that it was a separate highway project independent of the pipeline project and his decision and his decision in the suit was based on a different set of circumstances.

TAPS then applied for a haul-road in conjunction with the pipeline right-of-way application. State can exercise its rights under highway legislation. Really then you don't want the state to be a party in the court.

Price: I would have to refer that the AG. We are engaged in the litigation. If we are to file successfully in the district court in Anchorage.....that did not preclude or amend the orders, injunctions against the district court in Washington D. C. If there were inconsistent orders, the governor of the state of Alaska would only be bound by the State of Alaska and not by the District of Columbia. Only the Secretary of Interior is bound by Judge Hart.

Rettig: Page 7, paragraph 7. The participants employ agents and contractors during the time of construction and the operation does not have to pay any state imposed cost. Fuel taxes, highway taxes, use permits, employment taxes?

Price: I do not read this as a tax. As a tool maybe.

Rettig: It is possible to construe the word that broadly but would not fit in the contract. Used here in a legal sense. It is extended for the life of the pipeline which might be 50 years.

Price: It wasn't the intention that cost would include exemption from state gas tax. Just to provide a tool I presume.

Rettig: For the life of the pipeline?

Price: It is going to be part of the state highway system. It is a state highway. You cannot change tools.

Rettig: If there isn't any purpose in it, why is it in there?

Price: For caution by the TAPS people.

Jackson made some closing announcements.

He hoped to have Hugh Wade tomorrow night on the legal problems. TAPS representatives if they wish to appear on the same problem. This meeting will be recessed until 8:00 p.m. tomorrow evening, May 7.

Meeting recessed at 11:05 p.m.

TAPS HEARING - May 7, 1970

Meeting was called to order at 8:10 p.m.

The AG will not be here tonight. I gave him a copy of the list of questions I had on the contract based on the testimony taken yesterday. He advised that these concerned administrative policies. Mr. Price said he was committed tonight and could not appear. Mr. Beard reported that he was unable to line up anyone for tonight. Mr. Wade from the Department of Interior will be here and also TAPS representatives will be willing to meet with us. Either in the afternoon or in the evening. Hopefully for 4:00 p.m.

Miller: I would go along with that on the investigation, that it was my understanding that we ask for subpoenas to be issued if they do not attend.

Kerttula thinks Mr. Miller has a good point.

Cornelius: Because of my personal feelings of hoping for this road and the pipeline permit. It really pains me to see this, but in my mind it is without a doubt one of the worst legal documents I have ever seen. There is a potential law suit in every paragraph, whether the pipeline is built or not. As a result of the.....there are so many loopholes that it is just painful. Particularly one that Mr. Rettig brought out last night, if the pipeline permit is given after July 1, 1971. Only liable to the amount of their participation in TAPS. Two per cent interest. The state gets back only 2% of the money. They could assign their interest to any of the other interests. This is just one of the examples. I am concerned about this.

Jackson: We have to recognize that they have been under intense pressures to come up with an agreement. It is not needed for changes in the agreement. When would Mr. Bradley expect Mr. Wade? A member of the audience went to see about this. I don't know what we can do at this time. I could review points I have discovered, but I hate to do that.

Fink: I can't agree with Mr. Cornelius at all. I think that we have to acknowledge that the contract was handed out by two parties after negotiation. Looking at the viewpoint of one party, it is not the way you would like it to be. There are two parties involved. There is no question in my mind that the state will be reimbursed. There is a lot of question in my mind. The 2% bit is absurd. We could get it from them in other ways. Government regulates. The big issue is whether it will ever be built. We could criticize the administration and TAPS. Not written for either one, but to give certain advantages to both.

Miller: I have listened to both of these. I think the contract lacks a lot for either side. Benefits to the state are so clearly lacking that I would question it on the basis of mutuality if not for other legal theory.

Cornelius: Maybe we will have to make a policy decision. Some feel that the road should be built regardless. There are $100 million worth of resources up there--and just a supply road for these deposits would be

advantageous. We should build it for the minerals there. Whether or not the pipeline is built. We should have a better contract than this one. The railroad to the West was built to help private enterprise get to the West Coast. It opened up a large section of the United States. The same possibility exists up there.

.....We haven't offered them every section.

Kerttula: That railroad caused the states' legislatures to be controlled by the railroad.

Miller: I agree with most of what Cornelius said. I think it should be built for the sole purpose of opening up that country. We are going to build it a 100 miles at a time. Now we can develop the state beyond all imagination. If you are going to tie it to the contract--well, there are weaknesses in the contract. It should be mutual and fair to all. On the other hand, if you are going into economics there is copper and asbestos, and other developments, homesteading, and agriculture, too. There are many advantages to opening the road. There is also lumbering and other things besides oil. Really the purpose is to develop the pipeline and the delay is very expensive. $400 million in three years. The road is needed and should be built.

Harris: I request a ten minute recess until Mr. Wade arrives.
(Recessed until Hugh Wade and Dick Bradley arrived.)

You probably will not be able to give definitive answers to the questions we will ask tonight. You have had an opportunity to see the agreement between the state and TAPS. Comment first of all on the question of permits for airports and free use materials. The committee has received copies of applications for gravel--What is the benefit in the department of the handling of that? When is action expected?

Mr. Hugh Wade, Department of Interior: I would like to explain my position and our position on this whole thing. I had a call from Art Peterson and he indicated that he thought that maybe we could be helpful, so I communicated with the office in Washington, D. C., the Solicitor, and was told that we are not in on all of the negotiations of the pipeline and the highway permit so it probably would be best if the state had any legal questions that you should refer your questions to Washington. In view of these instructions, I didn't think we could appear. I called the Solicitor and told him about this and he said we have talked at length with the AG for the State and you have answered many of the questions he had. We haven't had time to communicate what his answers were and his questions. You probably better stay away from the meeting. About an hour later he said I talked with the Secretary's office. No, the Secretary feels that if the committee in the legislature feels that we can be helpful, it would be best for us to appear. But, I did want you to know that under established precedent for the last 9 months.....TAPS had a legal problem that was presented to BLM in Anchorage or not to the Solicitor's office in Anchorage but to Washington, D. C. Washington answered it. I can frankly say that lots of times the Solicitor doesn't communicate everything that he has

discussed about Alaska with the Regional Solicitor. Many problems that we are not aware of and know nothing about. The Secretary reversed the Solicitor and said, "No, I would like to have Mr. Wade appear and tell the committee that if the Interior Department can be helpful they will be glad to do so." Peterson sent a wire to the Solicitor when I talked to him he had not yet received an answer. .....asking a very general question of what legal problems were anticipated? I talked today with the Solicitor and practically asked him if he received the wire yet. He didn't mention it. I am sure you will be receiving an answer from the Solicitor of his views.

Jackson: I would like to know what the plans are of the Department of Interior with regard to the pending litigation that has been brought by both the Wilderness Society and others and Stevens Village and others. In the District of Columbia courts with regard to the proposal by the state to build the road. Both as to right of way and as to any permits that may be necessary. (2) Whether it is the positionof the Department that the injunctions that have been issued in any way would affect the right of the state to proceed to accept the right of way under the statute and whether or not the injunction would in any way affect the right of the Secretary to grant permits for airports or for gravel, incident to the construction of the road. (3) Whether the Secretary of the Department sees any difficulty in obtaining a change in the Rampart withdrawal? It is my understanding that a formal request has been issued by the state. (4) Aside from litigation, what time frame may be involved in the permits themselves? (5) Whether or not the department expects to have to consult with the Interior and Insular Affairs Committee on any phase of the state road? If so, what phase?

answer

Mr. Wade: I can't/any one of the four or five questions that you posed. I have not been aware that there is any problem as far as airport sites are concerned. In connection with construction of the highway?

Jackson: Yes, sir.

Mr. Wade: One thing I can comment on I think. That is that yesterday I met with the two assistant attorney generals, Kishowa and.....Ranking assistant attorney general in the Department of Justice. He was in Anchorage yesterday and with his assistant Mr. Pittle who tried and argued the five village cases before Judge Hart and the Wilderness case. The reason we met that they thought that we ought to be informed as to what their arguments were and the status of the case at the present time. No indication as to what their plans were for following up the injunctions. Except to say that they are considering either an appeal which would take some time to get a decision on and a request for modification. This is the status of the thinking at this time. They brought up this question about the Secretary's letter to the various committees. And I had seen the Congressional Record that had come in that day that the Chairman of the House Committee, Mr. Aspinall, had replied to the Secretary's inquiry. There was daily debate as it affected the Interior Department. The Congressional Record came in three or four days later. They had notified the Secretary that they had replied to his letter. They had

no objection to the state application for highway right-of-way. Mr. Pittle spoke up.....we saw and we were aware of this and this is an accredited report.

Jackson: Has the House answered the letter?

Wade: I asked if they had any answers from the Senate Committee. They had not at that time. I would say in talking with the gentlemen from the Department of Justice. They had not replied to it and they made quite a point of saying that the AG was not going to rule on the question. But legal affairs of the Department of Justice would probably have a pronouncement to make. What the ....I don't know. After the Legal Affairs decision of the Department of Justice receives the problem you will probably get some sort of an answer.

Jackson: I think you will recognize that members of the committee that even if we appropriate the $120 million tomorrow and not seek reimbursement but because there may be legal implications.....any assistance you can give us.

Cornelius: Would it be legally possible for the Secretary to in a case of this kind modify the land freeze order to the extent of the route of the proposed road.....state and the road would not be crossing federal lands?

Wade: This might be an approach and I expect to talk with them tomorrow and ask them about this.

(6) Another question - When someone buys or takes property from the federal government they theoretically have access to cross intervening federal lands to that property. In this case the state has obtained or partially obtained lands in the Prudhoe Bay area. Doesn't the state have road access across federal intervening lands to get to the state lands?

Wade: This would be without a permit from the Interior Department. We have a case similar to this and it could be something to explore on the part of the state.

Jackson: Would you say without the necessity of a permit from the Interior Department?

Wade: This is what we have determined in this other particular case.

Miller: I think that the law provides that the permit is required where it becomes a permanent dedication. Just to use it I don't think you need a permit.

(7) I have seen the theory that the 1866 Act is not applicable to lands to which there is Indian title. If this is so, in the absence of the law suit brought by the Indians on their land claims, what would be the position of the Secretary as guardian, to allow effective acceptance of

the offer as in the statute? Obviously, he can't do anything under the statute perhaps, but perhaps he could refuse to give permits for gravel and airports?

Wade: I can't answer except to say that the Interior Department does not recognize Indian title on lands in Alaska at this time.

Bradley: The 1866 Act says when it is self-executing. If it applies we don't have to do anything to give it to you.

Jackson: If it does apply, the Secretary may not recognize the Act.

Wade: I am sorry that I was told that TAPS was coming down here. Maybe you would get to us sometime during the evening. I thought I would come about 8:30. Sorry I was late. I will assure you that if by tomorrow I can have these specific questions that you asked, I will be able to telephone the Solicitor and say these are the questions that the committee would like an answer to. I did want to let you know that the Secretary and the Solicitor told me that we were to cooperate fully.....willing to do anything that the state asked them to do if it wasn't contrary to law and regulations of the department.

Closing remarks by Jackson: We will be continuing to work on this. An executive session is planned with administration and TAPS sometime tomorrow.

Cornelius: Would it be possible that Mr. Wade be present at the executive session?

Wade: You can reach me at Dick's office.

Fink: From what you said I am not sure about the law of 1866. Where its application has anything to do with being North of the Yukon.

Wade: Tom, he must have had in mind that the state was going to select some land up there.....10950.....anyone that wanted to do anything up there. Pertains only to when the state wants to select the land. I think that is what the Solicitor would say. This question has already been sent in to the Solicitor. 6 (c) of the statehood act spells it out pretty much as to when and what you can do. This limitation only affects selection by the State of Alaska. That is my opinion, Tom.

Miller: Since you mentioned that the law doesn't pertain to this these lands are not public lands. These are, aren't they?

Bradley: The Interior Department has not recognized this. They are public lands.

Miller: This law would apply to them? Wouldn't it tie down that actually this applies to the withdrawal of these lands for this particular purpose?

Bradley: The question I had was whether.....changes the character of "super freeze" all vacant and unused land.

Miller: That is the question. These lands are not unreserved public lands according to the 1866 Act.

Jackson: For the information of the committee "from all forms of appropriations of the public land laws." An action to accept a right-of-way is an appropriation of public lands.

Wade: We haven't gotten an answer at this point.

.....(8) The state testified that they probably had the authority from navigable waters for construction of the road. This belongs to the state under the Statehood Act. Is that true? What is the Interior Department's position as to what is and what is not navigable waters? (9) Take gravel from navigable waters you still have to get a permit from the Corps of Engineers or other agency?

Wade: The mere taking of gravel needs a permit from the department unless in the course of taking they obstruct navigable waters.

Cornelius: What about fisheries, there is a problem here. State Fish and Game might prohibit you. I don't think Sport Fisheries and Wildlife have any authority to stop anybody from doing it. They can advise you not to do it. You may be ruining a spawning ground.

Miller: The state department of natural resources controls streams. It would be changed to the Department of Fish and Game so the state would control this.

The meeting adjourned at 9:00 p.m.

LAW
REVISION
COMM.

JUDICIARY COMMITTEE REPORT

ON HOUSE BILL NO._____, ESTABLISHING

THE ALASKA LAW REVISION COMMISSION

This bill establishes a law revision commission as a vehicle for continually reviewing the law of this state and providing in-depth legal research through the cooperation of the legislative council, the Alaska Bar Association and various law schools. (The bar has reached tentative agreement with the dean and some faculty of the U.C.L.A. Law School.) The lawyers and law students engaged in these activities will not be paid for their time, but members of the commission will be entitled to payment of a per diem allowance and travel expenses for commission business.

This arrangement would provide legal services and recommendations to the legislative council beyond which the revisor of statutes and the rest of the staff of the Legislative Affairs Agency presently have time for. It appears to have been the experience of some other states with a law revision commission that whereas the legislative council or comparable agency of the legislature has primarily devoted itself to "new law" or revision of "public law", the commission has been able to devote more time and effort to the development of "private law" -- the law which is administered between citizen and citizen.

The commission's research projects will be only on topics which the legislature has approved, and the commission will operate under the supervision and control of the legislative council, with adminstrative services provided by the Legislative Affairs Agency to the extent authorized by the council. It is expected that where there may be some overlapping of functions between the commission and the revisor of statutes the commission will work through him in presenting its recommendations to the council.

_____

Barry Jackson, Chairman

Draft

Bill Lucas
Draft

IN THE HOUSE BY THE JUDICIARY COMMITTEE

HOUSE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act establishing the Alaska Law Revision Commission."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 24.20 is amended by adding new sections to read:

ARTICLE 3. LAW REVISION COMMISSION.

Sec. 24.20.400. ALASKA LAW REVISION COMMISSION. (a) The Alaska Law Revision Commission is established, under the control + supervision of the ~~as a permanent agency of the legislature.~~ A Leg Council. It is comprised of five members of the Alaska Bar Association and the following seven governmental members: the chairmen of the judiciary committees of the state Senate and House of Representatives, or their designees from among the members of their respective committees, the chairman of the Alaska Legislative Council, and a member of the council from the opposite party appointed by the chairman, or their designees from among the members of the council; the attorney general, or his designee from among his staff; one justice of the Alaska Supreme Court, chosen by the justices of that court, or his designee from among the justices; one judge of the Alaska Superior Court, chosen by the judges of that court, or his designee from among the judges of that court. The first bar association members of the commission are to be selected by the president of the association and subsequent ones by statewide election by active members of the association with at least one commission member from the first judicial district, one ... from the third ... and one from the second or fourth judicial districts.

(b) Vacancies on the commission shall be filled by the respective

Legis Council

selecting authorities for the remainder of the terms of the vacated positions.

(c) The commission shall elect one of its members to serve as chairman for a term prescribed by the commission.

(d) The attorney general, the supreme court justice and the superior court judge are nonvoting members and may not serve as chairman.

Sec. 24.20.410. TERM OF OFFICE. The term of office for nongovernmental members and for the judge and justice is four years, and they shall hold office until the selection of their successors. Initial nongovernmental members shall be appointed by the president of the bar association for staggered terms as follows: two members for two years, two for three years and one for four years.

Sec. 24.20.420. TRAVEL EXPENSES AND PER DIEM. Each member of the commission is entitled to payment of travel expenses and per diem as provided in AS 39.20.180, but is not entitled to receive compensation for his services.

Sec. 24.20.430. ADMINISTRATIVE SERVICES. ~~Necessary~~ Administrative services for the commission ~~shall~~ may be provided by the Legislative Affairs Agency to the extent authorized by the Leg Council.

Sec. 24.20.440. STATE RESEARCH FACILITIES AVAILABLE TO COMMISSION. The material of the state law libraries and other state libraries shall be made available to the commission. All state agencies and all persons connected with them shall give the commission full cooperation and reasonable assistance in matters of research requiring recourse to them or to data within their knowledge or control.

Sec. 24.20.450. ~~RESTRICTIONS ON LEGISLATIVE ACTIVITIES.~~ No member other than a legislator or the attorney general may, with respect to proposed legislation concerning matters assigned to the commission

Voting Leg Member shall not be

for study under sec. 490 of this chapter, advocate the passage or defeat of any such legislation by the legislature or the approval or veto of any such legislation by the governor or appear before any committee of the legislature as to such matters unless requested to do so by the committee or its chairman. The legislative members are not bound by their vote on a given matter when it later comes up for consideration by the legislative council or legislature. No ~~governmental~~ member of the commission may advocate the passage or defeat of any legislation or approval or veto of any legislation by the governor in his official capacity as a member.

Sec. 24.20.460. RULES. The commission shall make rules providing for internal operation and administration.

Sec. 24.20.470. DUTIES OF COMMISSION. The commission shall within the limitations imposed by sec. 490 of this chapter:

(1) examine the statutes ~~of the state,~~ the common law and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms;

(2) receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned body;

(3) receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law;

(4) recommend changes in the law it considers necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state into harmony with modern conditions;

(5) recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the supreme court of the state

or the Supreme Court of the United States.

Sec. 24.20.480. REPORTS. ~~(a)~~ The commission shall, within the limitations of sec. 490 of this chapter, submit to the Leg. Council reports ~~with its~~ on subjects selected by the recommendations (prepared in accordance with the Legislative Affairs Agency's legislative drafting manual) as to revision of the laws, ~~to the legislative Council.~~

~~(b)~~ The reports and proposed legislative measures shall be printed by the leg. affairs ag. on auth. by the Leg. Council ~~state under the supervision of the commission. The exhibits shall be printed so as to show in the clearest manner the changes and repeals proposed by the commission.~~

Sec. 24.20.490. STUDIES. The commission shall file with each regular session of the legislature a list of the topics selected by it for study, the studies in progress and the topics intended for future consideration. After the filing of its first list, the commission shall confine its studies to those topics set out in its last preceding list which are approved for its study by concurrent resolution of the legislature.

Sec. 24.20.500. COOPERATION WITH OTHER INSTITUTIONS OR ORGANIZATIONS. (a) The commission may cooperate with any bar association or other learned, professional, or scientific association, institution or foundation in any manner suitable for the fulfillment of the purposes of this chapter.

(b) The commission may, with the approval of the commissioner of administration, enter into, amend and terminate contracts with colleges, universities, schools of law or other research institutions, or with qualified individuals for the purposes of research.

The Legislature of the State of Alaska
FISCAL NOTE
First Session - Sixth State Legislature

COPIES: x THE CHAIRMAN OF THE COMMITTEE MAKING THE REQUEST, POUCH V
x THE LEGISLATIVE FINANCE COMMITTEES' STAFF, POUCH Y
x THE DIVISION OF BUDGET & MANAGEMENT, POUCH C
x RETAIN A COPY FOR YOUR FILES

subject Law Revision Commission HB _____ SB _____
requested by House Judiciary Committee
referred to _____ date of request 2/26/69
completion date requested 2/28/69 date received _____

EXPENDITURE DETAIL	FY	FY 69-70	FY
100 PERSONAL SERVICES	$	$ 5,880	$
200 TRAVEL		1,660	
300 CONTRACTUAL SERVICES			
400 COMMODITIES		2,460	
500 EQUIPMENT			
600 LAND AND STRUCTURES			
700 GRANTS, CLAIMS & SHARED REVENUE			
TOTAL	$	$ 10,000	$

FUNDING DETAIL			
FEDERAL RECEIPTS	$	$	$
SPECIAL FUNDS			
UNRESTRICTED GENERAL FUND RECEIPTS			
Man Months			
Permanent Positions			
Temporary Positions			

FISCAL ANALYSIS

The $5,880 estimate for Personal Services is based on Mr. Howitt's thoughts that there would be two 5-day meetings per year, one in Anchorage and one in Juneau. This figure allows for per diem to be paid also for the travel time to and from the meeting places.

The Travel estimate of $1,660 is as close an estimate as is possible without knowing the resident city of each member who would comprise the commission. However, taking into consideration those governmental members who will automatically be on the commission, it is my best estimate that the commission will be composed of 6 people from the Anchorage area, 4 from the Fairbanks area, and 2 from the Juneau area. If this is the case, the $1,660 travel estimate would be an accurate figure.

There is no way at this time to estimate an amount needed for Equipment or Commodities as these items of expenditure would depend entirely upon the work projects of the commission. In this fiscal note I have estimated $2,460 for Commodities, which would make the total amount needed to fund the commission for F.Y. 1969-70 $10,000.

DATE 2/28/69 SIGNATURE _____

NAME & TITLE John Elliott, Executive Director

Jahren
Jud. Com file

ALASKA BAR ASSOCIATION
Committee on Law Revision

James Singleton, Chairman
Committee members:
Daniel Moore, Esq.
Millard Ingraham, Esq.
James B. Bradley, Esq.
Senator Brad Phillips
Hon. Jay A. Rabinowitz, Associate Justice, Alaska Supreme Court
G. Kent Edwards, Attorney General
John Elliott, Executive Director, Alaska Legislative Affairs Agency
Lester W. Miller, Jr.
Dean Richard C. Maxwell, U.C.L.A. Law School
Edward Reasor, Esq.

Former chairman- Hon. George Boney, Associate Justice, Alaska Supreme Court

REPORT AND RECOMMENDATION FOR THE CREATION OF THE ALASKA LAW REVISION COMMISSION

This report and recommendation was prepared by James Singleton and Daniel Moore and is an outgrowth of meetings by the Committee on Law Revision. A tentative draft was circulated to all members of the Committee.

The Committee on Law Revision was formed as a special committee within the Alaska Bar Association. Its purpose is to find a method for the orderly and effective revision of antiquated laws and for the adoption of uniform laws for the state. It was recognized by the committee that some guidance, assistance to the legislature, and overall practical review by professional persons engaged on a daily basis in utilizing our laws might prove of benefit to the state. Toward this end, a proposed Alaska Law Revision Commission has been suggested and draft legislation is enclosed. The concept of the Commission has been endorsed by the Alaska Bar Association.

Stanley Howitt, Director
Alaska Bar Association

Leg Aff. Ag. – has not done enough on law revision
Prob. comm in legislature to be established at UCLA law school
graduating student as possible staff atty for L.A.A.
ABA – civil contracts time w/o cost (except per diem + travel)
Att'y gen – do not have staff or time for statutory revision
Should be in legislative branch

TABLE OF CONTENTS

1. Proposed Statute relating to Alaska Law Revision Commission (patterned on New York and California Acts) (Draft No. 2)

2. Proposed procedures for Alaska Law Revision Commission.

3. Footnotes.

IN THE

BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act creating an Alaska Law Revision Commission."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. AS 24 is amended by adding a new chapter to read:

CHAPTER 60. ALASKA LAW REVISION COMMISSION

Sec. 24.60.010. ALASKA LAW REVISION COMMISSION. There is created in the state government the Alaska Law Revision Commission. The Commission consists of members as follows: The Chairmen of the Judiciary Committees of the House and of the Senate; the Chairman of the Alaska Legislative Council; the Attorney General or his designate; one justice of the Alaska Supreme Court, chosen by the justices of that Court, who shall be a non-voting member; one judge of the Alaska Superior Court, chosen by the judges of that court.

The foregoing members shall be designated the government members. The Commission shall further consist of five members of the Alaska Bar Association, the first members to be selected by the President of the Association and thereafter by statewide election by active members of the Association with at least one member each, from the First Judicial District and Second or Fourth Judicial District. The Commission shall elect one of its members to serve as chairman for a term prescribed by the commission. A vacancy shall be filled by the appointing power for the

remainder of the term.

Sec. 24.60.020 TERM OF OFFICE. The members, other than government members, shall be selected for a term of four years and shall hold office until the selection and qualification of their successors. However, initial non-government members of the commission shall be appointed by the President for staggered terms as follows: two members for two years; two members for three years and one member for four years.

Sec. 24.60.030. TRAVEL EXPENSES AND PER DIEM. Each member of the Commission shall be allowed travel expenses and per diem as provided by AS 39.20.180, but shall not receive compensation for his services.

Sec. 24.60.040. DIRECTOR OF RESEARCH, EMPLOYMENT AND COMPENSATION GENERALLY. The commission may appoint a Director of Research and other professional, clerical or other employees which it considers necessary for the performance of the duties and exercise of the powers conferred upon the commission and provide for their compensation in accordance with law.

Sec. 24.60.050. STATE LAW LIBRARIES AND OTHER STATE AGENCY RESEARCH LIBRARIES AND FACILITIES TO BE AVAILABLE TO COMMISSION. The material of the State Law Libraries and other state and legislative research libraries shall be made available to the commission. All state agencies, and other official state organizations, and all persons connected therewith shall give the commission full cooperation and reasonable assistance in any matters of research requiring recourse to them, or to data within their knowledge or control.

Sec. 24.60.060. RESTRICTIONS ON LEGISLATIVE ACTIVITIES. No employee of the commission and no member other than a member of the State Legislature or the Attorney General shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to A.S. 24.60.120, advocate the passage or defeat of any such legislation by the legislature or the approval or veto of any such legislation by the Governor or appear before any committee of the legislature as to such matters unless requested to do so by the committee or its chairman. The government members are not bound by their vote on a given matter when it later comes up for consideration by the legislature. In no event shall an employee or non-government member of the commission advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor in his official capacity as such employee or member.

Sec. 24.60.070. RULES. The commission shall make rules implementing this chapter and rules providing for internal operation and administration.

Article 2. Duties

Sec. 24.60.080. DUTIES OF COMMISSION. The commission shall within the limitations imposed by A.S. 24.60.120 of this code:

(a) Examine the common law and statutes of the judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

(b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.

(d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this State into harmony with modern conditions.

Sec. 24.60.090. COMMISSION RECOMMENDATIONS ON STATE STATUTES.

(a) The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the State or the Supreme Court of the United States.

(b) The commission shall submit its reports, and its recommendations as to revision of the laws to the Legislative Council.

(c) The commission may, within the limitations imposed by A.S. 24.60.120 of this code, include in its report the legislative measures proposed by it to effect the adoption or enactment of the proposed revision. The reports may be accompnaied by exhibits of various changes, modifications, improvements, and suggested enactments prepared or proposed by the commission with a full and accurate index thereto.

(d) The Commission shall file a report at each regular session of the legislature which shall contain a calendar of the topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. After the filing of its first report the commission shall confine its studies

to those topics set forth in the calendar contained in its last preceding report which are thereafter approved for its study by concurrent resolution of the legislature.

Sec. 24.60.100. PRINTING OF REPORTS. The reports, exhibits, and proposed legislative measures shall be printed by the State under the superivison of the commission. The exhibits shall be so printed as to show in the readiest manner the changes and repeals proposed by the commission.

Sec. 24.60.110. COOPERATION WITH OTHER PUBLIC OR PRIVATE INSTITUTIONS OR ORGANIZATIONS.

(a) The commission may cooperate with any bar association or other learned, professional, or scientific association, institution or foundation in any manner suitable for the fulfillment of the purposes of this chapter.

(b) The commisison may, with the approval of the Commissioner of Administration, enter into, amend and terminate contracts with colleges, universities, schools of law or other research institutions, or with qualified individuals for the purposes of research.

A SUMMARY OF THE ORGANIZATION'S INTERNAL PROCEDURE

The committee recommends that once the legislature has approved a program for research, each topic in that program be assigned to a committee chaired by a member of the commission.[6] The commission as a whole will determine whether the basic research required by the topic will be done by

(a) An expert consultant specifically chosen,

(b) The UCLA Alaska Committee,

(c) Some other law school's students,

(d) A special research committee chosen from the Alaska Bar, or

(e) The staff of the Legislative Affairs Agency.[7]

The committee feels, based upon comments made at the commission's initial meeting that due to the heavy work load presently carried by the Legislative Affairs Agency, that it should only be asked to assist as a last resort.[8]

Once the basic research is done and proposed legislation drafted, the sub-committee will make its recommendations which will in turn be discussed, debated, and determined by the entire commission.

The research study will hopefully: (1) identify the problem under consideration, (2) outline the present Alaska law on the problem, (3) set out the solutions to the problem found in the law of other jurisdictions, (4) identify the various competing policies involved. All relevant cases and statutes will be considered (foreign as well as domestic) as well as pertinent legal literature e.g. treatises, periodicals, restatements, model or uniform laws. Factual investigation is not contemplated.

Once the commission has approved a draft statute and issued its recommendations, it is assumed that the government members will see that the material reaches the legislators and is properly introduced.

ORGANIZATIONAL PROCEDURES FOR THE ACCOMPLISHMENT OF THE LAW REVISION COMMISSION'S OBJECTIVES[9]

A. Basic Structure.

1. The appointment of an executive secretary and director of research. This person has the responsibility to acquire a research and clerical staff and to organize the work of the commission.

2. The executive secretary directs inquiries to Judges, lawyers, reporters, annotaters of the Americal Law Institute or to other groups interested or concerned with the reform of the law.

3. The executive secretary will compile a list for immediate study or reserved list for subjects to be given long-term consideration.

4. The establishment of an office and clerical staff for the commission.

B. The Plan of Research Within The Commission.

1. The government members presence at working sessions of the commission would be appreciated but not required.

2. The government members may not be able to regularly attend all the meetings and therefore they should not receive any definite assignments for the project undertaken.

3. The government members are not bound by their vote on a given matter when it later comes up for consideration by the legislature.

4. The non-government members would not be responsible for the basic legal research required on the project work assigned.

C. The Selection of Projects.

1. Source: The commission will accept project suggestions from the courts, the Governor, the legislature, public officials, lawyers, or the public.

2. Action on the Suggestions: The commission will be required to consider projects suggested by the Governor or the

legislature. The commission, within its discretion, will decide whether or not to consider projects suggested by other sources.

3. Factors considered: The commission in deciding whether to undertake a particular project will consider its complexity, urgency, research facilities, manpower, budgetary fund, and evidence of the need for such undertaking. If the subject matter is under study by another State agency or within an agency's jurisdiction or concerns policy matters, this commission will not undertake the project.

D. Project Reports.

1. A current project report on each topic under consideration will be submitted annually. This report shall consist of two parts (a) a short statement explanatory of topics submitted for the first time, and (b) a brief restatement bringing up to date topics previously submitted not yet researched, explaining why the matter has been delayed or suspended.

2. Calendar of topics for study: This will have three divisions: (a) the immediate study list, i.e., the topics on which study has been authorized and assigned; (b) the reserved list, i.e., those topics not rejected or referred elsewhere on which study has not yet been authorized but which will be re-examined, and (c) the suspended study list, i.e., those topics which have been previously studied and have been submitted to the legislature but which were not accepted by it, or subjects to which after study by the commission no recommendation was made for legislation, including those subjects upon which study was begun but not completed for some reason.

3. Factors considered for placement of subject matter on the immediate study list: The commission's decision for placement of this list will involve the following factors: (a) the availability of qualified personnel to undertake the study; (b) a prediction made substantially ahead of the time the legislature opens as to what will be a balance program of proposed bills including an estimate of the work that can be finished before the legislative session commences; and (c) a judgment as to what project studies are most likely to result in legislation and which are not; and (d) a balancing of the work among the members of the commission in accordance with their specialized interest or professional experience.

E. Organization of the Membership of the Commission With Respect to Research.

1. The chairman of the commission will appoint one or two members of the commission to undertake a preliminary study of the project work selected.

2. The members of the commission appointed on the committee for the particular project work will engage the services of researchers to make a basic study of the subject matter coordinating the same with the director of research.

3. The members of this committee will hold any necessary meeting and/or direct correspondence to the researcher and will be responsible for obtaining a complete report for submission to the full commission with its recommendantions for a plan of action.

4. The commission will then consider the report and recommendations of the subcommittee. If no decision can be reached, the matter will again be referred back to the committee for further study. If the commission decides to recommend legislation, consideration will then be given to the drafting of a suitable statute to accomplish this purpose.

F. The Function of the Research Assistants or Consultants.

1. Source: On Page __ of this report on organization is set forth the possible sources from which the necessary research can be accomplished.

2. Research Study: The project work must include an analysis of the Alaska law, a comparison of it with laws of other jurisdiction, including foreign law, and a consideration of the policy questions involved. Statutory as well as decisional law should be examined, and the ideas and thoughts of jurists, text writers and eminent authorities should be consulted, as well as all pertinent legal literature such as treatises, periodicals, restatements, model or uniform laws, etc. If actual investigations are called for, provision should be provided for this need. Where legislation is recommended, the research study will include a proposed draft of a statute resolving the problem studied.

G. Necessary Steps After Approval of the Research Study.

1. When the commission decides that legislative action is desirable then a draft of the proposed statute will be prepared.

2. The bill form submitted to the legislature should be accompanied by an explanatory "statutory note" and a separate document known as the "recommendation" which sets forth the reason for the proposed legislation and reviews concisely but fully the entire problem presented in the research study. The legislation proposed must be the product of the joint consideration of the members of the commission and have been fully considered before submission to the legislature.

3. The commission should then submit the proposed bill to a standing committee of the Alaska Bar Association for consultation and recommendations. Any criticisms or recommendations suggested by the standing committee of the Alaska Bar Association will then be reconsidered by the full commission for acceptance, rejection or modification. When this is accomplished, the bill will then be submitted to the chairman of the judiciary committees of both houses for introduction to the legislators.

4. Following the introduction of the bill, the commission should be willing to hold a full meeting before any legislative committees and the member of the commission who was assigned the particular subject matter shall have the responsibility of explaining and answering questions raised concerning it by the legislators.

FOOTNOTES

1. The legislative members are considered necessary to insure a good working relationship with the legislature. See Sutton, The English Law Commission: A New Philosophy of Law Reform, 20 Vanderbilt Law Review 1009, 1016-1017 (1967). The New York and California Acts have similar provisions cf. McDonald Note 2 Infra.

Following Justice Rabinowitz's suggestion regarding possible conflicts no judicial voting member is recommended but cf. Cardoza, A Ministry of Justice, 35 Harv. Law Rev. 113 (1921) suggesting substantial judicial involvement and cf. Sutton, supra 1017-1018 text accompanying Note 35. No lay members other than members of the legislature are contemplated but cf. McDonald, Note 2, infra, pp 407-409 Note 35 and See Note 40 pp 413-414.

The committee considered these alternatives for choosing non-government members:

(a) The commission requests from the president of each bar association names of those interested in serving and chooses among volunteers.

(b) Election by bar association (cf. Judicial Council).

(c) Appointment by Judicial Council.

(d) Appointment by Governor with (as in California) or without (as in New York) approval by Senate.

The committee felt, if politically feasible, that the President of the Bar Association should choose the initial members and that vacancies should thereafter be handled under alternative (a). The committee expresses no opinion regarding geographical representation.

2. One of the major problems facing the commission will be that of funding. (Note: The New York Commission pays each appointed member a salary. (originally $5,000, now $9,000) See McDonald, Legal Research Translated into Legislative Action: The New York Law Revision Commission 1934-1963, 48 Cornell L. Quarterly, 401, 445-446 (1963). The budget is found Id. at 453.

Naturally, if appropriate funding is unavailable, the statute will have to be modified.

3. Note two, supra.

4. Note two, supra.

5. California provides for general cooperation between legislature and commission. The committee understood that in Alaska it would work through the Legislative Affairs Agency.

6. McDonald, supra, Note 2, pp. 421-422.

7. See Stone and Pattee, Revision of Private Law, 54 Harv. L. Rev. 221, 226-227 (1938). The authors argue that the Legislative Council is primarily concerned with "new Law" and "Public law" rather than the revision or reformation of old "private law". Consequently, that organization is overloaded to the extent that it must also handle questions of private law revision.

8. McDonald, supra, Note 2, pp. 424-425.

9. Note 2, supra, pp. 416-428.

LOCAL
BOUND.
COMM.

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STATE OF ALASKA

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From:
Dept: Legal Affairs, Juneau Date 2/18/69
By: Avrum M. Gross

Jud. Com. file

Local Boundary Commission

State of Alaska

Decision Regarding the Proposed Nenana Boundary Change

On February 1,1969, the Local Boundary Commission convened in Nenana, Alaska, for the purpose of hearing public comment on a petition to annex certain lands lying south of and contiguous to the City Boundaries.

At the hearing testimony was advanced in support of the proposed annexation and no opposition to the proposal was expressed. Based on the testimony and information submitted by the Local Affairs Agency, the Commission finds as follows:

(1) A petition in proper form was filed on December 20, 1968, by the Honorable Ray Brown, Mayor, on behalf of the City of Nenana;

(2) No answer or other written objection to the petition has been filed;

(3) Public notice of the hearing has been given in compliance with statutory requirements and Commission regulations;

(4) The City of Nenana is subject to recurrent flooding from the Tanana and Nenana Rivers;

(5) The area proposed to be annexed is at a sufficient elevation to give the City developable land safe from flooding;

(6) The southward expansion of the City is one of the alternatives for development recommended by the Alaska State Housing Authority's comprehensive plan for the City of Nenana;

(7) It appears that future development will take place in the area proposed to be annexed;

(8) Annexation will enable the City to provide for the planned and orderly development of the area;

(9) The area will benefit from annexation through receiving fire and police protection, public utilities, and other municipal services.

It is the conclusion of the Commission, based on the foregoing, that the boundary change proposed by the petition is in the best interests of the City of Nenana and the area concerned.

Now therefore, it is the decision of the Local Boundary Commission that the Commission recommend to the Legislature, pursuant to Article X, Sec. 12, of the Alaska State Constitution and Alaska Statutes 44.19.260, that the boundaries of the City of Nenana be described as follows:

> From the point of Beginning, which is the Southeast Corner of Section Thirty-six (36), Township Four (4) South, Range Eight (8) West, Fairbanks Meridian, go Northerly along the Township Line to the point in Section 24, Township 4 South, Range 8 West, Fairbanks Meridian, where the Township line intersects the Southerly Bank of the Tanana River; thence Meandering along the Southerly bank of the Tanana River in a Northwesterly, Westerly and Southwesterly direction to the confluence of the Tanana River and the Nenana River; thence meandering along the Easterly Bank of the Nenana River, in a Southwesterly, Southerly, Southeasterly, Westerly, Northwesterly, Easterly and Northeasterly direction to the intersection of the Easterly bank of the Nenana River with the Southerly Township line of Township 4 South, Range 8 West, Fairbanks Meridian, which intersection is located in Section 34, Township 4 South, Range 8 West, Fairbanks Meridian; thence East along the South Township line of Township 4 South, Range 8 West, Fairbanks Meridian, to the Southeast corner of Section 36, Township 4 South, Range 8 West, Fairbanks Meridian, the point of beginning.

The Director of the Local Affairs Agency is hereby directed to prepare a recommendation in accordance with this decision, and to submit the same to the Legislature on behalf of the Commission.

February 1, 1969

James K. Singleton, Chairman

Victor Gill

Grace Johnson

George Norton

Bernice Stokke

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STATE OF ALASKA

Inter-Department Route Slip

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DEPT: Legislative Affairs, Juneau

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Remarks:

From:
Dept: D.C.A. Date: 1/15/69

By: John Bosshard

MINUTES
LOCAL BOUNDARY COMMISSION
PUBLIC HEARING

February 1, 1969

Mr. Singleton: At this time we will call to order the meeting of the a Local Boundary Commission in Nenana, Alaska to consider a petition of the City to extend its boundaries. With me today are members of the Local Boundary Commission: Mrs. Johnson from Nome; Mrs. Stokley from Petersburg, Mrs. Stokke; Mr. Norton from Delta Junction; Mr. Gill from Anchorage; and as representative of the Local Affairs Agency, Mr. Beard. I am Jim Singleton, Chairman of the Local Boundary Commission. Our normal procedure since we have in the report to the Local Boundary Commission a statement of the procedures that have been carried on so far to give public notice of the meeting. We can, I believe, waive any additional discussion of that and proceed directly to the presentation by the proponent of annexation. It is my understanding, Mr. Coghill, that you are going to speak today on behalf of the proponents of annexation.

Mr. Coghill: That is correct.

Mr. Singleton: Our procedure is to allow the proponents to make a brief opening statement, outlining first of all what the City desires in the way of annexation? Why the City desires such annexation? What the function of the additional land is to be and what services, if any, will be performed in that area? You can or you may, for purposes of your statements, take for granted that each member of the Local Boundary Commission has had an opportunity to review all the materials assembled with the petition. You may also assume that the Local Affairs Agency has made a report to the Local Boundary Commission in which it has included a statement or information drawn from the various state agencies regarding the proposed annexation. That information, incidently, is available to you and I don't know whether you've had an opportunity to look at it yet. Naturally, that material will be made available to the City. So, if we may then, we would like to begin with you, Mr. Coghill, and then if anyone else wishes to speak on behalf of the petition, we will hear from them and finally, we will hear briefly from anyone who wishes to oppose the petition. Once those desiring to oppose the petition have finished their remarks, you will be given a brief opportunity to answer any questions that they might have propounded, or to offer any rebuttalment here that they might have come up with. So at this time, we'll turn the meeting over to you and ask you to speak on behalf of the annexation petition.

Mr. Coghill: Thank you, Mr. Chairman. First of all, I'd like to greet all of you folks here to Nenana. Nenana, of course, has its place in the history of and place in the events of Alaska. We are the riverport community; we serve just about 1/3 of the large mass of land to the west of the railbelt area; we are the riverport community for interior Alaska. And, of course, on this river, we have our annual Nenana Ice Classic event, which is

the thing that brings tourist attraction to our community every spring. Nenana, of course, being a small community, came about being brought into the direct travel of the new Alaska with the highway system and the completion of the highway bridge across the Tanana River about a year ago. The problems we see in our small community at this particular time is that of "what is going to happen to the area?" Are we going to have a checkerboard development in the valley? Are we going to have people putting up nice homes in certain areas along the road, more particularly, close to Nenana and at the same breath have somebody that is trying to reek a living out of wrecking cars and building a junkyard putting in a massive wrecking yard right next to someone that desires to build a $50 or $60,000 home? I think that, basically, this is the key to the City's proposal to annex a portion to the south of Nenana, basically, for zoning purposes. You are all aware of that August 14 of 1967 we had a disastrous flood in the Tanana Valley. Since that time, why we have spent quite afew hours trying to devise means and methods of controlling the Tanana Valley as far as our small community is concerned. We are situated 60 miles south of Fairbanks; of course, we're not in the North Star Borough, but we are a first class city incorporated in 1923. This gives us our legal entity to contract with state government or with the federal government as far as any type of flood control program we might desire to do. And I believe that we could have gone for a limited type flood control program, but we have to look a little bit to the future before we ask state and federal agencies to spend large sums of tax money to aid a community of four or five hundred people. We have to look a little bit to the future, and of course, this brings in the second phase of our request for annexation, and that is, that we want to develop to the south of Nenana and hinge our hopes on the possibility of the North Commission becoming successful in pushing forward their much needed rail link into the Arctic and to the mineraly enriched area of the Kobuk Valley. We feel that, I personally feel, that in order to spend large sums of money, you have to spend them to a solid future; you can't spend them just to something that is just contemporary or something that has been in the past. If we were to build a dike around Nenana or we were to build Nenana up and then the railroad became a reality, the riverport community for interior of Alaska would move to the Yukon River, because in transportation, river transportation, for the interior of Alaska, the Tanana River is really the stopping block of being able to haul larger loads; have larger barges; and have larger tugs, and once they put a port, a river port on the Yukon River, why their annual capacity of moving freight will almost go five times greater because of the draft of the river. So we see a reality that possibly Nenana could then no longer be identified as the riverport community. So in looking to the future, we felt that before homestead entry, before many other types of entry developed into this area that we requested, that the City of Nenana should have this as part of their City and then therefore, be able to control to a great degree how it's developed and it would actually, in fact, cost much less when the community would be developed in this area because if we had to go in and buy out entries that had already been placed after the fact,

why, this of course, we find in development in many areas where the community is growing, so I would say that this is the second reason. Now the third reason being that our community is basically a railroad orientated community of 1918 through 1923. In 1923 we were incorporated. At that time we were incorporated into approximately a mile square area, according to your exhibits and the maps which we have produced for you. In 1941 the C.A.A. built an airfield about a mile and one half to the south of us and was operated by the F.A.A. up until we took, until we became a state in 1959. The F.A.A. under contra operated this airfield for three more years under a contract with the state. In 1963 the City of Nenana, through the surplus properties agreement with General Services Administration, took over the operation and the ownership of the Nenana airport. Since that time we have up-graded it and now we have a first class field of about 4700 feet. However, the area around the airport and the airport itself is not within the City boundaries; it just happens to be a piece of city property. And between the airport and our southern boundary there are many acreages; lots that were sold by the Land Department that are a part of what they call the Nenana Acreage Addition, but they're not within our taxing unit. These people that acquired this property bought it for $25.00 a block acreage just by paying for the filing fee and now today they're speculating on it and we have no tax revenue off this property or no way of saying "well, either develop it or turn it over to somebody that is going to develop it" so we do have a stifeling effect to our economy where this is more or less put into a freeze area. We feel that this is the third most important part of our fight to get this area annexed. The coupling of all three of these items together is basically the reason for the, for the petition to annex. It has to do with development; how we can plan; how we can go forward; how we can keep things in their proper perspective, but if somebody is going to put a junk yard in or wants to put in a parking lot or a trucking firm or a trucking area; wants to build a housing development, then the City has the power to zone so that we can keep the development in their proper place. Nenana has a school - it has the capacity of holding about 400, about 300 people, 300 students. To this date, we're, our average daily membership is around 225. We have the possibility of developing more. Out of this 225, almost a hundred of them are transported into our system and out of our tax base. The City Council decided in their annexation of last year, of their proposal for annexation, of last year, when I was still mayor, that we only proposed to go to the end of Section 36 - and personally, I would like to see it go farther, but this comes into the area of how far does the Boundary Commission and the Local Affairs Agency wish to develop this and how large can a city be before we get into the area of where does a borough start and where does a city stop? One of the things that's very definite, gentlemen, ladies and gentlemen, is that Nenana and the Nenana area does not want to become a part of the North Star Borough. If there's any leads in this way or any developments that looks like they're going to try to extend their southern boundary, why, then we would respectively submit to you that a hearing be held in Nenana because I would imagine probably this would

force dual government in the valley. I don't think we're large enough yet to have dual government and this is the reason why we're asking just to have a city enlarged, just this far, for this particular time. I think that pretty well sums up our presentation.

Mr. Singleton: Thank you very much, Mr. Coghill. I will ask at this time if any of the members of the BoundaryCommission have any questions they wish to direct to Mr. Coghill, they do so. Mrs. Johnson, did you have anything you wanted to ask?

Mrs. Johnson: No, thank you.

Mr. Singleton: Mrs. Stokke?

Mrs. Stokke: The talk of tax bases, that's for school purposes?

Mr. Singleton: Yes.

Mrs. Stokke: You don't plan to give other services on that area that you annex?

Mr. Coghill: We actually give this service now, in a limited manner. What we would probably do in this annexed area, we would pay for the street lights that the individuals now pays for themselves. We would, in part, help pay for the police protection. We had a contract state trooper living in Nenana and because of the financial burden, and because of other things, why the Public Safety Department decided not to contract anymore but to leave a policeman here and we'd provide certain services, we'd provide him with an office and such stuff as this, though, actually, the community is in effect in a small way, participating in this. The tax base, our tax base, is ten mills. Out of the ten mills, why we have our fire protection, we have our street snow removing of which would be extended into this area; we have our street light program which, of course, would be extended into this area.

Mr. Norton: That's volunteer - fire department?

Mr. Coghill: Yes, yes sir, in this type of thing. And we have our school. As I remember our income is basically around $20,000 a year from our tax -

Mr. Norton: On the ten mill basis?

Mr. Coghill: On the ten mill basis. And out of that why we pay about 11 or 12,000 of the total paid. You know, a real interesting . . .

Mr. Norton: That's augmented by the 219 or 220 per student that comes in above the regulars?

Mr. Coghill: Oh yes, yes. We would never be able if we didn't have state tuition formula and the Public Law 874 formula and the school Foundation formula, why we would be a state operated school.

Mr. Norton: I can understand that.

Mr. Coghill: In fact, you know, I might digress for a minute - this is one of the problems that we have in the smaller communities - of being able to provide this basic function which is schools. If you go to some of the unincorporated areas, and George, I now talk about Big Delta, or Tok Junction, or Glennallen and you compare your school facilities with ours which we have built on our own - we've got - our assessed evaluation is around a million five hundred thousand and we have a million dollar school facility that was built by this community -

Mr.Norton: I know what you're talking about.

Mr. Singleton: George, did you have anything else you wanted to ask?

Mr. Norton: No.

Mr.Singleton: Vic?

Mr. Gill: Yes. How far does the North Star Borough, how far does it come,

how close does it get - what milepost maybe?

Mr. Coghill: You drove down?

Mr. Gill: Yes.

Mr. Coghill: Up on top of the rise as you come out of Fairbanks, and you pass the Curtis Lumber, I don't know whether you . . .

Mr. Gill: They don't have a sign there anymore.

Mr. Coghill: They don't have a sign there anymore but you pass a . . .

Mr. Gill: There's a little bar there. Did you notice that little bar there?

Mr. Coghill: Just off to the left there's a place that has an Olympia beer sign - and there's a couple houses there . . . .

Mr. Gill: Cripple Creek. Where is it in relation to Cripple Creek?

Mr. Coghill: Its more than 30 miles . . . Well, I'll tell you, if you notice where you hit the pavement, its about four miles before you get off the pavement.

? Oh, is it on the top? . . .

Mr. Coghill: It's on the top of the hill. It's barely in there - its barely in the borough.

Mr.Gill: That puts it roughly, how far away from here?

Mr. Coghill: Roughly, 22 miles away from here. I could show you on the map.

Mr. Gill: No, I just wanted to know how close it is.

Mr. Coghill: They cut across the hills there and cut in just below Saulich and Dunbar on the railroad, went over to the Chatanika River and followed the Chatanika River up behind Fairbanks and then cut off into down by Salcha - cut across and took in the whole bombing range and come down to the watershed of the Wood River and the Wood River comes into the Tanana River about twenty miles north of us.

Mr. Gill: Well, my point was if it is close here, why maybe the North Star Borough could move in here because by the same token its a long ways away; it may be wiser, and you'd have to study the economy, to form your own little borough if it was forced upon you.

Mr. Coghill: I would imagine that if we were faced with this decision that you would find a south star borough.

Mr. Gill: Yea, yea . . . That was why I was wondering how far away it was. I have no more questions.

Mr. Coghill: I might add, Mr. Chairman, that I probably am the largest by far property holder in this area to be annexed, and as far as taxes are concerned, I would be paying probably 50% of the tax base earned in this particular area. I am building a $60,000 home out, on, in the section 36 section.

Mr. Singleton: You don't contemplate any change in your mill rate or any change in your taxation level. You are just anticipating extending the tax level you have already reached to this new area.

Mr. Coghill: This is correct, we . . .

Mr. Singleton: Approximately how many people would be involved in the extension or the expansion, Mr. Coghill?

Mr. Coghill: I would say that probably about, about, 15 to 20 families.

Mr. Singleton: And they all use,shop in Nenana, they use the Nenana post office, is that right?

Mr. Coghill: That is correct, yes.

Mr. Singleton: In otherwords, they would have, the people in that area . . .

Mr. Gill: This says 45 persons.

Mr. Singleton: . . . the people would have . . .

Mr. Coghill: About 15 or 20 families would be about 45 or 50 people.

Mr. Gill: That's right.

Mr. Singleton: But, I assume that these people were aware of this meeting.
Mr. Coghill: It has been posted on our bulletin board. We have two of the members of the council here, Mr. Chairman, Mr. Burlingame and Mr. Speck.
Mr. Speck: It has been well talked about. I hear about it every night.
Mr. Coghill: Mr. Speck has the Moocher's Bar on the corner and of course, he is a very valuable person on the council because he is the buffer board for the council as far as public opinion. (laughs)
? That's understandable.
Mr. Singleton: Alright, then if thats the end of your presentation and there are no further questions from the Boundary Commission. I would ask if there is anyone else here who wishes to speak on behalf of the petition.
Mr. Beard: Mr. Chairman, might I address one or two questions to Mr. Coghill?
Mr. Singleton: Oh, certainly.
Mr. Beard: Can you give us an idea - do you know how much area you are talking about? In square miles or acres? If you extend the boundaries proposed to the baseline of Section 36.
Mr. Coghill: We're talking about three sections.
Mr. Beard: Well , . .
Mr. Coghill: Our township is about three sections. Now a section has about . . .
Mr. Beard: 640 acres.
Mr. Coghill: 640 - so we're talking in the - probably around 2,000 acres.
Mr Beard: Do you have any idea how this property will be assessed? What value, assessed value you're going to be picking up?
Mr. Coghill: It will be assessed in the same manner, I imagine,
Mr. Beard: No, but I mean do you now know what the value is? Can you project at this time what the additional city revenues will be?
Mr. Coghill: No, I don't have that information off hand - we could probably get a barnyard guess on it for you, but you see its not really a move to increase revenue as much as it is to zone and control.
Mr. Beard: That I understand, but as I understand it you're also talking about being able to make services available to this additional section and I wondered if you had any way of comparing the cost that the City would be called upon to expend with the revenues that it would generate.
Mr. Coghill: Oh, the City would make money off it, because the only things that you would be - they already have the volunteer fire department - they're already supporting the schools - the tuition rate from these children would not offset the personal property tax and the real property tax. A large portion of these forty-five people would be coming from the now FAA station, that is -
Mr. Beard: So there'd still be no federal money?
Mr. Coghill: But yes, we'd get this not only in taxes but we also get it in Public Law 874 fund.
Mr. Beard: How many students are there in this area?
Mr. Coghill: In this area? There are about 22.
? Might I ask this, Jack? This section 36 that you're speaking of, of course, if its a section or whatever plot of ground it is, it isn't intersurveyed in lots or anything, is it?
Mr. Coghill: No sir, there is, there are five parcels of property on this school ground section 36 that the state subdivided about five or six years ago, and they were sold and they've just been sitting and nobody has done anything with them -
? Yes, I can understand that type of operation. It happens every place.

Mr. Coghill: And what they've done is they've just plucked them off and let it sit . . .

? Speculation . . .

Mr. Coghill: . . and they're just betting on the _____and the thing is if we have some way or another of getting in there and say "Buster, you'd better start doing something" because you go try to buy one of these pieces of property and it's worth 20 times what they paid for it, alright, if its worth 20 times, they can pay taxes on it.

? Same thing exists at home.

Mr. Coghill: And its the same thing as is true around our airport. There's some property around the airport on this, in this, acreage addition. You try to buy a piece of that property and it's worth six - seven thousand dollars. Alright, this is worth six - seven thousand dollars, let them put it in their own self-assessment forms of which we - this is the form of which we operate.

? Self-assessment, huh?

Mr. Coghill: We have a self-assessment system.

? (laugh) That's pretty nice.

Mr. Beard: One more serious question.

Mr. Coghill: Yes, sir?

Mr. Beard: I take it this ground is on higher ground and will not be subject to flooding like the present town?

Mr. Coghill: Yes, we have, we have a series of plans that were projected by an engineering firm through the, through the Alaska State Housing Authority under a contract between the City, the state, and ASHA and they came up with, oh, four or five different plans. They came up with one of building up the community -- some of it was quite sophisticated.

Mr. Coghill

? Present.

Coghill: What?

? The present community.

Mr. Coghill: The present community.

Mr. Beard: A land fill.

Mr. Coghill: Some, one was a landfill, of different natures. I have those all right here before me, Mr. Chairman, I could present them to you.

Mr. Beard: Well, I wonder if you could just advise the Commission as to what effect this annexation will have on flood relief.

Mr. Coghill: This annexation thing, if we should have anotherflood this year and get into as much damages as we had before - we've all pretty much signed waivers that we're living in a flooding area and we're going to have to move, well, if the Tanana Valley is getting so saturated with dams, dikes and roads and stuff like this where this flow or this raise is a permanent type thing in the Tanana, why then we're going to have to move someplace.

Mr. Beard: And this will be safer ground?

Mr. Coghill: This did not get wet during, - it got wet from the rain because we had 22 days of constant rain but it was not innovated by the water.

Mr. Beard: Do you expect that by the very fact that it will be within city boundaries will help to generate movement on an individual basis from the present townsite, of individual.

Mr. Coghill: I think so, plus the fact that this will be an orderly movement, if it takes place.

Mrs. Stokke: You plan to zone the whole area before you start this movement?

Mr. Coghill: Yes, mam, yes, mam, this is probably one of the first issues

that would take place.

Mr. Singleton: Any further questions, does anyone else have any further questions? (To the Commission members) Was there anyone else who wished to speak on behalf of the petition? (To the audience) Have anything to say that Mr. Coghill hasn't covered? If there are none, is there anyone who wishes to speak against the petition. And if there are none, we wish to thank the people of Nenana for having us here for the hearing today and you will be receiving word of the Local Boundary Commission decision very shortly, Mr. Coghill. Thank you.

Mr. Coghill: Thank you.

Transcribed from tape of Nenana Hearing of February 1, 1969 by

Loretta D. Wilke

MINUTES OF LOCAL BOUNDARY COMMISSION MEETING

NENANA, ALASKA February 1, 1969

Chairman Singleton convened the meeting of the Boundary Commission on February 1, 1969, at 1:55 P.M. in Nenana, Alaska immediately following the hearing on the petition to change the boundaries of the City of Nenana.

Members of the Commission present were Victor Gill, Bernice Stokke, Grace Johnson, George Norton, and James Singleton. Also in attendance was John Beard, Director of the Local Affairs Agency.

Chairman Singleton indicated that the purpose of the meeting was to discuss and reach a decision upon the proposed boundary change. A general discussion followed and it was observed that the necessity and desirability of the boundary change was fully documented in the presentation of Mr. Coghill, the only person who testified at the hearing. It was noted that no person had spoken in opposition to the proposal.

The members of the Commission agreed that the information presented to the Commission demonstrated that the area to be annexed would provide the City with land, free from flooding, in which to develop.

Mr. Gill moved, seconded by Mrs. Johnson, and it was passed without objection that the boundary change as presented in the petition be accepted and recommended to the Legislature.

It was then discussed that the recommendation must be submitted to the Legislature within the first ten days of the session. Mr. Gill requested that the Local Affairs Agency prepare a formal Memorandum of Decision, setting forth the findings of the Commission as previously discussed. Chairman Singleton directed Mr. Beard to prepare this memorandum and to circulate it for the signatures of the Commission members; and to draft a formal recommendation of the boundary change and submit the recommendation to the Legislature, on behalf of the Commission, within the 10 day requirement.

Meeting adjourned at 2:05 P.M.

ATTEST:

Loretta L. Wilke
Secretary, Local Affairs Agency

APPROVED:

James K. Singleton, Chairman
by: John R. Beard
John R. Beard
Director, Local Affairs Agency

LOCAL AFFAIRS AGENCY REPORT

to

LOCAL BOUNDARY COMMISSION

Nenana Annexation

January 27, 1969

LOCAL AFFAIRS AGENCY JUNEAU, ALASKA

Proceedings to Date

On December 20, 1968, the Local Affairs Agency received a petition, in the form of a letter from Ray Brown, Mayor of Nenana, on behalf of the Nenana City Council, for a boundary change that would effect an annexation of certain lands to the City of Nenana.

The Agency determined, upon review of the petition, that it was in proper form and that, there being no political subdivisions in and about the territory involved other than the petitioning city, proper service of the petition had been accomplished.

To date, no answer to the petition has been filed with the Agency.

From information contained in the petition, and from further information in the Agency's file, the Agency determined that it was highly desirable that the Local Boundary Commission hold its hearing in time for its recommendation to be submitted to the forthcoming legislative session. Upon ascertaining that a quorum of the Local Boundary Commission could be assembled in Nenana on February 1, 1969, the Agency sent notice of the hearing, by certified mail, to the city of Nenana. Notice was received by the petitioner on January 15, 1969. Notice was published in the Fairbanks News-Miner, a newspaper of general circulation in the Nenana area, on January 17, 1969. The City was requested to post copies of the notice in three public and prominent places in the City and was instructed to have a copy of the petition available for public inspection at the City Clerk's office. A copy of the Notice of Hearing is appended to this report.

It is the opinion of the Local Affairs Agency that all statutory and regulatory notice requirements have been complied with.

Introduction

Due to the limited time between receipt of the petition and date of hearing, the Agency has not had an opportunity to resort to all of the sources of information upon which it usually draws in preparing its reports to the Commission. The Alaska State Housing Authority is preparing a staff report on the Nenana economy, however, and has provided us a preliminary draft of that report. The draft, which is also appended, provides a great deal of pertinent information. This Agency's report will summarize ASHA's major findings and provide such supplemented information as is available.

Vital Statistics

Population of Nenana: 396. This figure was provided by Mayor Brown. It is assumed that it includes residents of St. Mark's native village, an area located east of (and not included within) city boundaries. ASHA study estimates 282 in City, 28 in St. Mark's as of August, 1968.

Population of area to be annexed: 45. (provided by Mayor Brown)

School enrollment: 210 (provided by Mayor Brown). ASHA estimates that about 100 students reside outside the City. The Agency has no figures on students residing in the area of proposed annexation.

School costs: $1,012 per average daily member. The City is reimbursed by the state, for nonresident students, at the rate of $219.72 per student.

Location: Bounded on the north by the Tanana River, on the west by the Nenana River.

Access: Highway (approx. 60-65 miles from Fairbanks on Anchorage-Fairbanks Highway); Air (City owned airport, located south of and contiguous to city boundary, in area to be annexed; no scheduled service); Railroad (passesger service to Anchorage and Fairbanks, daily in summer, twice weekly in winter; year-round freight service); River (railhead for Tanana-Yukon waterway)

The Annexation Proposal

Nenana is not located within an organized borough. The territory which the City proposes to annex is primarily rural in nature - the nearest "urban" development to the south being in the Anderson-Clear area, some 15-20 miles away. The present petition, then, does not represent an attempt to resolve jurisdictional disputes or to consolodate contiguous urbanized areas under a central governing authority. To this extent, the Commission is not being called upon to resolve the conflicting claims of City, Borough, and/or service area that each is best designed and most able to provide needed services to residents of the affected area. The considerations that would apply to a boundary change in the Anchorage area, for example, and that are anticipated in much of the Minnesota legislation, are not wholly applicable in this instance.

Nenana's petition appears to have been prompted largely, if not entirely, by the City's flooding problem. The nature of this problem is

discussed briefly on page 11 of the ASHA report, and its influence upon Nenana's plans for the future is a continuing theme through that report. ASHA concludes (pp 37 et.seq.) that without flood alleviation, Nenana's population "could drop as low as 250-275 by 1971" and would be unlikely to grow "much beyond 350-400 by 1985", notwithstanding possible industrial development. Moreover, recurrent flooding would cause constant population fluctuation, with the probable gradual loss of business and population to the Anderson area.

The 1967 flood, by its severity, focused attention on Nenana's acute need for flood relief. Studies by the Corps of Engineers, ASHA, and private consultants resulted in four proposed flood protection programs (ASHA report, p. 29). The report discusses only the last two of the alternatives, considering them to be the most practicable; and by its petition and supporting information, the City indicates that it envisages the fourth - southward relocation - to be the more desirable.

No funds are currently available for a concerted relocation project. Quite possibly, monies would be more readily available once the land were brought under City's jurisdiction. The City feels, however, that individual residents would be attracted away from the river and into the safer Sand Hill area, even without financial assistance, if the area were annexed to the City. (It may be that such individual resettlement in this area is already occurring. The Commission will perhaps wish to inquire into this, for purposes of gauging the present need for City planning and zoning).

The economic effect of relocation in the Sand Hill area is also assessed by the ASHA study, page 37. Briefly, it is estimated that the City's population would stabilize at 400-450 people by 1985, barring significant industrial growth. Over the land-fill alternative, the annexation-relocation approach has the advantages of (a) being less costly and (b) affording room for additional growth in the event of rapid development.

Rapid development, as more fully explained in the report, is not to be expected, however. Of primary significance is Nenana's situation at the railhead of the Tanana-Yukon river highway. It is the staging area for river commerce to the interior. When the proposed North railway is constructed, Nenana will lose this advantage. Goods will be shipped by rail to the Yukon River and thence distributed downriver. (ASHA, pp. 33-35)

The City is hopeful, at least, that the northern spur will join the mainline at Nenana. This would generate substantial economic activity

during the construction period and would possibly retain for Nenana maintenance and storage facilities, with attendant jobs.

Conclusion

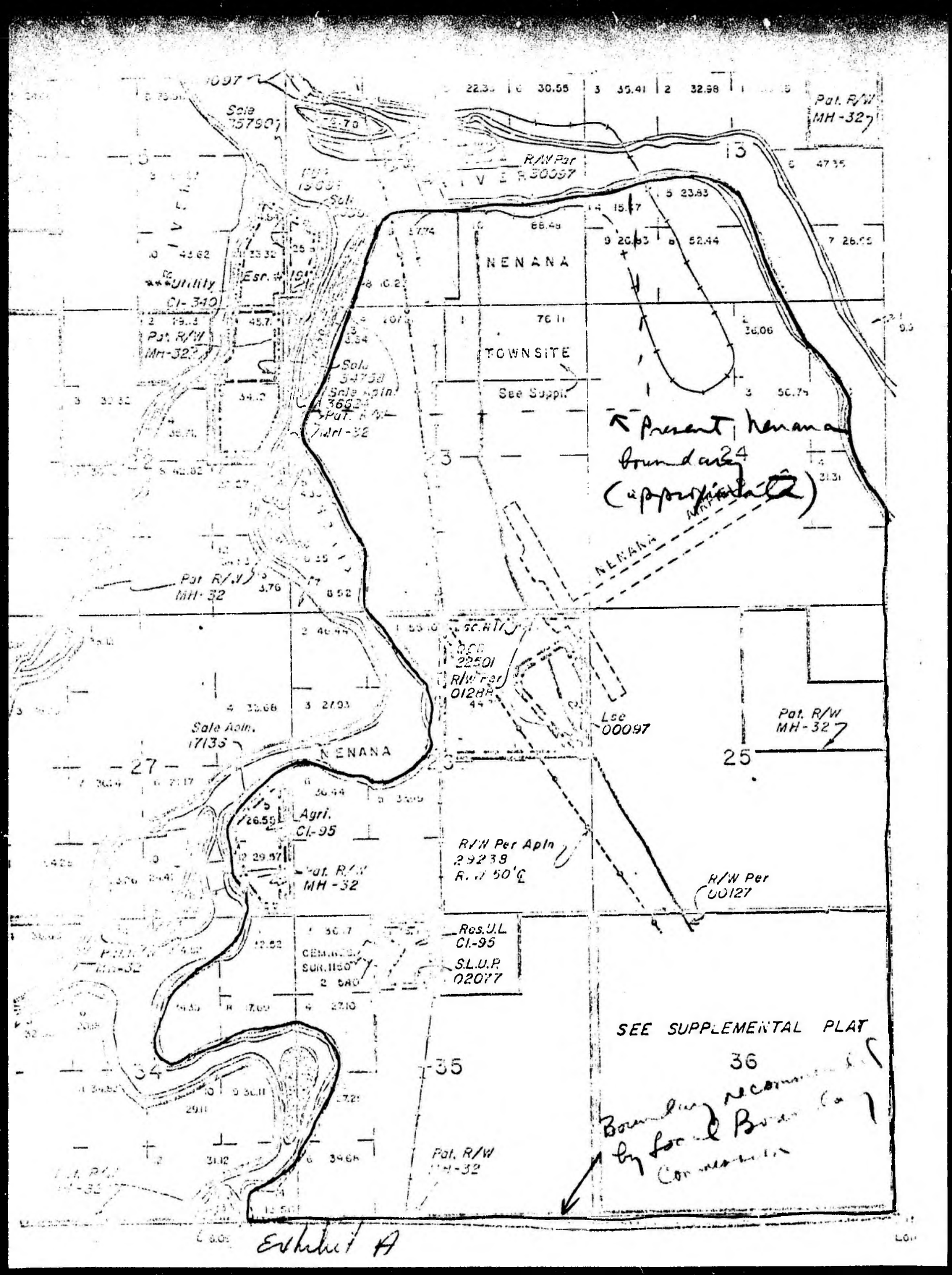
Nenana has been the subject of a good deal of economic and development study of late. Most of these studies have not been entirely finalized - and have been unavailable to the Agency - but the apparent lesson of all will be a need for flood protection. It seems, too, that accord has been reached on development of a "new city" in the area of proposed annexation as a viable answer to that need.

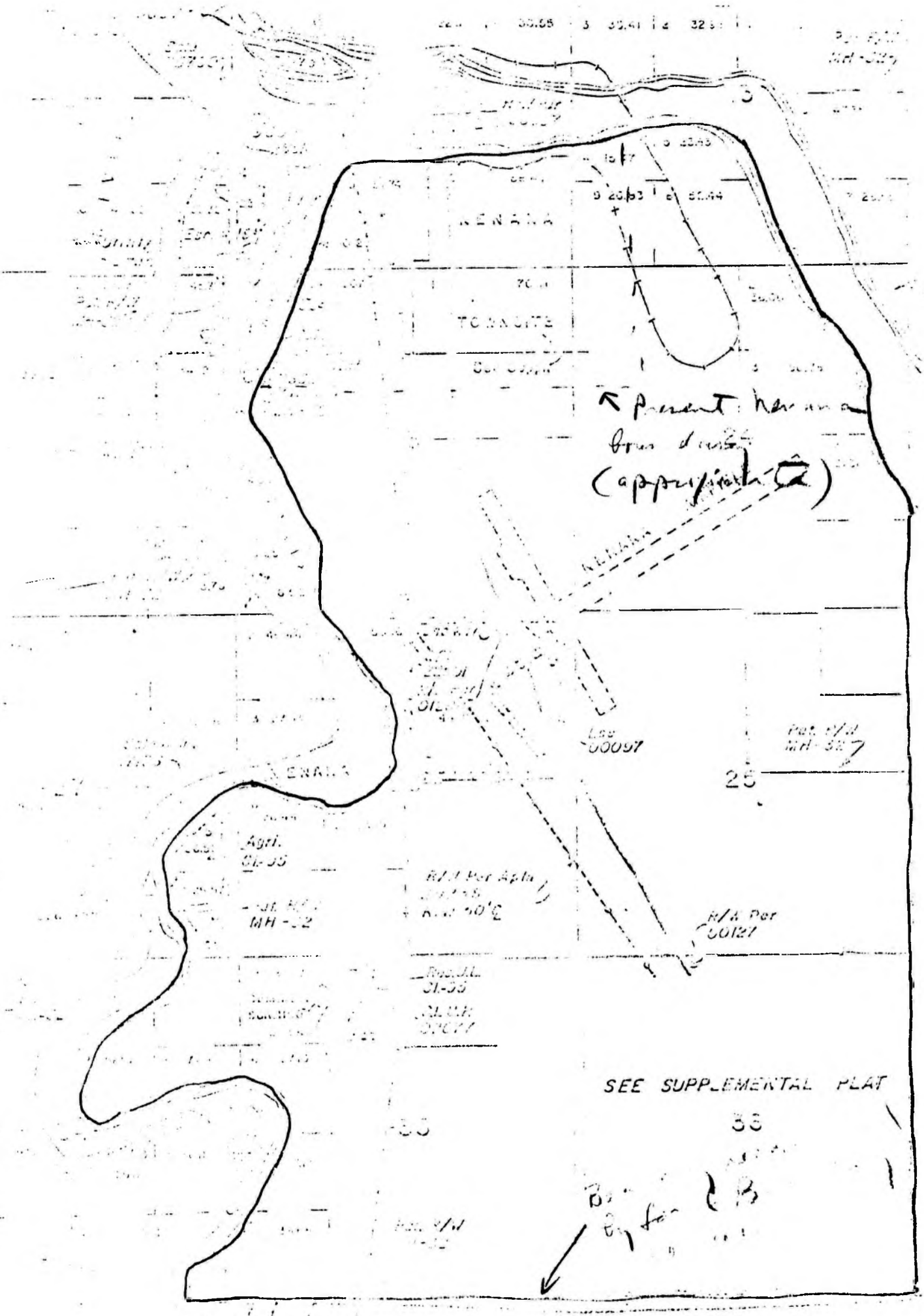
The Agency considers annexation to be a good first-step toward such development. It would enable the City to extend services - water, sewer, police, streets - into the protected area, thus encouraging individuals to remove from the present flood plain (and perhaps fostering, as well, an imigration of residents from further south). Should funds become available for a total relocation project, annexation will be essential.

The Agency does not have sufficient information on the residents and land owners in the area of expansion to determine how annexation will affect them. The Commission will want to know (and the City has been so informed) what services will be made available to this area and what the cost of these services - both to the City and to the residents - will be.

It should be noted, in addition, that the City has stressed, as a reason supporting annexation, its desire that the airfield be within city boundaries. The Agency understands that the airfield is city-owned, located on city property contiguous to the present boundaries. This being the case, the airport could be annexed by ordinance (AS 29.70.210). Should it develop at the hearing that the airfield is the only justification for annexation, the Agency recommends that the Commission deny the petition and make no recommendation to the Legislature.

Subject to the above qualifications, it is the Agency's opinion that the proposed Nenana boundary change would serve a positive purpose and is in the best interest of the State and the City.


NENANA
TOWNSITE
See Suppl.
Present Nenana boundary (approximate)
NENANA
Sale 15790
Pat. R/W MH-32
R/W Per 30097
RIVER
Utility Esr. #101
Cl-340
Pat. R/W MH-32
Sale 34738
Sale Apln. A 36622
Pat. R/W MH-32
Pat R/W MH-32
Sale Apln. 17135
NENANA
Agri. Cl-95
Pat. R/W MH-32
Pat. R/W MH-32
R/W Per Apln 29238
R/W Per 00127
Res.U.L Cl-95
S.L.U.P 02077
Lse 00097
Pat. R/W MH-32
SEE SUPPLEMENTAL PLAT
Boundary Commission by Local Boundary Commission
Pat. R/W MH-32
Exhibit A


KENAI
TOBACITE
Present Kenai
boundary
(approximate)
KENAI
Agri.
SEE SUPPLEMENTAL PLAT
25
36

PORNO

2/1/70

RETURN

I certify that on February ___, 1970 I served the attached subpoena on Major M. E. Dankworth, at _____, Alaska, by delivering a copy of it to him.

Dated: February ___, 1970
_____, Alaska

_____

SUBPOENA

TO: Major M. E. Dankworth, Commander
Southcentral Region
Alaska State Troopers
702 East 30th Avenue
Spenard, Alaska

Under authority of AS 24.25, you are (or your designee is) commanded to appear before the Judiciary Committee of the Alaska House of Representatives and produce one copy of each of the motion picture films "Love Camp 7" and "The Pleasure Machine" (presently in your possession in connection with the case of State v. Handby), for viewing by the committee, at the committee room in the Masonic Hall at Fourth and Seward Streets in Juneau, Alaska, on February ___, 1970, at ___ p.m.

Dated: February ___, 1970
Juneau, Alaska

Jalmar M. Kerttula, Speaker
Alaska House of Representatives

Barry W. Jackson, Chairman
Judiciary Committee
Alaska House of Representatives

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Criminal No. A-61-69
JAMES FAYE VINSON, Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

The Defendant's first contact with police officers in this case was on January 26, 1969, when his baggage was searched under a lawful warrant alleging the Defendant was carrying a quantity of marijuana. A careful search was made and no marijuana was found. However, eight (8) photographs and four (4) reels of 8 mm film, subsequently alleged to be obscene, were found. The photographs and film were not seized at that time.

On January 29, 1969, a search warrant was issued covering the Defendant's residence to search for obscene pictures and motion picture films. The warrant was based solely on the affidavit of Donald Watson, Customs Agent. (A copy of the Search Warrant and Affidavit are attached.) The affidavit does not even assert that the conclusion of obscenity was based on the affiant's personal observation of the photographs or films.

Under the warrant, a search of Defendant's residence was made. In addition to the four reels of film and eight photographs mentioned in the affidavit, thirteen other films were seized along with numerous photographs. Also, a careful search for marijuana was carried on in the residence under the warrant for obscene films.

Subsequently, after viewing one or more of the films and photographs seized, the Grand Jury indicted the Defendant charging violation of Title 18 U.S.C. Sec. 1461(a) and 1465.

To this point, several fatal errors have appeared in the Government's case.

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The affidavit of the Customs Agent was insufficient to show probable cause as there was no allegation that his statements were based on personal knowledge. After all, that is the purpose of an affidavit.

Conceding for purposes of argument that the Customs Agent had viewed the films, his affidavit stating so and reaching the personal conclusion that the films were obscene, the warrant is still invalid. In Lee Art Theatre v. Virginia, 392 U.S. 636 (1968), the U. S. Supreme Court reversed a State Court conviction of possessing and exhibiting lewd and obscene motion pictures. The fatal defect was the use of evidence seized under a search warrant based on the affidavit of a police officer

> "which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard in front of the theatre that the films were obscene." Lee Art Theatre, supra, P. 636.

> "However, we need not decide in this case whether the Justice of the Peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant was issued solely upon the conclusionary assertions of the police officer without any inquiry by the Justice of the Peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity', id., at 732, 6 L. Ed. 2d at 1136, and therefore fell short of constitutional requirements demanding necessary sensitivety to freedom of expression." id, at 637.

In other cases, Courts have required a prior judicial determination of obscenity before a warrant can issue, and even declared invalid warrant issued after the Judge had viewed the film. The defect in that case was the lack of an adversary hearing on the question of obscenity before the warrant issued. See Cambist Films v. Illinois, 292 F. Supp. 185 (1968).

In U. S. v. Brown, 274 F. Supp. 561 (1967), the Defendant was charged, as in the present case, of transporting obscene material in interstate commerce [illegible] plus a quantity of comics, as in the present case, [illegible] search warrant based on the affidavit of an FBI officer who observed the material.

None of the contents were submitted, as in the present case, to the Commissioner for his persual. The Court held the seizure unlawful and ordered the evidence suppressed and returned to the Defendant.

The Court stated that

> "the common thread running through recent Supreme Court decisions on the seizure of allegedly obscene matter is that because the line between protected and unprotected speech is so difficult to draw, dissemination of a particular work should be completely undisturbed, at least until an independent determination of obscenity is made by a judicial officer. Complete restraint on any work must await a final judicial determination of obscenity." U. S.v. Brown, supra, p. 563.

The Court in Brown relied heavily on Marcus v. Search Warrant, 367 U.S. 717 (1961), and A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964). Conceding that the Supreme Court in Marcus and A Quantity of Books was expressing its view in the context of civil forfeiture cases, the Court in Brown as did the U.S. Supreme Court in Lee Art Theatre, supra, applied similar procedures to criminal obscenity prosecutions.

> "A search and seizure for the purpose of gathering evidence for a criminal obscenity prosecution imparts at least the same potential restraint on the dissemination of material protected by the First Amendment as one made solely for the purpose of commencing forfeiture proceedings." U. S. v. Brown, supra, p. 563.

Another interesting question and probably of first impression in this Court has arisen as the result of the recent U. S. Supreme Court case, Stanley v. Georgia, 37 Law Week 4315 (1969). In that case, the Court held Stanley had a right to possess obscene films in his own home. It should logically follow that a warrant designed to deprive a person of possession in his own home of obscene matter is invalid. If he has the right to possess the matter in his own home, no one should have the right to take it from him while in his home.

If he has the right to possess it in his own home, logically he should have the right to bring it there, unless he had stolen it somewhere.

You can pa-3-yes it for your illegally gotten Gains.

It could be argued that the seizure was not to deprive the Defendant of possession in his own home, but to use that seized as evidence of violation of another statute. That contention is confronted by at least two problems in the present case. First, are we to discriminate against those who must purchase the material out of State? That is, those who purchase the material in Alaska and take it to their own homes in Alaska have violated no law. Those who purchase the material outside Alaska are subject to prosecution for violation of a number of laws, if the material is held obscene. One of the stated purposes of Title 18, Sect. 1462, the statute the Defendant is accused of violating, was to supplement State legislation. If there is no legislation prohibiting possession in one's home, or if such legislation exists and is unconstitutional as a result of Stanley, that purpose is no longer existent.

Secondly, is the manner in which the officers initially discovered the material alleged to be obscene. During a valid search for marijuana, the officers found the photographs and films, and went to great pains to view the contents, especially of the films, by unrolling the film and looking through the individual frames in the light. This type procedure occurred in the Stanley case while the officers were searching the Defendant's home for gambling devices under a lawful warrant for that purpose. Mr. Justice Stewart, with whom Mr. Justice Brennan and Mr. Justice White joined, in a concurring opinion, stated:

> "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. And this is not a case that presents questions as to the permissible scope of a search made incident to a lawful arrest. For the appellant had not been arrested when the agents found the films. After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.... [illegible] to invite a [illegible] ingly [illegible] to get into a [illegible]

> launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.
>
> Because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmissible in trial." Stanley v. Georgia, supra, p. 4319.

True, the films in the present case were not seized immediately after such a search described in Stanley, but the later seizure was certainly a fruit of the unconstitutional procedures of January 26, 1969.

CONCLUSION

The evidence seized should be suppressed and returned to the Defendant for one or more of the following reasons:

1. It is the belief of the Defendant, that the January 29, 1969 search warrant was not issued to the F.B.I., but to a Customs Agent and transferred to F.B.I. without approval of the Commissioner, therefore, the F.B.I. had no authority to make the search;

2. The affidavit on which the January 29, 1969 warrant was based did not allege personal observations and conclusions of the affiant, and, therefore failed to show probable cause. Nor does the affidavit state as the warrant asserts that the affiant believes the films to be on the premises to be searched;

3. The January 29, 1969 search warrant was invalid because prior safeguards to protect the Defendant's First Amendment rights were not taken before the warrant was issued;

4. Under the January 29, 1969 search warrant, the material seized was in the possession of the Defendant in his own home and a warrant to deprive the Defendant of that possession is invalid; and

5. The January 29, 1969 search warrant was the fruit of an illegal search undertaken under the auspices of the January 26, 1969 search warrant.

Respectfully submitted,

ROBISON, McCASKEY, STRACHAN & HOGE

By: _____
Stanley P. Cornelius

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	)
JAMES FAYE VINSON, Defendant.	)

Criminal No. A-61-69

REPLY MEMORANDUM

Defendant, JAMES FAYE VINSON, is satisfied that the warrant was issued to an F.B.I. Agent instead of a Customs Agent, but the other points raised in the Defendant's MEMORANDUM have not been satisfied by the Plaintiff's MEMORANDUM IN OPPOSITION.

The MEMORANDUM IN OPPOSITION states in the first sentence that Defendant has admitted in Paragraph 1 of the MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS, "that the search pursuant to the warrant of January 26, 1969, was legal". Referring the Court to Paragraph 1 of that memorandum, no such admission can be found. The Defendant admits in that paragraph that the warrant was lawful, but does not state that the search was lawful. In fact, the second paragraph on Page 4 and the first paragraph on Page 5 of the MEMORANDUM IN SUPPORT are devoted to illustrating the illegality of the searching procedures on January 26, 1969 with respect to the allegedly obscene material.

Referring to the January 26, 1969 warrant, the Defendant does not deny that a search warrant can be valid if based on hearsay; however, certain basic rules must be followed. One rule is that the hearsay affiant must state that he "believes" the objects of the proposed search are on the premises to be searched. Nowhere, in the affidavit of Donald Watson, does he state that he believes the alleged obscene materials to be on the premises searched. His affidavit is based solely on what transpired on January 26, 1969.

Secondly, the MEMORANDUM IN SUPPORT points out that the U. S.

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Supreme Court has ruled unconstitutional searches for obscene materials based on the affidavit of an enforcement officer stating his personal observations. It should surely follow that a search warrant for alleged obscene materials based on an affidavit of an enforcement officer that does not state the conclusion of obscenity was based on his personal observations, is invalid.

Much of the MEMORANDUM IN SUPPORT was devoted to illustrating that the Defendant's First Amendment rights have been violated. The MEMORANDUM IN OPPOSITION does not even discuss this question though faced with U. S. Supreme Court cases and lower Court cases that indicate the proper procedures to protect the Defendant's First Amendment rights were not followed.

Much of the law cited in the MEMORANDUM IN OPPOSITION does not go to the real questions in issue. The Plaintiff cites Rule 41 (c) as allowing the Commissioner to issue a search warrant based on affidavit if the Commissioner believes there is probable cause. But the Commissioner must require certain procedures before he can determine probable cause. As pointed out earlier, the affiant must state he believes the objects of the search are on the premises to be searched, and, in the case of obscene materials, an independent determination of obscenity must be made by someone other than the police officer, most cases requiring a judicial determination (see Pages 2 and 3 of MEMORANDUM IN SUPPORT), before a search warrant can be issued and the material seized.

Referring to the matter at the bottom of Page 1 of the MEMORANDUM IN OPPOSITION, the Defendant does not quarrel with the Plaintiff's position that a warrant may be based on hearsay, but again, with respect to a search for alleged obscene materials, even warrants based on personal observations have been held invalid (see Pages 2 and 3 of MEMORANDUM IN SUPPORT).

Referring to the matter at the top of Page 2 of the MEMORANDUM IN OPPOSITION, the Defendant agrees with a policy of not imposing stringent over-technical standards upon a Commissioner in determining probable cause; however, the requirement that the affiant

state he believes the objects of the search are on the premises to be searched is a basic requirement certainly not over-technical. The cases have shown that a prior independent determination of obscenity is also basic.

The Defendant also agrees, referring to the last paragraph on Page 2 of the MEMORANDUM IN OPPOSITION, that enforcement officers may search and seize fruits of an alleged crime, but again the basic issue has been avoided. That is, the search warrant used for that search must be valid.

Referring to Page 3 of the MEMORANDUM IN OPPOSITION, the Plaintiff seems to argue that a presumption contained in 18 U.S.C. 1465 takes precedence over the recent U. S. Supreme Court case of Stanley v. Georgia, 37 Law Week 4315. Then in the last sentence, the Plaintiff admits that the presumption does not go to the issue of suppression of evidence or dismissal of endictment. The Defendant quite agrees and cannot understand why the presumption was referred to if it has no relevance to the issue of suppression of evidence.

Finally, not only does the Plaintiff avoid completely the issues of protection of the Defendant's First Amendment rights and failure of the affiant to state he believes the objects of the search are on the premises to be searched, but no reply has been made to the Defendant's allegations contained in the last paragraph on Page 4 and the first paragraph on Page 5 of the MEMORANDUM OF SUPPORT. That is, the procedures in the January 20, 1969 search were illegal and that the January 29, 1969 search warrant was based on the fruits of the illegal procedure during the first search. The quoted portion from the Stanley opinion is certainly right on point.

DATED: July 7, 1969

Respectfully submitted,

ROBISON, McCASKEY, STRACHAN & HOOK

By _____
Stanley P. Cornelius

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES FAYE VINSON,

Defendant.

FILED

AUG 1 1969

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By..... Deputy.

No. A-61-69 Cr.

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion to suppress evidence, return seized property, and dismiss the indictment, based on an allegedly unlawful search and seizure.

On January 26, 1969, defendant's baggage was searched for marijuana at Anchorage International Airport, pursuant to a valid search warrant. No marijuana was found, but four reels of motion picture film and eight still photographs, believed by the Customs Agent to be obscene, were observed.

Three days later Customs Agent Watson executed an affidavit before the United States Commissioner alleging the above facts and no more. On the basis of that affidavit a search warrant was issued to search defendant's home for "obscene pictures, motion picture film" concealed in violation of 18 U.S.C. §§1462(a), 1465(1964). The warrant was executed and the evidence seized which defendant now moves to suppress.

Agent Watson's affidavit, the sole support for the warrant on the record, is fatally defective in two respects.

First, in obscenity cases a magistrate issuing a search warrant is required to make an independent finding of probable cause not only as to the presence of the offending matter, but also as to its obscenity. The "conclusary assertions of a single police officer" are not sufficient. Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968); Marcus v. Search Warrant, 367 U.S. 717, 731-32 (1961). Here the affidavit states only that the materials in question "were observed to be obscene." Agent Watson's grounds for this conclusion are not given, nor does the record show that any such grounds were laid before the Commissioner.

Second, there is nothing in the record to connect the allegedly obscene matter with defendant's home. The affidavit states that on January 26, obscene matter was observed in defendant's suitcase at International Airport. On this basis a search warrant was issued three days later for defendant's home. There is no indication that any law enforcement officer had probable cause to believe, from personal observation, hearsay or otherwise, that the material seen in the suitcase three days previously was then in defendant's home.

It is therefore ORDERED:

1. THAT defendant's motion to suppress is GRANTED;

2. THAT the motion picture film and photographs seized be returned to defendant's possession;

3. THAT the indictment herein is DISMISSED.

DATED at Anchorage, Alaska, this first day of August, 1969.

United States District Judge

cc: Stanley P. Cornelius
Marvin S. Frankel, United States Attorney

he said. "The shadow of the swastika is on every courthouse, on universities, on Government buildings."

Ugly Mood. After the speech, a crowd of 500 gathered in a park to listen to student radicals. Many of the wholesome-looking youths, clenched fists raised, appeared to be out for a lark. But the mood suddenly turned ugly, and when police patrol cars appeared a block away, the crowd began hurling rocks.

With 1,000 students and street people shouting "Burn, baby, burn!" youths set fire to piles of debris and shoved them through the Bank of America doorway. Some of the students argued that the attack was senseless. The burners, unable to articulate their reasons, answered that the bank was a "symbol of corporate corruption."

Though outnumbered, state patrolmen and sheriff's deputies took the offensive. But after a ten-minute rock barrage, they retreated, leaving a patrol car behind. The students set it afire. Meanwhile, the bank burned to the ground —a $275,000 loss.

Tear Gas. The third night, despite a curfew and the arrival of some 500 additional state law-enforcement officers, the students continued their rock hurling. Police attempted unsuccessfully to break up unruly crowds, and from a hovering helicopter equipped with a loudspeaker ordered them to disperse. With only one known exception, the police kept their firearms holstered, sometimes throwing rocks themselves when they ran out of tear gas. One cop was even photographed using a slingshot.

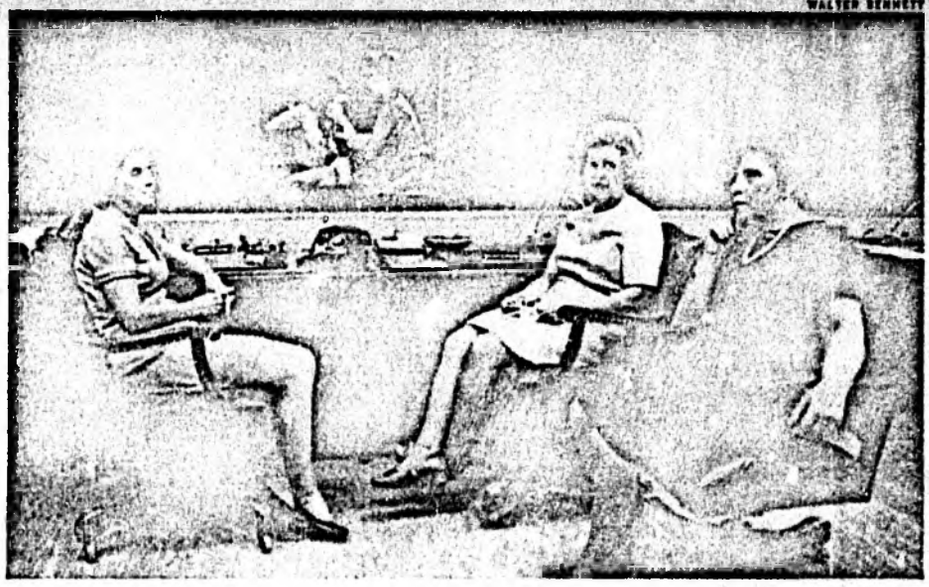
The authorities' restraint kept casualties down: 32 lawmen and two civilians were injured. There were 135 arrests. Finally, Governor Ronald Reagan, who described the rioters as "cowardly little bums," ordered a force of 400 National Guardsmen into Isla Vista and peace was restored. The destructive rampage, like other riots for little or no justification, did more than destroy property and endanger lives. It hurt the cause of rational dissenters while strengthening the hand of those who would quash dissent of any kind.

MORALS

Defense Against Dirt

"They call us the dirty-movie ladies," says Mrs. Margery Shriver. "They don't realize," adds Mrs. Mary Avara, "the headaches we get from watching this stuff." "Can you imagine," asks Mrs. Rosalyn Shecter, "kids at drive-ins getting to see stuff like this? They do elsewhere, you know."

The "stuff" is flesh flicks, and the three middle-aged, middle-class mothers constitute Maryland's defense against them. The last state to censor motion pictures in advance of distribution, Maryland pays the members of its Board of Motion Picture Censors between $4,000 and $4,500 a year each. In fiscal 1969, the trio previewed 687 movies, censored objectionable portions from 14, and rejected 59 outright. Half of those rejected were 8-mm. porno productions made on a shoestring, which is more than most of the performers wore. None of the disapproved films was produced by members of the Motion Picture Association of America, which voluntarily rate their movies for their suitability for different audiences. To look at the issue through the censors' eyes, TIME Correspondent Art White spent a day with the ladies in the Baltimore State Office Building theater. His report:



WALTER BENNETT

CENSORS SHRIVER, SHECTER & AVARA AT WORK
You wouldn't believe the headaches they get.

Electrodes. "O.K., let's go," says Mrs. Shriver, 44. The first film of the day is a Japanese import, *The Daydream*, a collage of sensual sounds and sadomasochistic fury. On the screen, a man hangs a girl from the ceiling by ropes, then cuts off her clothing with a knife. "I'm either out of touch with Oriental culture," says Mrs. Shriver, wife of an oil-company executive, "or there's something here that escapes me." In another scene, the man strokes the girl's private parts. Both are naked except for masks. "I can't tell what they're doing," says Mrs. Shriver. "Don't ask," replies Mrs. Avara, 60, a widow who has been on the board since 1960.

Electrodes are placed on the girl's breasts. "This is going to be shocking," cracks Mrs. Shriver. The film grinds to a finale in which the hero stabs the nude girl. "We're turning the whole picture down," says Mrs. Avara. "They insult us by submitting stuff like this." Among the films banned last year was *I Am Curious (Yellow)*, the Swedish import found by federal district courts to possess sufficient "redeeming social value" to qualify for constitutional protection.*

Italian Shoes. The projector again whirls, and the women settle back behind their desks to watch *Decameron 69*. They see two figures squirming on a bed; he removes her sweater, she fondles his fly. "Mark that," Mrs. Shriver shouts to the technician; the scene will be deleted. "Look at his testicles showing there," she calls later. "Mark that." As the film grinds on, the women exchange comments. "I can't tell which country this is because there's no dialogue," complains Mrs. Shriver. "They look like Italian shoes," says Mrs. Shecter, 55, wife of a Baltimore advertising executive.

Watching as a girl is stripped by a male partner (he wearing gloves), Mrs. Shecter observes: "Some of the girls have wonderful undergarments, wonderful bras." Adds Mrs. Shriver: "When I first started seeing these films, they looked like they were made by underwear salesmen."

Susan Saved. At this point, the soundtrack voice interrupts: "As a prostitute, Samantha Jane makes 20 times as much as she'd make as a secretary." The scene shows a young man and a big-bosomed brunette in what appears to be a motel room. Says the brunette: "I need it all the time now." Says Mrs. Shriver: "You make a film like this for a couple of thousand dollars and gross ten or twenty times as much. All you need is a bed, a photographer, and a man and a woman."

As lunchtime approaches and the ladies watch a man mutilate another man with a knife, the board's pretty administrative assistant enters the screening room. "Don't look, Susan," Mrs. Shriver warns, and Susan rushes out. The women send out for sandwiches and coffee, then sit grimly munching in the dark, eyes on the screen.

By now, the cinematic activities have begun to exhibit a staggering sameness, and the joking becomes more strained. Two lesbians perform for the camera, and Mrs. Avara wonders aloud "what's going through their minds." Whatever it is, there is little likelihood that other Marylanders will get a chance to guess. The dirty-movie ladies rejected the film.

* The film's American distributor is challenging Maryland's ban in the U.S. Supreme Court, which has also been asked to rule on the constitutionality of the Maryland board.

February 6, 1970

Mr. Herb Shaindlin
Chief of News Operations
KHAR - TV
Pouch 7-016
Anchorage, Alaska 99501

Dear Mr. Shaindlin:

The House Judiciary Committee is looking at the overall problem of pornography, and we are informed that you have conducted an investigation on how the distributors of pornography are operating.

If you have any plans to be in Juneau in the near future, we would request that you testify before our committee.

Sincerely,

Barry W. Jackson, Chairman

BWJ/mm

HERB SHAINDLIN
CHIEF OF NEWS OPERATIONS
KHAR - TV
POUCH 7-016
ANCHORAGE ALASKA 99501

January 19, 1970

The Honorable Judge
Edward V. Davis
Superior Court
941 West Fourth Avenue
Anchorage, Alaska 99501

Dear Judge Davis:

This date the House Judiciary Committee has voted to take up the general question of laws or the like thereof relating to pornography.

In conjunction therewith, it was the feeling of the committee that we would like to review the films that were confiscated from the Billikin Drive In in Anchorage.

The showing of these films will be held here in Juneau in an executive session, that is, only members of the committee and staff will be present.

By this letter we are seeking your permission for such a showing and await your reply to make further arrangements.

Very truly yours,

Barry W. Jackson
Chairman Judiciary Committee

BWJ/SC/mm

bcc: Harold W. Tobey
District Attorney

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

DIVISION OF STATE TROOPERS

P. O. Box 6188-Annex
Anchorage, Alaska 99502
Southcentral Region

January 21, 1970

Rep. Jess Harris
Alaska State Legislature
Pouch V
Juneau, Alaska

Dear Jess:

Please find attached the material you requested. Unfortunately, much of the material brought to my attention during the year had no evidentiary value and as a result was either given to interested legislators or destroyed.

I would propose that you consider asking Mr. Herb Shaindlin, News Director for Station KHAR, to appear before your committee. I have determined that he has conducted probably the most extensive investigation into pornography that has been done so far. He devoted fourteen months to collecting material in Alaska and throughout the United States, and is very knowledgable of how the distributors of pornography are operating. I asked Mr. Shaindlin if he would be willing to testify and bring his collection of material before the committee and he assured me he would be more than glad to do so. In the event you would be interested in his appearing, I would be happy to assist you in making the necessary arrangements.

Mr. Hal Tobey of the State Attorney's office is not in Anchorage today but upon his return I will discuss with him the questions concerning the Billiken film.

I hope this will be of some assistance to you.

Sincerely,

Mel J. Personett, Commissioner
Department of Public Safety

by M. E. Dankworth

Major M. E. Dankworth
Region Commander
Alaska State Troopers

MED:cs
Enclosure

THE ORIGINAL FILE CONTAINS EXAMPLES OF PORNOGRAPHIC MATERIAL.

REFER TO STATE ARCHIVES.

AK BANK CODE

Introduced: 2/9/70
Referred: Commerce and Judiciary

IN THE HOUSE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

HOUSE BILL NO. 643

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act amending the Alaska Banking Code."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 06.05.005(3) is amended to read:

(3) authorize a state bank [UNTIL THE CLOSE OF THE NEXT REGULAR SESSION OF THE LEGISLATURE]

(A) to participate in a public agency created under the laws of this state or of the United States, for the purpose of affording advantages or safeguards to banks or to depositors and to comply with all requirements and conditions imposed upon such participants;

(B) to engage in any banking activity in which a bank subject to the jurisdiction of the federal government may be authorized by federal legislation to engage;

* Sec. 2. AS 06.05.015 is amended by adding a new subsection to read:

(11) charge off all debts owed to the bank in which interest due has been unpaid for a period of six months unless the debt principal is adequately secured and the bank is in process of collection.

* Sec. 3. AS 06.05.025 is amended to read:

AS 06.05.025. BANK EXAMINATIONS. (a) The department shall select <u>one or more competent persons</u> [A COMPETENT PERSON] to make a detailed examination of banks. <u>A report</u> [THE RESULT] of <u>each</u> [HIS] examination and findings shall be transmitted to the department. A copy of the report of examination shall be sent to the organization examined.

FORM SA-1B

MEMORANDUM State of Alaska

TO: The Honorable Barry Jackson
Chairman, House Judiciary Committee
State Legislature
Juneau, Alaska

DATE : April 9, 1970

FROM: John K. Robertson, Director
Division of Banking, Securities,
Small Loans & Corporations

SUBJECT: H.B. 643
Amendments to the Alaska Banking Code

The following are brief summaries of each section of H.B. 643:

Sec. 1. AS.06.05.005 is amended by deleting certain language as it was originally adopted from the model banking code. This section is known as the "wild-card" statute and its purpose is to ensure a competitive balance between state and national banks. However, as it now stands, it is not as useful as it might be since it requires that any banking powers authorized by the department to maintain the competitive balance must be acted upon by the legislature by the close of the next session. It is suggested that time limit represented in "until the close of the next regular session of the legislature" be deleted. Of the six states having this type of statute, three have no time limit.

Sec. 2. AS.06.05.015 is amended by adding a new subsection defining bad debts. As we broaden the powers of state chartered banks, we must also concern ourselves with asset quality. Most other state banking codes, as well as the national banking law, contain statutory bad debt provisions.

Sec. 3. AS.06.05.025 is amended to clearly authorize the employment of an examination team and conduct whatever examinations are required in the discretion of the commissioner, including followup examinations for mergers or branch banks.

Sec. 4. AS.06.05.035 is amended to enable the department to charge and collect adequate examination and investigation fees.

Under the existing examination statutes (Sections .025 through .035), every examination or investigation performed results in a substantial loss to the department. Due to the increased examination responsibilities, and activities of the department, as well as the increasing number of new bank and branch applications, we feel that it is businesslike and appropriate to collect sufficient fees to offset the costs incurred.

Sec. 5. A new section covering leasehold and development loans is proposed. This section would permit banks to make loans, within certain limits, secured by first lien leaseholds. A leasehold loan is a type of real estate loan in which the borrower (lessee) is the holder, or owner of a leasehold estate, which is of sufficient qualility to warrant a lender accepting it as security for a loan. In other words, the borrower holds a long term lease, which together with the improvements provide security to the lender. Leasehold

loans normally apply to hotels, office buildings, warehouses, service stations, apartment houses, and other similar commercial development. This method of lending is now being used extensively throughout the nation and should be made available to our state chartered banks.

Sec. 6. AS.06.05.207 is rewritten to allow a bank to make second mortgage real estate loans. This will permit our banks to serve customers who have a substantial equity in real property and avoid a rewrite of the first mortgage loan. Due to the loan/value ratios and amortization rates established, we believe that the concept is sound and also believe that it will provide a definite advantage over national banks.

This section is rather lengthy due to rearranging existing language for clarification, however, nothing was deleted or added except the provision covering second mortgages.

Sec. 7. A new section is proposed, allowing state chartered banks to make loans secured by forest tracts. We believe this is particularly important to banks and their customers located in areas where there is a significant and economically marketable timber resource. National banks may make such loans and the more modern state banking codes contain such a provision.

Sec. 8. A new section permitting banks to invest in a bank service corporation is proposed. A bank service corporation normally provides computerized bookkeeping and record keeping services to other banks, businesses, and the public. Such an investment is subject to examination and regulations by the department. Bank service corporations are quite common throughout the nation.

Sec. 9. The new section proposed would permit banks to acquire and lease at the request of the customer, both real and personal property. This enables the bank to offer broader services to its customers, relieving them of capital investment and providing tax advantages. The bank's investment in real and personal property under lease arrangements combined with other investments under Sec.230 is limited to an amount not to exceed the shareholder's equity. National banks may engage in leasing and the more modern state banking codes contain such a provision.

Sec. 10. It is proposed that AS.06.05.235 be rewritten to provide clarification and a broader definition for domestic bank holding companies. The definition (AS.06.05.540(9)) as it now reads is very confusing and limits corporate ownership of bank stock to the controlling interest in one bank. We believe this is too restrictive and should be changed.

The proposed new section would require a company to register as a domestic bank holding company, if it owns 10% or more of an Alaska bank or banks. The term "company" includes a corporation, business trust, partnership, association, or other similar organizations. The language used in the proposed new section is sufficiently broad to recognize a registered bank holding company (Bank Holding Company Act of 1956, controlling two or more banks), provided there is compliance with the domestic qualifications under this section. We believe this type of organization is desirable if not vital to the smaller banks in this state for purposes of remaining competitive with the larger banks.

Sec. 11. This is a proposed new section covering various banking practices,

including issuing letters of credit, trade acceptances, banker's acceptances, and the sale of data processing services.

Due to the increasing involvement of Alaska in foreign trade and frequency of large commercial transactions between banks and their customers in this state, our own state banks should have such authorized capability.

Authorizing the sale of data processing services should not be confused with the proposed bank service corporation legislation. This section permits the bank to offer the same services, but does not involve an investment in a separate corporate subsidiary.

Sec. 12. AS.06.05.345(a) is amended to reduce the par value of the capital stock from $10 to $1. We believe reducing the par value to $1 will allow a broader distribution of the capital stock, thus encouraging wider ownership of Alaska financial institutions.

Sec. 13. It is proposed that AS.06.05.365 be amended to provide that applications for new bank charters be accompanied by an application fee of $1,000. This is to ensure that new charters receive adequate feasibility study and investigation. In this connection, please refer to Sec. 3 and Sec. 4 of this memo.

Sec. 14. The amendment contained in this section is proposed in order to provide the department with adequate information in regard to bank conversions, mergers, and consolidations.

Sec. 15. This section repeals the existing domestic bank holding company definition. Please refer to Sec. 10 of this memo.

HOUSE JOURNAL

Judiciary Committee Report

on

CS for HOUSE BILL NO. 643

The Judiciary Committee recommends passage of this bill in order to improve the competitive balance between state and national banks and to allow state chartered banks to make loans and extend services to customers not authorized at the present time.

The bill authorizes banks to make second mortgage real estate loans, loans secured by forest tracts, loans secured by a first lien on a leasehold of improved real estate, and land development loans. In recognition of Alaska's increasing involvement in foreign trade, banks are authorized to issue and confirm letters of credit and invest in trade and bank acceptances. The bill allows banks to invest in a bank service corporation, which normally provides computerized bookeeping and record keeping services to bank customers,and,when national banks are engaged in the same activity, to acquire and lease real and personal property to customers.

The provision of these additional services are subject to limitations designed to maintain asset quality, safeguard the interest of depositors, and prevent undue competition with other commercial enterprises. A new section defining bad debts further enhances asset quality.

Another section of the bill amends the Alaska Mutual Savings Bank Act to allow a savings bank to pay interest at a stated rate and issue certificates of deposit.

Barry W. Jackson
Chairman
House Judiciary Committee

DRAFT

4/29/70

JUDICIARY COMMITTEE REPORT ON C.S. FOR H.B. 643

The Judiciary Committee recommends passage of this bill in order to improve the competitive balance between state and national banks and to ~~encourage~~ allow state chartered banks to make loans and extend ~~expand~~ services to customers.

~~The purpose of the bill is to amend the banking code so as to permit state banks to make loans and offer other services~~ not authorized at the present time.

The bill ~~incorporates a number of amendments which would broaden the range of services a bank may offer to its customers. It would~~ authorizes banks to make second mortgage real estate loans, loans secured by forest tracts, loans secured by a first lien on a leasehold of improved real estate, and land development loans. In recognition of Alaska's increasing involvement in foreign trade, banks ~~would be~~ are authorized to issue and confirm letters of credit and invest in trade and bank acceptances. The bill ~~would~~ allows banks to invest in a bank service corporation, which normally provides computerized bookkeeping and record keeping services to bank customers and to acquire and lease real and personal property when national banks are engaged in the same activity to customers.

The provision of these additional services ~~would be~~ are subject to limitations designed to maintain asset quality, ~~and~~ safeguard the interest of depositors, and prevent undue competition with other commercial enterprises. A new section defining bad debts ~~would~~ further enhances asset quality.

Another section of the bill ~~would~~ amends the Alaska Mutual Savings Bank Act to allow ~~clarifying that~~ a savings bank ~~may~~ to pay interest at a stated rate and issue certificates of deposit.

JKR/bb

FORM SA-2
1000M 8-65

STATE OF ALASKA
Inter-Department Route Slip

TO:
DEPT.: Masonic Temple

ATTN.: Merle Masone

☐ Approval	☐ Note & Return
☐ Signature	☐ Initial & Return
☐ Comment	☐ Return As Requested
☐ Contact Me	☐ Return For Approval
☐ Prepare Reply	☐ Necessary Action
☐ For Your File	☐ Your Information

Remarks:

From:
Dept.: Commerce **Date** 1-24

By: John K. Rodeston

FORM SA-18

File
HB 643

MEMORANDUM

State of Alaska
DEPARTMENT OF COMMERCE

TO: Honorable Barry W. Jackson
House of Representatives
Capitol Building

DATE : April 24, 1970

FROM: John K. Robertson
Director
Division of Banking, Securities,
Small Loans and Corporations
Department of Commerce

SUBJECT: Leasing and Other Bank Services

Attached is information in regard to leasing and other bank services. Included in the information is a comparison of leasing rates quoted by major banks across the country to their commercial loan rates.

If you need additional copies of any of this information, we will be glad to provide it.

Attachment

Bank	Leasing Rate	Commercial Loan Rate
Chase Manhattan Bank New York	10-15%	8-1/2-11%
U. S. National Bank of Oregon Portland	9%	8-1/2-10%
Bank of America San Francisco	10-1/2-13%	8-1/2-12-3/4%
Seattle First National Bank Seattle	10-1/2-14%	8-1/2-12%

Rates quoted January, 1970.

Chapter 29

LEASE FINANCING

*By KEITH G. CONE**

The word "lease" has been used to define the terms and conditions under which the owner of either real or personal property (called the "lessor") makes such property available for use by another (called the "lessee"). The lessor often has to find financing for the property which is the subject of the lease. Consequently, the position of a bank in the community makes it susceptible to requests to finance the purchase of such property. In view of the fact that the financing of personal property for lease purposes is much more common than requests to finance real property, this chapter will be devoted to the discussion of personal property financing only.

BANK ENTRY INTO THE FIELD

Financing of a purchase of personal property for leasing purposes was not generally done by banks prior to World War II. As a matter of fact, it was not until immediately after World War II that the first general indications that banks might become interested in such financing occurred. A small number of banks became interested in financing motor vehicles for leasing companies. However, as the leasing of automobiles grew in importance and volume, it appeared that there was also a tremendous market for leasing of all other types of equipment. It is possible to lease anything from the heaviest piece of equipment to the smallest. As a matter of fact, in the daily rental area, as contrasted to the term-leasing area, dishes, tablecloths, linens, and such are made available. However, this chapter will discuss only the financing of equipment for a specified term of months or years and will not be concerned with the financing of personal property used on a daily, weekly, or month-to-month rental basis.

Banks developed interest in lease financing slowly. It was not until the latter part of the 1950s that any appreciable number of banks entered into

* Senior Vice President, LaSalle National Bank, Chicago, Illinois.

the lease financing business as an aggressive part of development of instalment business. The banks' interest in leasing was increased as a result of the amendment of Regulation Q which made available much larger amounts of loanable funds than heretofore had been the case. Then, too, when the Comptroller of the Currency ruled, in March of 1963, that national banks could become lessors, it added another dimension to the business of lease financing.

A bank may become interested in lease financing in any one or more of several different ways. (1) A manufacturer, whether or not a customer of the bank, may request that the bank develop a plan to finance equipment which the manufacturer, as the lessor, leases to its customers. (2) The lessee, a customer of the bank, seeking to obtain a more favorable lease rate, may ask that the bank finance his lessor's purchase of the equipment. (3) A leasing company may ask the bank to develop a plan which it may use in developing its leasing business. (4) A customer of a national bank and in some states a state bank may request the bank to purchase equipment and lease it to the customer as a direct lessor transaction. The first three ways are clearly within the area of direct financing of the equipment for the use of the lessee, while (4) is in the nature of a service which makes equipment available to the lessee without the intervention of a third party as lessor. When a bank becomes the owner-lessor, it becomes subject to all the laws relating to ownership and leasing in the various states in which the property is used. Depreciation taken on the equipment, as well as the impact of tax credits given or taken, will have an important effect on the earnings of the bank. It is essential that expert advice be sought and followed by any bank desiring to direct-lease on a major scale.

TYPES OF LEASES

Maintenance or Service Leases

Inasmuch as the lease document is the basic instrument used to outline the terms, this chapter will briefly define the three basic types of leases. A maintenance lease is sometimes called a service lease and is used in all forms of leasing, although automobile leasing companies employ the maintenance lease more than do other types of equipment lessors. The lessor agrees to lease the described equipment to the lessee and, in addition, the lessor undertakes to provide certain described types of maintenance over the period of the lease. Such maintenance is determined through negotiation. In the case of automobiles, it usually requires the lessor to provide maintenance for mechanical problems, tires, battery replacements, and the like. Under this type of lease the lessee's responsibility is usually limited to paying the required rental each month for the term of the lease and

providing the gasoline and oil necessary in the case of an automobile in order to keep it running and to return the equipment to the lessor at the end of the period in the lease in good condition, reasonable wear and tear excepted. Under this type of arrangement the lessor bears the responsibility for absorbing ordinary depreciation and is also subject to the fluctuations that may take place in the market value of the equipment at the time it is surrendered. Of importance to a bank is the fact that usually the amount allocated to the bank from rentals will not be of sufficient amount to retire the amount advanced. Therefore, the bank must look to the lessor for amounts outstanding at the conclusion of the lease.

Finance Leases

Another type of lease is known as a finance lease, although in various parts of the country other designations are used. Finance lease is a descriptive term for the instrument that is drawn up to make it the obligation of the lessee to pay the entire amount of the advance by the bank to the leasing company to finance this equipment. The lease then can be used as the basis for obtaining credit by the lessor because of the obligation of the lessee. Such a lease requires the lessee to make rental payments under the terms of the lease to an assignee of the lessor free from any defenses which the lessee might have against the lessor. There is also a provision comparable to a deficiency clause in a chattel mortgage or conditional sale contract. While the obligation of the lessee is not as unqualified as that of the maker of a note or mortgagor under a chattel mortgage, nevertheless, the effect is practically the same. In this type of lease the lessor assumes only the responsibility of providing the equipment for use by the lessee and for disposing of the equipment at the conclusion of the lease, subject, however, to certain taxes, such as the income tax, which are the responsibility of the lessor; other taxes are usually the responsibility of the lessee. The bank under this type of lease has the obligation of the lessee to pay the total amount it has advanced to the lessor as contrasted to the obligation of the lessee under a maintenance lease. This type of lease is responsible for the great growth of both automobile fleet leasing and equipment leasing to corporations.

Net Lease

A net lease is a variation of either the maintenance lease or the finance lease and is most often used in the motor vehicle type of finance lease. It usually establishes a term of sufficient duration to permit the retirement of the total advance made by the financing institution, although it may not always do so. The main thing is that no maintenance is required, whether or not the lease generates enough in lease payments to pay out the advance made by thhe financial institution.

GENERAL CREDIT ASPECTS

Leasing is an attractive type of financing for banks. It offers banks another means for financing the needs of its customers in the community. However, it does not in any way permit deviation from the fundamental principles of credit upon which a bank predicates its loan policies. There has been a tendency to ascribe some type of magic to leasing. There is none. It must be approached and analyzed exactly in the same way as any other type of credit. The difference is in the application of the credit, in the documentation, and in the rights of the respective parties. Documents are of considerable importance. No bank should enter into lease financing without careful consideration and the opinion of competent counsel. Mention has been made concerning the use of the finance lease particularly in obtaining credit for use in the purchase of equipment. To a considerable degree, the same is present in other types of leasing such as the maintenance lease.

The bank in approaching the problem of credit granting must analyze the credit of the lessor as well as the credit of the lessee, even though the credit of the lessee may be of sufficient proportions to support the entire amount of the credit. The fact that the credit of the lessee is sufficient relates only to the possibility of obtaining repayment of the funds advanced. In the event that there is a problem on the part of the leasing company with its creditors, or the lessor does not have sufficient know-how, or has problems with the Internal Revenue Service, the lender faces a very real danger that his rights may be precluded because the leasing company did not protect itself and in the process protect the lender. Legal counsel should be consulted on this important question. In the event that the maintenance type of lease is used, there is an even greater reason why the credit of the lessor is important. Usually, in such types of leasing, the amount recovered under the terms of the lease is not sufficient to pay off the entire amount advanced. Consequently, the lender may be in the position of looking primarily at the sale of the equipment in order to pay off the remaining balance, a position it will not like, since it is axiomatic in banks that the collateral should not be the source from which repayment is obtained. The bank does not want to be in a position of having to look primarily to the market value of the property at the end of the lease for recovery of the remaining balance. The ability of the lessor to come up with any amounts needed to repay the advance is most important to the bank. Credit of the lessee is also important, but not to the same degree as in a finance lease. It is important to both the lessor and the bank which depend upon the credit of the lessee to fulfill the payment terms of the lease. Consequently, in appraising credit, the bank must have credit passers who are skilled in

analyzing the credits of both the lessor and the lessee and applying the results of that analysis to the type of lease involved.

This chapter has already discussed some of the aspects of a finance lease and its usage. It might be well to go into more detail since this instrument has become of such importance in the lease financing world. It originally was developed to enable a leasing company that had only nominal capital and could not support with its own statement the amounts needed to acquire equipment desired by the lessee; since the original need for such equipment appeared to be in the area of the larger corporations, the finance lease was an effective instrument for obtaining credit in far greater sums for the lessor than would have been the case under any other type of financing. There have been many developments in the instruments over a period of years, but basically it is still a fundamental requirement that the documents be of such nature as to, in effect, be an unqualified promise of the lessee to pay the sums required under the lease, free from any defenses against the lessor. Maturities in this type of lease range all the way from 3 to 15 or 20 years depending upon the nature of the equipment leased.

ASSESSING THE MARKET

Ordinarily the leasing company rate is determined by the credit of the lessee, to which the leasing company adds its fee for servicing its requirements under the lease. There has been a considerable decrease in the rental rates charged companies because of the fact that interest rates available to leasing companies have steadily decreased. Over the past few years lessees have succeeded in establishing rates in connection with leasing of the equipment which are based on short- and long-term borrowing rates available to the lessee. This aspect of the present rate situation should be carefully analyzed to determine whether the rate and conditions are of such nature as to adequately compensate the lender for the risk and expense. A lease instrument is not a term loan document. As a result the lessor, and the bank as assignee in particular, do not have the same control and protection. Generally speaking, such type leasing should be available only to the better credits. Originally the finance lease was used primarily for large fleets of items of equipment. However, there is a large market for lease financing for smaller items and smaller but good companies as lessees. It is possible to obtain better rates primarily on an add-on basis of $4.00 to $7.00 per $100 per annum.

Maintenance leasing appeals to lessees who do not want to have the responsibility for maintaining the equipment in good repair. Their theory is that the lessor is in a better position to provide maintenance than is the lessee. This is particularly true in the case of accounting equipment of

which International Business Machines is the outstanding example. It leases its equipment through what is termed an operating lease. It agrees that in addition to making the equipment available it will also maintain it in good working order. The same principle applies to the lease of other types of equipment, particularly automotive equipment.

Leasing early became a favorite method of trucking companies for acquiring the use of equipment—for a local operation or in over-the-road operations. The maintenance leasing of automotive equipment, insofar as individuals were concerned, was used primarily by professional men who used the vehicles in their businesses and consequently felt that it was to their advantage to be able to exchange the vehicle from time to time and have it maintained in proper working order in the interim. In recent years, however, more and more individuals have turned to leasing rather than a conventional purchase.

It is important for a lender to determine whether a leasing company it finances has any great proportion in leases to individuals. The lender needs to understand that under a lease, the lessee does not have the same obligation to pay with respect to the amount advanced by the bank as that same individual would have under a conditional sales contract assigned to the bank.

We have already pointed out that the major characteristics of a maintenance lease are the requirements that the lessor provide the vehicle and provide the maintenance agreed upon in the lease. The obligation of the lessee is to make the payments in accordance with the terms of the lease and to surrender the car at the conclusion of the lease in good condition, reasonable wear and tear expected. So it may be seen that maintenance leasing is available and is used by both companies and individuals, professional and otherwise.

In the case of automotive leasing of passenger cars, the lease usually runs 24 months but, in some instances, it may be set up on a 36-month basis. Automotive equipment other than passenger cars often has a longer maturity, five years being the most common, but in some of the larger units seven years may be used as the lease term.

Ordinarily the bank advances to the lessor the cost of the equipment. Repayment quite often is calculated on the basis of a percent per month of the amount advanced during the term in which the lease is in effect. In some areas, it is 3 percent per month, in others it has been decreased to lesser amounts such as 2½ percent per month. It is recommended that in determining the repayment requirement, the bank pay considerable attention to the type of automotive equipment involved, its resale value, and the usages to which it will be put.

Rates vary in this type of leasing, quite often determined by the financial stability and position of the lessor rather than that of the lessee. Generally speaking, rates range from a 6 percent simple interest rate to add-on

rates of $6.00 per $100 per annum. Needless to say, the lower rates are commanded by the better companies particularly where large numbers of vehicles are involved.

Lease financing is generated through a number of different sources. Primarily, however, lease financing is generated through the leasing companies which apply to the bank for credit to finance their leasing activities, no matter what their nature may be. On the other hand, manufacturers are often a source of leasing business since they need a leasing plan and need it financed for the purpose of gaining wider distribution of the products they manufacture. Other sources are customers of the bank who come to the bank directly and ask that a lease be arranged for equipment which that customer wishes to lease. In other words, it seems that the sources of business are about the same as we might find in any other type of equipment sale and distribution.

INSURING COLLECTION

The fact that the credit of the lessee as well as that of the lessor is most important has already been mentioned in this chapter. It might be well to repeat that there is no magic in leasing, that basic credit principles must be applied in any application for credit. The same exhaustive investigation and appraisal must be made in lease financing that is made in any other type of financing. Collection policies and practices must be tailored to the type of lease, the amount advanced, the quality of the lessee, and the obligation of the lessor.

It is suggested that the bank in setting up a collection procedure use the techniques which have been successfully applied to instalment credit collection with whatever allowances need to be made in the way of number of notices, letters, and telephone calls, as the circumstances require. It must be borne in mind that in the instance of corporations, collection procedures should be established which recognize that the problems of collecting from corporations are different than the problems of collecting from individuals.

It is imperative that auditing procedures be established in the same manner required in any instalment financing. Safeguards against double financing are in order in this type of financing as well as in other instalment financing. Verification procedures should be established through which may be determined from time to time whether the collateral that is on hand is in fact what it purports to be. It may be well to summarize this aspect by a few do's and don'ts:

1. It is essential that the bank have a complete and protective document approved by bank counsel.
2. In the case of a maintenance leasing company especially, it is essential that the company have a net worth that will support any exposure due to the

bank's advance being greater than the required repayment during the period in which the lease is in effect.

3. It is also imperative that the bank ascertain the ability and experience of the lessor, whether it be in maintenance leasing or finance leasing.

4. Be sure that the lessor knows how to figure his costs and expenses and to translate them into a profitable rate.

5. Review from time to time the progress that the lessor is making in his business.

6. Review his rates and costs from time to time also.

7. Make a thorough investigation of the lessee, both financially and performancewise.

8. It is safer to require the lessee to remit the lease payments directly to the bank, thus maintaining a better control of money.

9. Know your bank's costs in order to set a profitable rate for yourself.

10. Don't permit your competitor to dictate your bank's policies whether it be in rate, terms, advances, or otherwise.

11. Don't forget that the basic obligation of a lessee is not the same as the obligation of the maker of a note or the mortgagor on a chattel mortgage.

12. Don't permit the lessor to dictate your policies; control him, don't let him control you.

13. Finally, don't succumb to the feeling that there is magic in leasing and relax your basic credit requirements.

CONCLUSION

It would appear that leasing has had its greatest period of development in the last five years. On the other hand, there is every indication that it will continue to grow and that it will continue to find acceptance among the users of equipment of all kinds. It would therefore appear that there is room in the future for more participation by banks in the field of leasing, remembering that it is merely another method of financing the needs of the people of the community in which the bank does business.

FORM SA-1B

File

MEMORANDUM State of Alaska

TO: The Honorable Barry Jackson
Chairman, House Judiciary Committee
Alaska State Capital Building

DATE : April 30, 1970

FROM: John K. Robertson, Director
Division of Banking, Securities,
Small Loans & Corporations

SUBJECT: Committee Substitute for H.B. 643

The purpose of this bill is to improve the competitive balance between state and national banks and encourage state chartered banks to expand services to customers. The bill amends the Alaska Banking Code so as to permit state banks to make loans and offer other services not authorized at the present time.

The following are brief summaries of each section of Committee Substitute for H.B. 643:

Sec. 1. AS.06.05.005 is amended by deleting certain language as it was originally adopted from the Model Banking Code. This section is known as the "wild-card" statute and its purpose is to ensure a competitive balance between state and national banks. However, as it now stands, it is not as useful as it might be since it requires that any banking powers authorized by the Department to maintain the competitive balance must be acted upon by the legislature by the close of the next session. It is suggested that the time limit represented in "until the close of the next regular session of the legislature" be deleted. Of the six states having this type of statute, three have no time limit.

Sec. 2. At the present time, the banking code fails to define bad debts and AS.06.05.015 would be amended by including a provision that loans which have run six months beyond their due date without principal or interest payment are considered bad debts. Loans adequately secured and those in process of collection are excluded.

Sec. 3. AS.06.05.035 is amended to enable the Department to charge and collect examination fees, sufficient to cover the cost incurred in conducting the examination. In order to cover the costs of the examiner's salary, per diem, and travel, the rate was established at $125 per day, per examiner. It is not the intention of the Department to duplicate FDIC examinations, but simply participate as a member of their examination team. We will, of course, conduct our own independent examinations of the non-insured banks and finance companies. (National banks are assessed semi-annually for examinations at the rate of $100 plus $40 per million of total assets. State insured banks are not charged examination fees by FDIC since these banks already pay a fee for deposit insurance.) This section provides for a maximum annual examination fee of $3,750 or two examiners for fifteen days.

Sec. 5. A new section covering leasehold and development loans is proposed. This section would permit banks to make loans secured by first lien leaseholds and within the limits prescribed for real estate loans in Sec. 207 of the banking code. A leasehold loan is a type of real estate loan in which the borrower (lessee) is the holder, or owner of a leasehold estate, which is of sufficient quality to warrant a lender accepting it as security for a loan. In other words, the borrower holds a long term lease which together with the improvements provides security to the lender. Leasehold loans normally apply to hotels, office buildings, warehouses, service stations, apartment houses, and other similar commercial development. This method of lending is now used extensively throughout the nation and should be made available to our state chartered banks. (See attached example of typical leasehold loans). National banks are permitted to make leasehold loans and the more modern state banking codes contain such a provision.

Also, included in this section is a provision allowing banks to make land development loans. In other words, a bank may make a loan on undeveloped real property, provided the proceeds of the loan are used to provide improvements, i.e., streets, water, sewer, fill, bulkheads, pilings, etc. The loans are made subject to the provisions of Sec. 207 in the banking code applying to other real estate loans. (Loan/Deposit ratio and amortization rate). The purpose of this provision is to encourage banks to become involved in developmental lending on industrial, commercial, and housing subdivisions. (National banks are permitted to make land development loans and the more modern state banking codes contain such a provision).

Sec. 6. This section appears rather lengthy due to the rearranging of existing language of Sec. 207 for clarification. However, nothing has been deleted or added except a provision covering second mortgages. AS.06.05.207 (Real Estate Loans) would be amended to permit our banks to serve customers who have a substantial equity in real property and avoid a rewrite of the first mortgage loan. The second mortgage loans are subject to the same loan/value ratio and amortization rates as prescribed for first mortgage loans. Due to the limitations established, we believe the concept is sound and will provide our state banks with a very useful tool in serving their customers.

Sec. 7. A new section is proposed, allowing state banks to make loans secured by forest tracts. We believe this is particularly important to banks and their customers located in areas where there is a significant and economically marketable timber resource. The total aggregate dollar amount of all such loans made by a bank may not exceed 50% of the bank's combined capital, surplus and undivided profits. National banks may make forest tract loans and the more modern state banking codes contain such a provision.

Sec. 8. A new section permitting a bank to join with one or more banks in a bank service corporation is proposed. The purpose of a bank service corporation is to provide banks with a joint method of acquiring larger computer equipment, capable of more sophisticated applications. A bank service corporation normally provides automated bookkeeping and record keeping services (payroll accounting, accounts receivable accounting, inventory records and etc.) to the bank's customers and to other banks. A bank's investment in a bank service corporation is limited to 10% of its total capital and surplus and to-

gether with its total investment in banking premises, furniture and fixtures, and investment under proposed Sec. 232 may not exceed the combined capital surplus and undivided profits. In other words, it is only stockholders equity invested in the bank service corporation. The bank service corporation would be subject to examination and regulation by the Department. Bank service corporations are quite common throughout the nation.

Sec. 9. A new section is proposed which would permit banks to acquire and lease at the request of the customer, both the real and personal property. This enables the bank to offer broader services to its customers, relieving them of capital investment and providing tax advantages. The bank's investment in real and personal property under lease arrangements, combined with other investments under Sec. 230 (Banking Premises and Equipment) and proposed Sec. 231 (Bank Service Corporations), is limited to an amount not to exceed the total capital, surplus and undivided profits of the bank. (In other words, the shareholders equity). Leasing agreements would also be subject to a bank's legal lending limit to one customer (15% of total capital, surplus and undivided profits, AS.06.05.205), i.e., a customer's lease agreement with the bank would be combined with his outstanding loans in order to determine the bank's legal lending limit to that customer.

National banks may engage in leasing and the more modern state banking codes contain such a provision. National bank leasing regulations and those of many other states are not as restrictive as the statute proposed here. In order to provide some idea of the volume of leasing now handled by banks, the Comptroller of The Currency has just reported that national banks alone are handling approximately $700 million in direct leases. This section contains a special provision prohibiting state banks from engaging in this activity until a national bank in the state has actually done so.

Sec. 10. Sec. 06.05.275 is a proposed new section covering various banking practices, including issuing letters of credit, investing in trade acceptances, issuing and investing in banker's acceptances, and the sale of data processing services.

Due to the increasing involvement of Alaska in foreign trade and the frequency of large commercial transactions between banks and their customers in this state, our own state banks should have such authorized capability.

Authorizing a bank to engage in the sale of computer time and the sale of data processing services, involving its own equipment, should not be confused with the proposed bank service corporation legislation (Sec. 231). This section permits a bank to offer the same service but does not involve an investment in a separate corporate subsidiary. This is an authorized activity for national banks and is a common practice by national banks in this state and by both state and national banks in other areas.

Sec. 11. AS.06.05.345 (a) is amended to reduce the par value of the capital stock from $10 to $1. It is believed reducing the par value to $1 will allow a broader distribution of the capital stock, thus, encouraging wider ownership of Alaska financial institutions.

Sec. 12. It is proposed that AS.06.05.365 be amended to provide that

applications for new bank charters be accompanied by an application fee of $1,000. This is to ensure that new charters receive adequate feasibility study and investigation. It is imperative that new applications for financial institutions receive careful attention in order to prevent weak and unqualified entries into the financial system, and to determine that the needs and convenience of the public are actually served.

Sec. 13. AS.06.05.462 would be amended in order to provide the Department with adequate information in regard to bank conversions, mergers, consolidations, as well as provide standards by which these may be approved or disapproved.

Sec. 14. AS.06.15.220 of the Alaska Mutual Savings Bank Act is amended to clarify that a savings bank may pay interest at a stated rate and issue certificates of deposit. A careful reading of the Mutual Savings Bank Act, particularly Sec. 220, subsections (a) and (b), will reveal the confusion which exists in regard to the payment of interest and the issue of certificates of deposit. The current statute places our savings banks in an awkward position resulting in a competitive disadvantage in comparison with commercial banks and S&L associations.

In lending on a leasehold, a lender normally is lending on the value of the buildings subjectto the ground rent that belongs to the lessor or fee owner. A simple case in fact would be as follows:

"A" railroad owns a parcel of land and leases it to "B" for 20 years with probably two ten-year options of renewal by "B". In turn,"B" wants to build a warehouse costing $400,000. "B" goes to his bank and requests a 75% loan, 15 years, in the amount of $300,000, and agrees to pledge his leasehold interest in the land subject to the ground lease to "A". "B" may be a user for the warehouse or he may in turn lease it to a credited tenant called "C". In either event

the test of this type of loan depends on the following:

(1) The term of the ground lease to "A" from "B" must be for a longer term than that requested for the mortgage - preferably by five years.

(2) The ground lease must be firm and not cancellable except for non-payment of rent.

(3) The ground lease should be a triple net lease with lessee paying all expenses including taxes.

(4) The mortgagee should get consent in writing from the fee owner, "A" stating that in the event "B" should default on the lease, the mortgagee be given notice to cure such default prior to commencement of foreclosure.

(5) Leasehold loans normally apply to hotels, office buildings, warehouses, service stations, banks, apartment houses, and other improvements where the tenant may have a top rating such as AAA1, or the location is such that there is little doubt that the improvements will sustain an income which will support its valuation and retire the mortgage in full.

(6) In the State of California, it is quite common to make leasehold loans on residential property, however in the State of Washington it is very seldom done and of little consequence except on second home sites where the land is owned by the Indians and one may lease from them and build a house. These sites are normally waterfront tracts where the Indians are precluded from selling their land.

TYPICAL LEASEHOLD LOAN

FROM: LEASING STANDARDS AND PROCEDURES
Published by Thomas Publications, Ltd.

INTRODUCTION TO LEASING

THE HISTORICAL roots of leasing go deep in time. As long as man has had machinery, he has leased it to others. But the great expansion of leasing, its coming of age as an important industry, has taken place since World War II.

When the war ended, American industry was faced with a shortage of capital and at the same time struggled with soaring market demands. In many cases it turned to leasing as a means of conserving capital while simultaneously accumulating the equipment and facilities it needed to manufacture and distribute its products.

The boom in leasing has continued to this day, and conservation of capital continues to be a motivating factor. Other factors, however, have entered the picture within the past ten years. Conservation of labor, protection against obsolescence, tax advantages, and the very human desire to conform to a popular trend, have all become important reasons for leasing.

LEASING TODAY

Whatever the reasons may be, there is no question that leasing is on the increase. It is difficult to relate the accelerating pace of this increase to any other index or barometer of business activity. In general, this increase represents progress. There are, however, cases of companies going into leasing without real reasons, without awareness of the reasons why it may not be advantageous for them. One lessor has said, "In my years of leasing I have never been able to fully understand why a company leased or didn't lease. All I know is that once they decide they are going to lease, you can't talk them out of it; and once they have decided that they are not going to lease, the soundest arguments in the world won't convince them they should."

In this state of change, leasing stands today. The industry is booming, and the service it offers can greatly benefit a lessee. It can also be an unnecessary and expensive mistake. This manual is intended to help managers, and others in a position to consider leasing, to decide which situation fits their own organization. Should the decision be made to lease, there is information here to help them get the most for their leasing dollars.

LEASING AND LABOR COSTS

The United States Departments of Commerce and Labor recently released figures on what pay hikes would mean to the average employee's paycheck by the year 1971. Recent agreements between management and labor have pushed the national pattern of wage and "fringe" benefit in-

creases up to around 6 per cent a year. The survey shows what has happened to pay levels in major industries in the past five years, and what they would be in 1971 with a rise of 6 per cent per year. The following are the figures:

What Pay Hikes of 6 Per Cent Would Mean

	AVERAGE WAGES AND "FRINGES" (per hour)		
	1961	1966	1971
Autos	$4.04	$5.33	$7.13
Steel	$4.28	$4.94	$6.61
Oil refining	$4.99	$5.93	$7.93
Machinery	$3.36	$4.01	$5.37
Transportation equipment (except autos)	$3.71	$4.37	$5.85
Electrical equipment	$3.22	$3.69	$4.94
Printing, publishing	$3.23	$3.85	$5.15
Rubber	$3.04	$3.58	$4.79
Textiles	$1.99	$2.45	$3.28
Lumber, wood products	$2.07	$2.50	$3.35
Food products	$2.74	$3.50	$4.68

NOTE: Figures are averages for all employes, including salaried workers.

Higher wage scales for employees who help manufacture the products they in turn buy, will ultimately bring about a higher cost for the products, thereby taking a significant portion of the added buying power from the higher take-home pay.

In an industry which has responded to higher labor costs by raising product prices, a strike or lay-off or other loss of wages deprives employees of purchasing power. This is obvious. It happens frequently and the economy survives. More than just one industry is affected, however, for the industry producing one product is the consumer of many other products, and that industry's workers are consumers of another vast range of products.

Such a situation, then, is not a healthy one for the economy as a whole. Nor is it healthy for the leasing industry, which has its own labor costs and is itself a consumer of the products of industry. In one respect, however, the leasing industry is unique. It is in a position to help correct one of the major weaknesses of our capitalistic system, its "inability to control spending."

ECONOMY AND LEASING

In a most provocative article in the *Harvard Business Review*, Prof. Ferdinand F. Mauser of Wayne University discussed the role of leasing in the stabilization of the industrial economy through its potential influence on consumer and industrial spending.

"Stabilization," Prof. Mauser wrote, "involves getting at one symptom of business cycles, namely, fluctuation in the rates at which individuals, industry and government spend money. Fluctuations in spending reflect directly on production scheduling. Production must be steady, for this is the only means of assuring steady incomes for those who produce."

Prof. Mauser went on to point out that "Elimination of fluctuations in spending requires that businessmen must increasingly apply their marketing ingenuity to secure regularly committed amounts from each individual's income. The privilege of individuals doling out their incomes at any rate of speed or schedule they please will be a luxury which will have to be curtailed (not by fiat, but by persuasion) if we are to fully reap the material benefits of an automated world."

Relating leasing to this problem, Prof. Mauser's discussion is given to the change of attitude toward ownership of goods. He wrote, "In the new world of technological affluence, the principle of ownership of material possessions by individuals is fast becoming an anachronism," and "people in a busy, rapidly moving, affluent society increasingly realize that they are not interested in things per se, but rather in their use in a convenient and worry-free manner."

"If the goals of economic stability and full employment are to be achieved," Prof. Mauser continued, "marketing must be viewed as a social force. The public in general, and business leaders in particular, must better understand the place of marketing in the new society, for it is the force which will shape economic destiny by expanding and stabilizing consumption."

The situation lessors must face is a part of the larger problem of what Prof. Mauser called the "Age of Consumption." As he pointed out, "Methods for forcing consumption must be expanded and widely accepted as a permanent part of our social convention. The tempo of continuous consumption must be accelerated. Puritanical attitudes (mothered all these centuries by scarcity) that view excessive consumption as immoral must be discarded."

Changing attitudes is the challenge for the marketing profession. As attitudes change, and as consumers of all kinds move in the direction described by Prof. Mauser, the leasing industry — if it is ready — will have an opportunity unmatched in its history.

Just two or three years ago, any predictions that the American consumer would embrace leasing as a way of life would have been regarded as wildly futuristic. That was before the "credit card rush of 1967," which demonstrated that the middle class consumer was ready for bold changes in his style of living and buying.

Another trend that laid the ground work for a lease economy was the shift from goods to services. At the end of World War II, Americans spent 40% of their income for services, 60% for goods. Just ten years later, this had shifted to 50-50, and the proportion of income spent on services continues to rise.

Americans were also ignoring the precautions of their elders, who used a pay-as-you-go waste-not-want-not, policy to survive the depressions of the '30's. Between World War II and 1967, private debt doubled, rising to 1.3 trillion dollars. Americans are now in debt for 20% of every after-tax income dollar, three times the 1947 rate.

The new generation, obviously, has no doubt about its future earning power. It wants the good things of life, and it wants them now, paid for with tomorrow's dollars.

Fully half of all Americans are now under 26 years of age. A leased economy promises tomorrow's young married couples, who have an insatiable appetite for durable goods, the use of expensive household goods without the delay of accumulating down payments.

Have you gone to the apartment of a newly married young couple? They don't start out with a wedding gift cardtable and chair set to dine on. They have a beautiful "dinette suite," plus a complete line of appliances in the kitchen. Walk into their living room and you will find comfortable furniture, plus color TV. Walk into their bedroom and you will find another TV, plus beautiful bedroom furniture.

Parked outside or in the garage that comes with one of the rented apartments is a new car. The younger generation does not want to wait and save for the finer things in life, they want them now and they get them. How can they afford them? They charge everything with easy-to-obtain credit, and pay so much a month, because they want to enjoy it while they pay for it. This is really nothing but a leasing situation.

WHAT'S SO NEW ABOUT LEASING?

In recent years, leasing has found its way into many areas of the economy. In other areas, it was there all the time, under other disguises. In addition to using leased telephones, most businessmen have used nothing but leased help all their hiring lives. Except for some high priced ballplayers, employees aren't paid five or ten years' salary on their first day on the job. Instead, employers pay for their help as it is delivered, a week or two at a time. Some even go beyond this, leasing individual blocks of employee time through a part-time help agency that leases workers and then re-leases them to employers in need of temporary extra help.

Clearly, the American consumer, like American industry before him, has been gradually discarding his love affair with property ownership. Ahead lies a new, unheard-of level of convenience, the convenience of use rather than ownership.

The groundwork for a widespread consumers' switch from ownership to leasing has been done.

Leasing has acquired "class." The future "lease generation" has watched its heroes on TV as they leased a Mercedes in Switzerland and left it in Rome, leased a Riviera villa for the season, leased a hunting lodge in the Canadian wilds, or leased a full set of tableware and furniture for a society wedding.

A boardroom full of Madison Avenue advertising executives couldn't have prepared a more effective campaign to motivate the average consumer towards the acceptance of leasing as a way of obtaining today's goods with tomorrow's money.

It can easily be predicted that in the not too far distant future there is going to be a surge in consumer leasing. For a flat lease payment of, let us say, $48 a month over a five year period, our young people will receive a refrigerator, freezer, oven, range, color TV or some other comparable assortment of appliances. Their monthly payments will also include a maintenance man stopping by at regular intervals to make sure everything is in working order. At the end of the five year lease period, a truck will back up to their door and deliver the new appliances they will have arranged for, and the old appliances will be taken away. Every five years the old goes out and the new comes in. Our young married couple might even go so far as to include carpeting in the leasing package, as well as some fine furniture.

It could be projected that a good percentage of the younger generation will take advantage of some such lease arrangement, and probably quite a few of the older generation. What will this accomplish? It will accomplish what Professor Mauser said it would. The manufacturers of these appliances will be able to determine that a definite number of ovens, ranges, TV sets, freezers and so forth will be required at a particular date in the future. They can plan better than ever for wage demands, expenses, supplies, and hopefully profits.

As mentioned earlier, conservation of working capital is the prime reason why businesses, both large and small, lease. Members of the younger generation, in effect, are conserving or spreading out their "working capital," and in this way acquire more consumer goods. These same young people will soon be entering the business world and can very easily control trends and habits in acquiring equipment to run various industries.

In a recent survey of pre-college graduates, conducted by the Bank of America, young men were asked their preference as to employment after graduation. In 1963, 76% of those responding were interested in joining a large corporation for employment. In 1967, just four years later, the percentage preferring large companies went down to 55%, with an increase of 14% in preference for self-employment and 19% for partnerships.

Large businesses face the problem of limited working capital, and often can ease their financial burden through leasing. It can be assumed that the new one and two-man business enterprises favored by these young men will also turn to leasing, for working capital limitations will be just as severe for them, if not more severe, than for their larger counterparts.

We may never see the day when every businessman and every consumer will lease. However, if each of the manufacturers who serve these peoples needs could control 30% of his future production by leasing 30% of his products, it would be of tremendous help to him in charting the future.

Every industry which produces equipment used to make a profit or provide a service for another business could benefit through leasing its products. A lathe manufacturer, for example, may lease lathes to his customers on a monthly payment basis for the useful life of the equipment. His lease merchandising program may be set up by the manufacturer through his own leasing subsidiary, or by an independent lessor. At the end of the lease period, or sooner, new lathes or more efficient models would replace the currently leased lathes. As long as his product holds up and he provides good service, the manufacturer has a measure of control over his customers and his volume, giving his industry greater stability by being better able to program future production.

AUTO LEASING

In the October 23, 1967, issue of *Newsweek* magazine, appeared an advertisement for Volvo automobiles. Volvo contends that their cars will last longer. This may be true, but American consumers and especially auto fleet users are never going to buy only Volvo automobiles. The ad read, "YOU DON'T BUY A NEW CAR, THE BANK BUYS A NEW CAR, BY THE TIME YOU BUY YOUR CAR BACK FROM THE BANK IT'S OLD."

How true this is in today's automobile financing market. It is estimated that about 70 per cent of all new cars are financed in one way or another. This estimate may be low. The majority of automobiles are financed over a 24 to 36-month period. By the time the last payment comes due, or before, a new car is ordered and financing starts all over again with the hope that the traded-in car will pay off the indebtedness or unpaid balance on the old car. This type of automobile financing situation is nothing but a "leasing of money" arrangement, a definite leasing situation. True leasing is actually another way of financing.

If a portion of any manufacturer's production can be controlled, it will stabilize his future production, profits, and labor demands. The manufacturer can project what his future needs and commitments will be. Leasing of his products, such as automobiles, can help to give the manufacturer this stabilizing factor. Leasing will assure spending for replacement of the products at regular intervals, which results in repeat sales.

Does the automobile industry realize this? Major auto manufacturers are now offering to leasing companies a guaranteed trade-in value on leased automobiles. This means that the lessor, or leasing company, knows exactly what the value of an automobile will be in 18 or 24 months. If he trades it in at this prearranged time the lessor will know the exact residual value of the leased car. It would be foolhardy for him to speculate or to anticipate the unknown value of a trade-in. If he doesn't trade and "buy new" he risks losses at a later date.

This arrangement between lessors and the auto industry has taken the guesswork out of one of the most difficult problems faced by the lessors. "What to do with trade-ins and what will they be worth?" This guaranteed trade-in value of leased cars helps to stabilize the automotive leasing industry, as well as the automobile manufacturing industry itself. It will help the automobile manufacturer to project and plan for the future demands of labor and to know the model, the color, and even the cost of the automobiles he must produce. The automobile leasing industry is growing at the rate of 15 to 20 percent each year, while the number of vehicles registered in the country increases 4½ percent annually. The trend in leasing speaks for itself.

INDUSTRIAL TRENDS

Some of the factors that have made leasing more attractive to industry have originated within industry itself. These include programmed maintenance, absolescence of high priced equipment, and rapid changes in technology, that immediately require entirely new kinds of equipment.

Maintenance of industrial equipment, for example, has become a highly complex science in itself. The new technology of programmed maintenance, with periodic disassembly and inspection under the watchful eye of computers, beats old fashioned "wait until it breaks" maintenance costs by 15 to 75 percent. Such maintenance programs put the user in closer touch with the maker of the equipment, making leasing more feasible for both.

Material handling accounts for some 80% of all manufacturing cost today. As one way to cut this cost, mechanized material handling now approaches the "untouched by human hands" factory of science fiction. Computerized conveyor systems, heavy pallets floating on air cushions, and giant conveyor belts in place of interplant freight trains have successfully cut rising handling costs for

many hard pressed manufacturers. The manufacturer must first acquire the equipment. The solution . . . leasing.

TRANSPORTATION USES LEASING

The transportation industry has used many types of leasing to prosper and to insure future growth. Some methods have been established by long tradition in the industry, others are new, imaginative and even daring. Union Tank Car Company, traditionally a lessor of tank cars, has been using new, specially engineered cars to diversify its business and get away from its dependency on oil companies as clients. The leasing device has helped Union Tank Car put into service expensive, specialized units to haul chemicals, liquified gases, dry cargo, and such other non-petroleum products as cement. The company leases its equipment out on long contracts, averaging 5 to 15 years, that help insulate the company against fluctuations in the business cycle. The practice is successful. The rate of growth of Union Tank Car has held at a fairly steady 8½ percent per year for the last twenty years.

In a transaction fairly typical of aircraft financing today, a group of banks recently purchased six DC-8 jets from Douglas Aircraft Corporation, and leased them to a major airline. The airline was not in a position to deduct from taxes the full amount of the 7 percent investment credit on the cost of these planes. The banks were, and shared their tax savings with the airline. The airline thus paid only 2 percent for its money, while the banks made 5.2% on their invested funds.

Aircraft lessors are using a new concept in private aircraft leasing called "block time." The customer contracts to use a minimum amount of mileage each month, in effect leasing time and mileage rather than the traditional "seats of the aircraft." For a minimum mileage contract of 5,000 miles, the lessor guarantees that a jet will be standing by at any airport in the United States ready to take-off to any other part of the country six hours after a telephone request.

A 50 YEAR DREAM

As leasing becomes more widespread, it will have a positive effect on the economy so far reaching as to be almost revolutionary. Businessmen will recall the old days when people bought equipment rather than leasing it, and the resulting instability of production caused wildly swinging cycles of depression and widespread unemployment. Economist Mauser calls unemployment "the perpetual erosion which undermines the foundations of capitalism." Leasing has the potential to be a bulwark against that erosion.

AN OLD AMERICAN CUSTOM

Leasing as a method for acquiring the use of goods goes back to the days of ancient Rome, when ship owners leased their vessels for trade in the Mediterranean. Leasing of real estate was a common practice in England centuries ago. Until just a few years ago, however, leasing of equipment by individuals, or by businessmen in most industries, was a rarity.

An outstanding exception has been the telephone. From its beginnings in 1877, Bell Telephone Company wisely decided to retain ownership rather than allow the phone to become a consumer-owned appliance. As a result, the company has always enjoyed all of the benefits accruing to a leasing company which are just now being discovered by American industry as a whole-production pegged to future use, assured full employment for its workers, and control of its markets.

It is surprising that leasing has taken so long to catch on in this country, because it could actually be described as a good old American custom. As far back as the early 1900's leaders in some key industries were using leasing to gain marketing advantages which most of them still retain.

WHY BUY A BALL PARK?

A large leasing company once advertised "you don't have to own the ball park to enjoy the game." This principle of "use without ownership"

enables manufacturers to enjoy the benefits of the latest, most sophisticated eqiupment now, when it is needed, instead of waiting until they can afford to "buy the ball park."

It is ironic that today's typical businessman will take an arm's length look at equipment leasing, and many times not even consider it. This same businessman will lease an office, factory or warehouse. It is ironic because the equipment he buys to earn his profits will depreciate or become obsolete, yet the building that houses the purchased equipment will maintain or increase its value. It might be wise for this businessman to lease his equipment and own the building. The building is probably the better investment. Yet one out of every two businessmen buys equipment and leases buildings. Both equipment and building must be paid for somehow; why not own something that will retain its value, and lease something that won't.

BANKS JUMP IN THE WATER

Held back by rulings that kept them out of the leasing business until early 1963, national banks are now allowed to form their own leasing departments. On March 18, 1963, the Comptroller of Currency issued a directive that allowed national banks to lease equipment to customers under some conditions.

By October, 1965, direct lease financing by some of the larger national banks that had formed their own leasing companies had reached a volume of 235 million dollars. California banks, especially the Pioneering Bank of America, contributed 44 percent of this volume.

The primary reason banks enter the leasing business is profit. As banks have watched the decline in their net return per dollar of assets, leasing provided the service they could offer customers which might counteract this trend. The actual rate of return for the bank will be about the same as on regular equipment financing, but there is additional income recovered from the residual value of the leased equipment or from renewal options. Residual values can easily double the rate of return. Additional economic benefits may be realized through accelerated depreciation of the equipment, and through the investment credit if it is retained by the bank and not passed on to the lessee.

Another reason banks enter the leasing business is so that they may provide an additional service for customers. Leasing is one more way to finance equipment acquisition, and a bank feels that financing such acquisition is a service that should be kept under its own roof.

A third reason is that leasing does not count as a part of the banks legal lending limit. Most large banks have adequate limits, but for smaller banks, this fact may be an advantage in attempting to meet the needs of desirable customers.

Banks slowly entered the field of equipment financing, by means of conditional sales contracts, in the 1930's. When they became aware of profits earned by independent finance companies, banks entered this field and it is now one of their more profitable services.

MUNICIPAL LEASING

The days of pay-as-you-go are largely gone in City Hall, and many other public bodies have found themselves in the same situation. Many municipalities, indebted to their limit in long term obligations, are faced with pressing needs for more and better public facilities and equipment.

Some school boards, pioneering in a field where leasing has been slow to gain ground, have found they can get more for their money by leasing needed equipment. The needed equipment may vary from projectors, closed circuit television, food preparation appliances, and wood or metal-working machines, to typewriters or any other item necessary to carry on the daily activities of educating and serving their students. Schools find that when buying school buses, for example, they cannot purchase technical skill and help along with the equipment. If they lease the same buses, on the other hand, the lease contract covers the most highly professional maintenance available.

The lessor provides this service, which includes first-rate mechanics and maintenance facilities. Another factor is the cost that must be charged to administrative time. How much does it cost to own and administer a bus fleet? Does it involve one employee, or two, or three? At today's salary ranges, that can be $7,000, $14,000, or as much as $21,000 tied up in managing equipment, not education. This is a "cost of ownership" that may not appear on anyone's budget, but is nevertheless real.

CONCLUSION

This manual covers only a few cases, selected to show the many opportunities leasing offers to business, industry and anyone who uses equipment of any kind to render a service or produce a profit. The reasons for leasing, as one solution to equipment financing problems, are almost as numerous as the areas in which leasing is at work today solving these problems. Whatever phase of leasing the reader wishes to explore, he'll be able to chart a prudent and profitable course by following the basic principles outlined in this manual.

11

Equipment Leasing

Monroe R. Lazere

NATURE OF EQUIPMENT LEASING

Leasing is one of the oldest of legal relationships. Historically, it involved an arrangement in which an owner permitted another the right to use his property for a period of time pursuant to stipulated conditions. Familiarly, in real estate transactions it involves the granting of a right to use the realty for a period of months or years. Obviously such leases are for a substantially shorter term than the usable life of reality. However, in the case of ninety-nine year leases (or substantially equivalent terms) the realty becomes an integral part of the enterprise's operation. This discussion is limited to personal property and, even more specifically, to income-producing equipment for a business enterprise. Patently, such income-producing equipment has a usable life considerably less than that of realty. Obsolescence, depreciation, and ordinary wear and tear combine to reduce the usable life of the average piece of equipment to a limited number of years.

Indeed, this very fundamental fact gives rise to many of the unresolved problems concerning equipment leasing. The relationship between the usable life of the equipment, the dollar cost thereof, and the terms of the lease has been the major source of the debate on the legal and accounting treatment of leasing transactions.

The equipment leasing device really blossomed after World War II. In the 1950's it was in its infancy. In the 1960's the estimated annual volume of transactions was $600 million, and for the 1970's an annual volume of $7 billion appears to be a reasonable expectation

Terminology

The newness of the concept of equipment leasing has also contributed a multiplicity of overlapping terms. At the extreme ends of the leasing spectrum the terminology is clear. A business enterprise may lease trucks for the movement of its merchandise over a period of several weeks. This short-term use of relatively long-lived equipment is clearly a "pure" lease, or "true" lease, or "operating" lease. In common parlance it is frequently called a "rental." At the other end of the spectrum is the situation in which a piece of equipment with a usable life of perhaps ten years is leased by a business enterprise for five years at a rental that enables the lessor to recover the cost of the equipment plus his compensation for the use of the funds over that period. At the end of the lease period, the lessee has the option of purchasing the equipment for one dollar. Under such an arrangement, the lessee has effectively acquired the use and title to the equipment over a period of time. Such a lease appears to differ only in form and not in substance from a purchase under a purchase money security agreement (or, before the advent of the Uniform Commercial Code, a conditional sales contract). Such a lease has been described as a "finance" or "financial" lease. Between the extremes of the spectrum, of course, lies a large twilight area of transactions with many variables.

LEASES VS. INSTALLMENT PURCHASES

Understandably, the novelty of the device of equipment leasing has resulted in differences of opinion among financers regarding its proper function. To analyze leasing effectively one must recognize what it can and cannot do. Purchase money security agreements (in non-Code states, conditional sales contracts) are another means of acquiring equipment (as well as the use of the equipment) without an immediate full outlay of cash.

Several arguments favoring leasing over installment purchases appear in the literature. Since many of them almost fall of their own weight, their enumeration need not long detain us. Examples are: the formalities of leasing are less cumbersome, and leasing companies make decisions more rapidly than other lenders. The argument was also made that lessors know the equipment better than other lenders. While this last proposition may be accurate with respect to lessors specializing in particular equipment (e.g., automobiles or computers),

it surely does not apply to a leasing company handling a fuller range of equipment. Surely such a lessor would be no more familiar with the equipment than would a similarly broad-gauged installment sales financer.

Obsolete Arguments for Leasing

Other arguments favoring leasing over installment sales financing were originally valid. The validity was lost, however, as the device became more familiar. In this category of arguments was one urging that in government cost-plus contracts the entire rental would be taken as "costs" even though the equipment would be retained by the contractor by exercising a nominal option at the end of the term. Government contracting officers have now eliminated this possibility. Also, it was urged that leasing could be utilized to avoid restrictions in departmental capital budgeting. Now such budgeting usually includes restrictions on finance leases as well. And finally, leasing was urged as a method of avoiding restrictions regarding capital expenditures found in long-term debt agreements. Such agreements are now usually broadened to apply the restrictions to finance leases.

Thus some early supporting arguments have been seriously diluted, even eliminated. Newer and perhaps more persuasive justifications have developed. It may therefore be appropriate to discuss some of the more serious theoretical arguments in close relationship to their chronological development. In such a chronology, 1962 represents a key year, for then the investment tax credit provisions became law. Thenceforth the theoretical and practical justifications for leasing underwent a profound change.

Size of Down Payment

In the 1950's, however, leasing salesmen offered leasing as virtually a panacea for the company short of operating cash. They urged that the required down payment was less than in installment purchasing. Initially, this was true. The usual lessor required prepayment of one month's rental for each year of the lease term or 8½% of the total dollars involved. Under the pressure of such competition, however, the financers of equipment installment sales generally reduced their requirements from 25% to 10% of the purchase price. Hence the differential on this score became less dramatic.

Size of Monthly Payments

Further, the lower monthly payments promised by the leasing salesmen seemed illusory. Where, as was usually the case, the lessor acquired the equipment for a particular lessee, he would obviously anticipate the full recovery of the cost of the equipment plus compensation for the use of funds during the lease period. Hence the lessee's option to purchase the equipment at the end of the lease period was usually nominal because the investment then remaining in the equipment was insubstantial. After 1962, as will later appear, it became economically feasible for the lessor to schedule monthly payments that would leave a more substantial investment in the residual portion at the end of the lease term.

Tax Deductions

Another argument pressed by proponents of leasing was that the lease payments were deductible as an operating expense, thereby effecting a considerable tax savings for the lessee. It must be noted, however, that a purchaser of equipment may take depreciation and interest as tax deductible expense. Studies of comparative tables of parallel transactions (utilizing the same depreciation formula, cost of equipment, and interest charge) have been made. The conclusions thus reached clearly indicate that leasing does not increase or decrease the total tax savings. Leasing, however, does enable the lessee to distribute his tax savings more evenly over the term of the lease. The installment purchaser has higher tax savings earlier in the purchase period and lower in the later period. Further, as the lease term or purchase period increases, the annual differential on tax savings seems to become less.

Creditworthiness of Lessee

A fourth argument utilized by the advocates of leasing was that leasing obligations were not required to be reflected on the lessee's balance sheet as debt. Hence leasing equipment (as opposed to purchasing it) would not affect existing credit lines with lenders and suppliers. Such lines are, of course, predicated in part upon the amount of debt incurred by the debtor. To the prospective user or lessee, this argument had great appeal. This is explored further on page 244. While the no-debt argument was advanced by the

sales department, the credit department of the financer was usually more circumspect. In practice, no financer considered advancing the cost of a specified piece of equipment for the lessee without being reasonably certain of the capacity of that lessee to repay the advance. Or, in the alternative, the financer had to feel that the equipment itself had sufficient liquidation value so that in the event of lessee's default, the lessor could recapture his investment through a sale of the equipment.

Since the lessor expects to be repaid—as does the financer under an installment sales contract—the credit standards should be the same for both devices. This obviously contradicts the popular notion that an applicant who is too weak financially to qualify for installment sales financing can solve the problem by seeking a lease. Patently, if a prospect does not qualify for purchase money security interest financing with, for example, a 10% down payment, there is nothing in a lease that improves his credit. Conversely, if the credit factors warrant approval for lease financing, they would also qualify for installment sales contract financing. In short, in this context, leasing must be deemed just another form of equipment financing and the same credit standards should be applied. All facts about a company's financial condition should be examined—its operations and its ability to meet its obligations, including its lease obligations.

"TRUE" LEASE VS. DEBT

Effect of Filing

It has also been argued that additional recognition of a lease as debt is found in the filing by lessors of financing statements under the Uniform Commercial Code or the recording of the lease with the proper agency in non-Code states. The method of perfecting security interests in equipment is described in Chapter 7. That discussion is equally applicable to leases. Such filings make leasing transactions matters of public knowledge. By this action the lessor, it has been urged, puts future creditors on notice that such leases are debts. Hence the argument that a lease is not fixed debt became considerably weaker. Certainly this conclusion would be valid in a "finance" lease, and the filing would therefore be a vital protection to the lessor.

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a safer method than relying upon an identification plaque that can be removed from the equipment. It can therefore reduce some potential identification disputes with trustees in bankruptcy, receivers, etc. Conceivably, therefore, the lessor of a "true" lease with limited non-cancelable payments and large reversionary interest might also wish to file a financing statement. Such filing would also protect his security interest in the event that a referee in bankruptcy subsequently were to hold his agreement to constitute an installment sales contract. A filing without prejudice (i.e., with appropriate language describing the transaction as a "true" lease) would then constitute an insurance policy with nominal premium. Hence the filing per se of a financing statement does not resolve the problems of whether the lease obligations are debt and to what extent.

Legal Criteria

The legal criteria for classifying a lease run as follows: A true lease exists if the lessor's reversionary interest has a substantial economic value. On the other hand, if the exercise of a nominal monetary option enables the lessee to take title at the end of the lease term, then the lease may be considered a finance lease or quasi-purchase. Here the lessee would find it economically unsound to forego his option. In such case, the lessee has, during the lease term, virtually paid for the equipment plus the use of the funds employed in financing it.

The standards paraphrased above were set forth in many pre-Code statutes. In essence, they also represent the intent of Section 1-201(37) of the Uniform Commercial Code defining a "lease intended for security."

Obviously the determination of the facts and the development of conclusions making such standards operative will vary in each case. The relative novelty of the leasing format sometimes makes prediction of a court decision in a particular case uncertain. Because of a dearth of established authority, the decision may frequently turn on the predilections of the particular judge or referee and/or the matrix of circumstances from which the case arises. For example, if a large piece of leased equipment (with no financing statement filed therefor) lends an aura of affluence to the bankrupt, a persuasive creditor's attorney may convince the referee that the transaction is a purchase. Then the absence of a financing statement might throw the equipment into the general creditors' pot. This problem points up the advisability of filing a properly worded financing statement (without preju-

dice) covering a true lease. Lessee resistance to such a filing may develop because the possible balance sheet advantage (no debt) may then be lost.

Accounting Treatment

The problem of whether leasing obligations should be treated on the balance sheet of the lessee as fixed debt has been examined by the accounting profession.

A.I.C.P.A. Criteria. In 1964 an opinion of the Accounting Principles Board of the American Institute of Certified Public Accountants set forth guidelines for the reporting of leases in the financial statements of lessees. In doing so it made no "distinctions between leases of real property and leases of personal property." It is not clear why such distinctions were not made. It is submitted that such distinctions can be made and probably would be very useful. In any event, Opinion No. 5 recommends that where a lease arrangement is in effect a purchase, then the accounting treatment should indicate the asset and liability involved. The Opinion is expressly applicable only to non-cancelable leases (or leases cancelable upon a remote contingency) and sets forth some criteria to determine whether the lease is actually a purchase. Any one of the following criteria would indicate that a lease is a purchase:

1. The property was especially acquired by the lessor for the lessee and is probably usable only by the lessee.
2. The lease term corresponds to the probable usable life of the property; and the lessee is obligated to pay costs such as taxes, insurance, and maintenance.
3. The lessee has guaranteed the lessor's obligations with respect to the property.
4. The lessee has treated the lease as a purchase for tax purposes.

The Opinion attempts to standardize the accounting treatment and apparently seeks to set more stringent standards than formerly prevailing. It is submitted, however, that many routine leasing transactions would fall outside the criteria established. For example, a lessor purchases a lathe having a ten-year life for a particular lessee and leases it to him for five years with a nominal purchase option at the end of the lease term. Although the property was purchased for the lessee it is usable by not only the lessee but others as well. The lease term does not correspond to the usable life of the property. The lessee has not guaranteed the lessor's obligations, nor has the

lessee treated the lease as a purchase for tax purposes. Nevertheless, here the initial term is "materially" less than the useful life of the equipment. Hence, under paragraph 10 of the Opinion it should be reported as a purchase. However, if the useful life were six years and the initial term five years, a grey area obviously would develop. Further, if the total lease payments are small in relation to the lessee's net worth, accountants reasonably might differ on the proper treatment. Some accountants would feel justified in not reflecting such lease obligations on the liability side of the balance sheet.

Adequate Disclosure. To the layman some distortion of the lessee's financial position seems to result. Indeed, such a possible buildup of equipment leases, unreflected on the balance sheet, presently constitutes a major attraction for leasing deals. Where, however, the lease obligations appear to the lessee's accountant to be material (in relation to net worth, for example) he may feel compelled to footnote them. Assume now that the lessee's accountant feels compelled to report in the footnotes of the balance sheet the type of lease above described. It seems highly unlikely that the average reader of the statement would be able to absorb the full import of such information. It has seriously been questioned, therefore, whether footnoted information of this nature is properly presented, for such presentation resembles the raw materials of a financial statement, rather than a finished product. It is in this twilight area that a very real and significant, albeit intangible, advantage exists for leasing deals.

"Hell-or-High-Water" Clauses. It should be noted that most leasing agreements contain what have become popularly known as "hell-or-high-water" clauses. As indicated by the colorful description, these clauses require the lessees to make the agreed payments to the lessor notwithstanding operational difficulties encountered in the equipment. It therefore frees the lessor of any warranties relating to the equipment, for the lessee must make payments come "hell or high water." Such a lease seems to resemble very closely the installment sale contract in which the lender's security interest is free of the manufacturer's warranties. Nevertheless, as above indicated, the lease obligations may not necessarily appear as balance-sheet debt.

Lessee's Equity in Equipment. Another difficulty arises in the accounting treatment which revolves around the condition that lease obligations may be reflected as a liability, provided the lessee is developing an "equity" of some kind. Apparently this need not neces-

sarily be an ownership equity. Presumably it can be a "use" equity. Understandably, accountants are reluctant to assign a value to this "equity" because such evaluation falls into the realm of economics rather than accounting. It may be asked why the total amount of the firm commitments for lease payments could not be capitalized as a "use equity." Here, the use of the cost figure appears reasonable. Whatever the merits of this issue may be, the net result of the present treatment is an absence of a reportable asset and corresponding liability. Consider the case of a ten-year, non-cancelable lease on equipment having a ten-year life. There are no options at the end of the lease term. Assume that it otherwise falls within the conditions of Opinion 5 described above. No equity seems to be accruing to the lessee, and therefore an accountant would feel justified in omitting the reporting of the lease liabilities. On the other hand, the same equipment on a ten-year installment sales contract would result in balance-sheet debt for the purchaser. The reason for the difference in treatment seems tenuous, but the lessee apparently gains an advantage over the purchaser. This advantage, however, could mislead the lessee's creditors. It could also encourage the lessee to over-extend himself.

BANK LESSORS AND THE INVESTMENT TAX CREDIT

The year 1962 was pivotal for equipment leasing. In that year a ruling of the Comptroller of the Currency authorized national banks to purchase and lease capital assets. This, of course, encouraged national banks to enter the field and will probably also exert pressure on state banking authorities to grant similar powers to state banks. (This became an actuality for New York State in 1966.) The year 1962 brought another fundamental change to the leasing field. This was the amendment of the Internal Revenue Code to provide for the 7% investment tax credit. The tax credit could be taken by the lessor or passed on to the lessee. The accelerated depreciation (set forth in the Internal Revenue Code of 1954) could not be passed through to the lessee. The maximum of 7% (which constitutes an abatement of final tax otherwise computed) is available where the equipment has a usable life of eight years or more. It drops to 4.66% for an asset with a usable life of at least six but less than eight years and to 2.33% for an asset with a usable life of at least four but less than six years. These provisions were designed to encourage capital investment and thus stimulate the economy which was felt to be growing insufficiently at the time. The adminis-

tration's desired result was soon realized, and the impact of the provisions was dramatic. Commitments for the acquisition of capital equipment burgeoned substantially. Leasing and other devices for financing these orders all blossomed.

Low-Profit, High-Investment Industries

For the equipment leasing field, two major new concepts resulted. The first centered around industries that were not particularly profitable and therefore could not take direct tax advantage of the investment tax credit and accelerated depreciation features. Among such industries were railroads, trucking operations, and some airlines. Lessors could utilize the new tax credit and the accelerated depreciation features of the old law and then pass on the saving to the lessees in the form of interest rates, reflected in very low down-payment requirements and low leasing payments. In this area leasing held a unique advantage as compared with other financing techniques. Since the equipment involved jet aircraft, railroad cars, trucks, etc., with large dollar value per unit, the total dollar volume of such transactions mounted rapidly and substantially. Since the leasing company effects substantial tax savings by these two tax devices, it can ease the burden on the lessee and still profit handsomely on its investment.

Non-payout Lease

Another leasing development fostered by the dual tax advantages was the non-payout lease. This form of lease provides for a firm commitment by the lessee for a total amount which will not recover for the lessor the full cost of the equipment. Options to renew the lease or purchase at the then fair market value may then be available to the lessee. This method of leasing covers very select types of equipment such as jet aircraft and computers where manufacturer support is available to the lessor. This support may consist of the manufacturer's guarantee to cover any loss on the final disposition of the equipment up to an agreed percentage of original cost. The lessor's ability to utilize the accelerated depreciation for its tax purposes is here clearly established by the very non-payout structure of the arrangement. In setting up its deal, the lessor relies upon expert opinion regarding the future value of the equipment at key points of time.

Large leasing companies engaged in this activity are optimistic regarding the future outcome of their arrangements. Predictably,

the non-payout lease will flourish in the fields dealing with equipment that has developed or can very probably develop markets for second- and third-hand units. Such equipment would have some determinable market value for many years. The automobile is such an item of equipment, and the non-payout lease (including maintenance) developed early in that field, even before the advent of the investment tax credit. (It also flourished in the consumer area.) It seems quite likely that a parallel development is in the offing with respect to jet aircraft and computers. The anticipated wide demand for such equipment apparently has and will continue to create subsidiary markets for second- and third-hand units, thus assuring the lessor of their saleability. These markets eliminate the lessor's need for the above described manufacturers' support.

Effect of Government Regulation of Economy

Current economic thought includes the regulation of the economy by monetary, fiscal, and tax policies of the Federal government. As indicated above, this theory gave rise to the legislation regarding the investment tax credit and the earlier accelerated depreciation provisions in order to stimulate an economy then considered sluggish. Conversely, when a rapidly expanding economy exhibits inflationary tendencies, these regulators may be reversed. The economic valves that were opened may then in effect be closed. Such a possibility could readily result in a repeal or suspension of the favorable tax provisions, and in such event, some of the above described competitive advantages may be lost permanently or temporarily. The temporary suspension of the investment tax credit during the latter months of 1966 and early 1967 is a case in point.

The survival of one by-product of the investment tax credit seems assured. By and large, as discussed above, the non-payout lease technique probably will continue to be a viable device.

THE EQUIPMENT LEASE TRANSACTION

Let us follow through the practical application of a financial leasing transaction. XYZ Corporation is interested in a certain piece of equipment, perhaps a large piece of plastics machinery. The prospective lessee contacts a financer, giving it the specifications of the equipment, the vendor, the cost, and the length of time for which he wishes to lease it initially (see Fig. 11-1). The initial term is

TO: XYZ LEASING CORPORATION

LEASE REQUEST

COMPANY

Name of Company: XYZ Corporation

Address: 23 South Street Newark, New Jersey

Type of Business: Manufactures Plastic Toys Telephone Number:

Person to Contact: John Smith Title: President

Form of Organization: Corporation ☒ Partnership ☐ Proprietorship ☐

State of Incorporation: New Jersey

EQUIPMENT

Seller's Name: XYZ Plastics Company Address: First and Main

Wheeling, West Virginia

Manufacturer's Name: XYZ Automatic Tool Company Address: Richmond, Indiana

Equipment Description (Attach Descriptive Literature, Sales Brochures, Specifications and terms if any)

Model #: 123AB 456 Equipment: Plastics Molding Machine

(Continue on Separate Sheet)

Equipment is: ☒ New ☐ Used If used, how old is the equipment: Yrs.

The Equipment will be used for: Production of Plastic Toys

What Phase of Process: Molding of Raw Material

The Equipment is specially designed or built for intended use: ☒ Yes ☐ No

The Equipment is to be modified for particular use: ☐ Yes ☒ No

Cost of modification, if any: $ Number of Shifts to be run: Three

Has your own purchase order been issued: ☐ Yes ☒ No (If Yes, Please Attach Copy)

Has an invoice been received: ☐ Yes ☒ No (If Yes, Please Attach Copy)

Has the Equipment been shipped to or received by you: ☐ Yes ☒ No

Cost: $ 65,000.00 Sales Tax: $ None

Terms of Lease Sixty Months Desired Delivery Date: February 15, 19X6

Equipment to be located at: 123 North Street

Owner of premises: 123 North Realty Corp. (Name) Same (Address)

Will Equipment be attached to realty? If so, how? No

Shipping instructions: Best Way

CREDIT AND FINANCIAL

Trade References: Address:

Address:

Address:

Bank References: XYZ Bank Address:

Address:

Address:

STATEMENT ATTACHED FOR FISCAL YEAR ENDING December 31, 19 X5 Interim statement attached for months period.

Other equipment presently leased ☐ Yes ☒ No If so, total unpaid rent $ Term

DATE:

We hereby request you to acquire the above Equipment and lease the same to us on the terms hereof and of any lease submitted to you herewith. This Lease Request includes the terms and conditions appearing on the reverse side hereof.

XYZ Corporation

By

Title:

Fig. 11–1. Lease Request

TERMS AND CONDITIONS

1. In consideration of your ordering or purchasing Equipment (of which no notice need be given to us) we agree that thereafter our offer to lease Equipment on the terms hereof and of any lease submitted to you herewith cannot be revoked. We agree to indemnify and save you harmless from any liability to seller and/or any other party arising from or in connection with this Lease Request and/or the purchase of Equipment and leasing thereof, and in case of dispute with seller or other party we will pay you on demand any amounts theretofore paid by you in respect of the purchase of Equipment (in which event we shall be subrogated to your claims, if any, against seller and/or any other party.)

2. All delivery, transportation, shipping, storage, installation and testing charges shall be paid by us.

3. We agree that all inquiries and communications directed to seller will be made through you.

4. We represent that execution, delivery and performance of this Lease Request and the lease have been duly authorized and will not violate any provision of law or our charter or by-laws or any indenture, loan or credit agreement or other instrument to which we are party or by which we or our property may be bound or affected; and that the financial statements submitted herewith have been prepared on the basis of generally accepted accounting principles, and are complete and correct and fairly present our financial condition as at the dates thereof.

Fig. 11–1. Lease Request—Continued

usually determined by the cost of the equipment, its usefulness to him, and its depreciable life, or any combination thereof.

Credit Analysis

The financer thereupon makes a thorough credit analysis of the prospect. This includes reviewing balance sheets, profit-and-loss figures and trade and bank references. The financer also analyzes the prospect's need for the equipment and the liquidation value of equipment itself. In short, the procedure parallels that for an application for purchase money security interest financing.

The Lease Agreement and Acquisition of Equipment

If satisfied, the financer prepares the lease agreement which is executed to ensure a commitment on the part of the lessee (see Fig.

DELIVERY-INSTALLATION AND ASSEMBLY CERTIFICATE

Dated February 21, 19X6

TO: XYZ LEASING CORPORATION

Gentlemen:

We hereby acknowledge complete and satisfactory delivery, assembly and installation of the equipment supplied by XYZ Plastics Company and described in the Equipment Lease Agreement, Number 12345, between us dated February 1, 19X6. We approve payment for said equipment.

XYZ Corporation
Company

By (title)

Fig. 11–2. Delivery Acceptance

11–3, page 253). Then the purchase order is accepted and the equipment ordered. In short, a commitment to lease is required from the prospective lessee before a commitment to purchase can be given by the prospective lessor. The prospect's purchase order is transposed to the leasing company's form of purchase order (see Fig. 11–4, page 260) and submitted to the particular manufacturer with instruction to bill the leasing company and ship to the lessee. Upon completion, the manufacturer ships the equipment.

Acceptance of Delivery

Upon receipt and installation satisfactory to him, the lessee notifies the lessor thereof via a delivery acceptance form (see Fig. 11-2). The lessor-financer then pays the manufacturer, puts the lease on its books, and proceeds to bill the lessee on a monthly or other pre-determined basis.

Expiration of Lease

At the end of the lease period, the lessee may elect to buy the equipment from the financer for a pre-determined percentage of the agreed cost or re-rent for an additional period at some other percentage. These percentages will vary, but they will usually be tailored to the desires of the lessee. He will normally have paid during the term of the lease the cost of the equipment purchased on his behalf plus the desired return on the lessor's investment. Hence, the usual lessor does not consider the options part of the necessary return on its investment. This can be left open in the initial stages of the transaction.

In sum, therefore, equipment leasing has several facets. Financers and leasing companies make the techniques available. As is so frequently true in other matters, a decision based on full consideration of related facts and problems constitutes the soundest and most successful course.

outlining the potential of service expansion to broadly define the bank's customers. A definition of markets might be as follows:

1. The general public—consumers. The "retail" market.
2. The business community.
3. The banking community.
4. Government, quasi-public, social, and institutional agencies.

While such a grouping may be a helpful beginning, it does not, by itself, supply us with ready knowledge of the present and changing needs of each group. It is only in terms of such knowledge that services are born. It is as true of rainy day umbrellas in bank lobbies as it is of computerized accounting services for small business.

THE USES OF DIVERSITY IN BANK SERVICES

Charting Changes and Establishing Marketing Programs for Them

In a rapidly moving society, the commercial banker must be a student of change. He must learn how and why needs change. He must understand the underlying social changes and the changing technologies as they relate to the demands for banking service. This kind of knowledge is perhaps banking's greatest challenge. In terms of the magnitude of many of our markets, it is no longer possible to simply guess at or generate a "feel" of things. New services are expensive to establish and promote. Industry has long ago proven that the risk of unprofitable products can be minimized by formal marketing approaches and techniques.

Commercial banks are more and more finding that the shortest route to this knowledge is the establishment of formal marketing programs, staffed where possible with professional personnel. Where this is not feasible, the bank may still establish such a program using outside professional services to refine specific services, define markets, and pretest market acceptance and pricing.

But establishing such a marketing program in the hands of an executive committee is no guarantee of success unless the bank executives themselves stand ready to translate such knowledge into programs and services. Too many banks in the past set up public relations departments because they didn't want to be "the only one on their block" without one. The main problem in marketing, as an American Bankers Association-sponsored study showed, is the failure of both management and department heads to understand and use it effectively.

The reason why banks should formalize their marketing programs is the same reason why the discount committee meets according to a regular schedule. It serves to commit the bank to a recognition of the place of such knowledge in its role as a service center as well as to regularly focus administrative attention on this area. Whether a bank is an originator, an

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A good way to start, for instance, is to appoint at least two officers—or an officer and a senior employee—to develop a marketing approach. A schedule should be drawn to provide a definite length of time each week with a specific subject to be discussed and acted upon. As a beginning, a list should be drawn of all financial services offered in the area by all types of financial institutions. This would include automobile financing companies, for instance. While such an approach may sound elemental, it will go a long way to determining just how full a line of services the bank offers.

It will also serve to formalize the bank's own fledgling marketing move and direct attention to what services and rates the bank can offer. To the extent that other institutions are successfully offering financial services the bank itself might offer, this can lead to healthy questions regarding bank policy and operations. While the development of new services may sound exciting, the expansion, modification, and refinement of old ones should not be forgotten. In many cases, new services are only sophisticated extensions of old services.

THE CONSUMER PUBLIC

While primary market attention for most businesses is on the consuming aspect of individuals, commercial banks' interest is twofold: the general public is both a consumer of services and a saver. The broad rise in incomes following World War II has been followed by steady growth in savings of individuals. Indeed, it may well be that the effects of the past three recessions have been increasingly milder because of the cushion of savings which enables individuals to maintain spending levels even in the face of short-term unemployment.

This, in turn, has meant increased effectiveness in control of the business cycle through monetary and fiscal measures. If this assumption is borne out in the future, it will result in a still broader rise in income throughout the population as well as a rise in per capita income itself. As this happens and more reliance is placed on insurance and pension plans to safeguard against the circumstance of sickness, disability, unemployment, and old age, savings may not increase markedly from the present ratio of 8 percent of disposable income. In addition, discretionary income—that left over after cost of food, clothing, and shelter—may continue its long-term trend of rising faster than living expenses.

Based on a 1950 standard of living concept, discretionary income by 1975 may double what it was in 1964, rising from $234 billion to $462 billion. Living costs based on an increased population of 231 million will probably rise by only a fifth.

Discretionary income has been outpacing consumer credit in recent years and by all indications will be able to sustain an even greater expansion of consumer debt which reached $76.5 billion at the end of 1964.

Saving, spending, and borrowing—these are the aspects of the market. New savings will come from the heavy waves of new savers in the population, to a lesser extent from the increased dollar savings of existing savers as their incomes rise. The place of a school savings program becomes clearer seen in this light. It is one of the best investments any bank can make in its own future.

A growing population will be spending more, but individuals may not always be spending it on goods. The swing to buying services and leisure time pursuits has been noticeable. Consumer credit will expand, but what the character of the expansion will be, its magnitude, and what income levels it will touch are not entirely clear.

Identifying the Saver-Spender-Borrower

Too often the banker has seen the general public as a separate borrower, or saver, or spender. This would rarely be the case with commercial accounts whose borrowing makes them depositors as well. Even where recognition has been made of the frequent identification of saver and borrower as the same person, service promotion has too often taken the line of impersonal appeal of generalized statement-stuffers rather than concrete programs incorporating this identification.

It is often easy to overlook this simple fact while searching for new markets for services. There are literally thousands of dollars of profits to be mined from within the bank itself, if only the effort is made to reach the bank's own customers. After all, what better place to start to sell than with those who are already buying one or more services?

One doesn't need a computer to solicit checking account customers for automatic savings plans or savings certificates. No involved marketing study is needed to go after the bank's larger depositors to sell trust services. And if we expect our business borrowers to maintain a compensating balance with us, would it be totally unrewarding to suggest to smaller borrowers while they are at the bank that they might open a modest savings account with part of the proceeds? Some recent loan-savings plans are already a step in this direction.

One of the benefits of machine accounting systems is that they will enable bankers to analyze their own operations and customers more easily and discover the different aspects and needs of the same customer at different times. There is nothing mysterious in this. The rural banker who anticipates heavy spring borrowing from his agricultural customers is only utilizing marketing knowledge learned from experience.

The big difference from that simple example and what banks now face

is the difficulty of acquiring that knowledge due to increase in numbers of bank users and the proliferation of services. That difficulty is now past us. From large city bank to small rural bank it can be quickly overcome with the use of sampling techniques and computer equipment, whether the bank's own, or nearby service center, or its correspondent.

New Services Offer Insight into Consumer Needs

A glance at some of the new services that have been offered by banks in recent years can give us some insight into the divergent needs of bank customers. A partial list would include:

Open end mortgages. Utilizing a single credit instrument to finance home improvements, education, medical bills, and even autos.
Limited credit line plans. So-called instant credit.
Condominium loans.
College tuition loans.
Merchant charge plans.
Marine, aircraft, and mobile home financing.
Small business term loans.
Common investment funds for pensions of self-employed persons.
Loan-savings plans.
Savings incentive programs. Split rate plans, savings certificates bearing differing rate of interest for long-term savings.

The use of the open end mortgage is a good example of combining long- and short-term needs of a borrower into a single credit instrument. The rise in home ownership following World War II has created a broad market for such an instrument. But the mobility of the population, the turnover of homes, and the need for a national mortgage market which may not be able to cope with the ability of the local borrower to repay his short-term credit needs indicate that the open end mortgage may only be a stepping-stone to what is a sketch of the future.

If the trends indicated by the 1960 Census of Population are any guide, over 30 percent of the banks' 1960 local and regional markets will have moved away by 1970. Perhaps 55 to 60 percent will have changed their residences. The limitation of a credit instrument tied to residence is clearly seen. Of more importance is the credit worthiness of the individual himself based on his experience.

Such an approach suggests that an automated credit exchange linked with others in a national network might be in a more advantageous position to handle consumer credit than an individual bank. Such a network, through a single credit card, for instance, could handle the transactions of department stores, merchants, gas stations, restaurants, auto dealers, and utilities.

The equipment for such centers is already here, and the feasibility of

such a system can be demonstrated. New telephonic equipment, voice identification, memory units and on-line accounting equipment will require only supervisory personnel.

The question will not be whether such a system will evolve. Some such system will certainly evolve. It is already being suggested. The question is whether banks will operate it or whether they will be simply supplying funds to others.

Commercial banks now have a lead. According to Dr. Martin Greenberger of the Massachusetts Institute of Technology: "They already enjoy a confidential relationship with their customers. They have a good understanding of American industry and finance. They are knowledgeable in international affairs. They are accustomed to processing a large volume of information. And they are familiar with the ways of networks, through branch and correspondent banking and membership in the Federal Reserve System."

Such a system need no more eliminate competition or erase the identification of existing institutions than credit bureaus and clearing houses now operated by a group of banks

As a matter of fact, by reducing the time of bank personnel in record keeping, credit processing, and accounting, and expanding their own knowledge of credit and customer activities, it will place them in a better position to assume the role of financial advisor as well as to devise new means to meet changing needs and social conditions.

Widening the commercial banks' service role will also call for projecting a new image of banking through education of the public and business. Insurance companies, for example, have long since discovered this. They do not sell insurance. They offer themselves as financial counselors. They have devised a multitude of insurance plans so that a combination of them may fit the needs of individual families with varying circumstances. The image the insurance companies have succeeded in creating is that of guardian of the family hearth and security. The insurance agent is more and more achieving a role somewhere midway between the lawyer and family doctor.

Yet, banks have the broadest means of devising appropriate financial programs and the instruments needed to carry them out. They are in the best of all positions to offer valuable and neutral advice. Commercial banks will in the future have to learn to sell more than specific services. Oil companies not only sell gasoline. They sell car care, and courtesy, and weave an air of expertise about the station attendant designed to inspire faith on the part of the motorist.

Electronic data processing will make it possible for the bank to assemble profiles of its customers and to achieve greater selectivity in selling specific services. Banks will be able to select officers of corporations who do

not have personal accounts with banks, or accounts of a certain level of dollar balances who may be prospects for the trust department.

Mass and Class

One need in the expansion of commercial bank services is a shifting from the mass market approach too frequently used, the one service for everybody concept. Consumer goods manufacturers long ago learned that markets are actually "fractured," composed of groups or segments of the public differing in their demands and needs by geography, incomes, and social backgrounds.

Retail distributors recognize this when they distribute their products according to line and price in those markets where the products are designed to appeal. To cite an obvious example, a distributor of Italian food products would not spend equal amounts of selling time in Italian and Chinese neighborhoods.

While this has been generally recognized in dealing with commercial and industrial customers and prospects, as well as in the trust department, the same techniques can be used in dealing with the general public, particularly in urban areas where most of the commercial banking business is concentrated. The following is only one example.

The Prestige Market

The general rise in income levels has resulted in an enormous increase in the upper group of the income range. By 1963, *Sales Management* magazine estimated that over 10 million households in the United States had incomes of $10,000 or more, a 70 percent increase since 1959. This was nearly 18 percent of the total of 56 million families.

It is this higher income group—centered in cities and suburbs—that has given rise to an increasing demand not for goods alone but for personal services and leisure activities of all kinds. It is within this group that urban banking may well find a receptive market for a development of a prestige banking service such as is found still in Europe today in which the bank functions as bookkeeper, accountant, and business manager for the personal financial affairs of individuals.

Equally valuable is the fact that many persons of means are also the same business leaders whose corporations the bank has been attempting to attract. What better way to demonstrate the ability of the bank to service the needs of companies than through the owners and chief executives themselves?

Payment for such services has traditionally been achieved through the return on balances maintained with the bank. Using automated accounting, the commercial bank may well find this kind of service not only profitable but the experience may also prepare the bank to expand the

service on a straight fee basis where the widened market may not produce adequate compensating balances.

BANKING AND THE BUSINESS COMMUNITY

The business community is the bank's "natural" market. It is one that the commercial banker knows best and has lived with longest. With the technological breakthrough of the past decade, commercial banking stands at a point where knowledge and ability to perform are limited only by imagination.

The commercial banker enjoys a unique position. He sits in the center of the world of commerce and industry, and from time immemorial he has been regarded as a knowledgeable advisor. Unfortunately, since the end of World War II when industry here and abroad faced the tremendous challenge in rebuilding a civilian economy, this role has not brought with it the easy flow of demand deposits that banks had previously enjoyed. Companies were understandably pressed for cash and pressed for means of utilizing cash flow and the securities markets to finance their expansion. With commercial banks no longer able to engage in the securities business, their means of attracting compensating balances turned increasingly to generating new services and financing methods to enlarge their usefulness.

A sample list of new services developed by commercial banks over the past few years shows the trend:

Clearinghouse plans to settle interline freight bills.
Lease financing of chain store furnishings and equipment.
Construction equipment financing.
Merchant charge plans.
Establishment and investment in Small Business Investment Corporations to meet the capital needs of small business.
Mutual or common trust investment funds for small fiduciaries.
Accounts receivables financing.
Payroll accounting services.
Business and farm management trust services.

The Technological Breakthrough . . . and Break-even

There is no doubt that the new data-processing equipment and corresponding systems form the foundation of the revolution in business and industry, including banking. If more and more banks find that they cannot build without this foundation, they may also find that they have prepared themselves to move onto the wider stage of business service centers by selling computer services to their customers.

This is not to suggest that there is a clear, easy road to profits. But researched, and sold properly, banks will find that fees from such services will build a hedge against the increasing cost squeeze. The "but" is a big one because of the costliness of misjudgment. Markets and fees should be

carefully evaluated. Banks should concentrate on broad markets where the same service can be sold to a number of customers. Services that have already been attempted by some banks are tenant billing for building owners, and professional billing for doctors and dentists.

Another new service that has been developed by banks is an automated payroll accounting system for business. Because volume and calculations are no obstacle to electronic data-processing equipment, the plan can be merchandised to a large number of companies both large and small. It virtually eliminates payroll accounting on their part, reducing routine operating expenses. And since it can provide firms with detailed cost reports by department, product line, or contract, it should prove useful in increasing their overall business efficiency.

From employee and payroll information transmitted by the employer, the plan provides these reports to the company:

1. Payroll register or journal with details of hours, earnings, automatic overtime computations, deductions, and total earnings and deductions to date.
2. Employee ledgers covering each employee, delivered to the company every six months, or more often, if required.
3. Payroll checks. The check portion can be substituted for a receipt for cash payment or for a deposit slip to be credited to the employee's account at any office of the bank. Alternatively, stuffed cash pay envelopes can be delivered to the company.
4. Summaries by department, product line, or contracts.
5. Automatically prepared federal and state quarterly reports on earnings and withheld taxes including FICA information. These reports can also be filed for employers.
6. Annual W-2 statements for each employee.

While there may be some payroll accounts that may prove too costly to handle except on a negotiated fee basis, nearly all firms will make up the market for this service. Payroll accounting is a good example of the kinds of services that will prove profitable to develop. Banks should be careful not to develop a service that is locked in to only one customer need—such as automated inventory control for a single department store. Or a service that does not really meet all the customer's needs.

It is also necessary to design the service in such a way that costly time-consuming steps are eliminated. This may even mean a change in the user's operational habits. In the payroll accounting system, for instance, the preparation of individual employee ledgers is done only once every six months, or no more than quarterly in order to reduce the machine time costs of the service.

The important factor is the fee. Services should not be tied to a compensating balance unless the bank has made a thorough analysis of the return on such balances and what the true costs of the services are.

In the long run, this is the ideal time to move away from compensating

balances to a fee method of payment. As banks learn to utilize their electronic equipment to determine their true costs, they will be able to determine more adequately than at present the balances necessary to support the services they render and the fees to charge in the absence of such balances.

For Sale: EDP Services

Research has already indicated the kinds of markets that commercial banks can tap for computer services. Even smaller banks, for instance, can process payrolls for medium-sized companies and some local governmental agencies. They can also handle municipal, hospital, and central school accounting. In this field, banks should remember that they are selling a service: the customers come first, not their own internal bank processing.

More specialized services were outlined at a National Automation Conference of the American Bankers Association. The services range from ones designed for urban markets to those for rural areas.

1. *Automobile Dealer Accounting.* The monthly preparation of journals, general ledgers, and sales and expense reports.
2. *Real Estate Multiple Listing.* Providing data on homes and apartment buildings for sale in a metropolitan area to realty brokers. The bank would regularly print for participating realtors the location, style, selling price, number of rooms, taxes, plot size, and other facts on homes in an urban area.
3. *Financial Planning Services.* The market is primarily for small and medium-sized companies. Services would include: analysis of alternate financing plans; corporate portfolio analysis; calculation of minimum tax liability; pension plan development and fringe benefits cost.
4. *Farmer Credit Plan.* Farmers would be given a line of short-term credit at the bank. Merchants and wholesalers would sell goods based on the farmer's credit and be paid by the bank. One deterrent to this plan is that many merchants give free credit. Fee income would be negligible, with revenue realized from short-term interest rates.

Industrial Development

Commercial banks are certainly not new to industrial development in their areas. What is new is the intensive pursuit of this activity as a formal program within the bank with one or more persons assigned on a full-time basis, much as the railroads and utilities carry on this activity.

United States industry is still very much on the move. If a bank is located in an area where new development has taken place, the bank can accelerate and aid the process through cooperative efforts, dissemination of information, solicitation, and direct contact. Contact with realtors, for instance, may reveal advance information about the interest of a company. Information may come from a present customer, or a correspondent. A sign of welcome and an offer to obtain information on a confidential basis

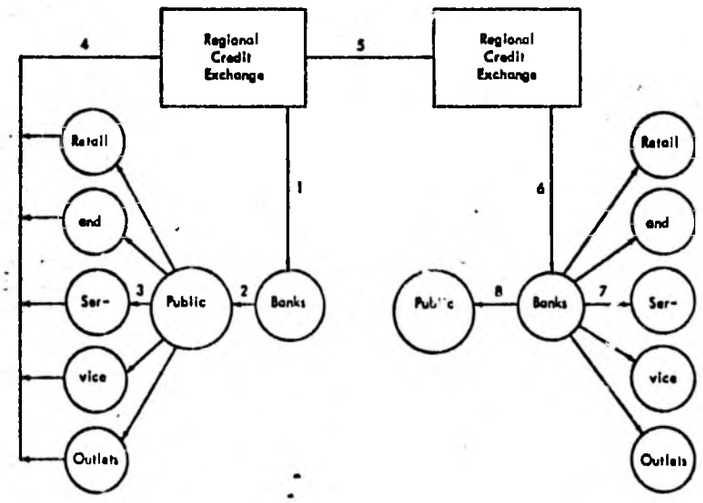
may go a long way not only toward creating a favorable attitude in locating a plant but also in securing the new account.

Industrial development is very much a part of business development and can be used to implement the sales efforts of branch managers or officers in a call program.

The collection of data pertinent to the area may or may not be necessary, depending on the availability and dissemination of local industrial development groups or the chamber of commerce. The bank may find it useful, however, to prepare periodic comments on business conditions and a simple index of business activity useful to prospective employers.

CORRESPONDENT BANKING

Correspondent relationships between banks were born out of the need to collect drafts and checks drawn on out-of-town banks which their business customers deposited with them. Out of that simple need has come the multitude of services—spurred on by par clearance and the Federal



Simplified diagrammatic sketch showing how a network of regional credit exchanges might work in consumer transactions. (1) Bank receives credit advice on individual from exchange preparatory to a loan to consumer. (2) Using this advance, or credit devices such as credit cards or voice identification, consumer makes purchase through retail and service outlets. (3) Transaction data from outlets is transmitted to exchanges. (4) Exchanges would either forward transactions applicable to customers of individual bank when the bank is a member of the exchange, or through a network arrangement, transmit data to another exchange (5) which in turn would transmit data to member bank (6) for adjustment of individual accounts (7) and (8).

FIG. 74–1. Hypothetical operating sketch for a network of regional credit exchanges.

Reserve System's free check collection service—that are now grouped under correspondent banking. Services which run from asset allocation studies through loan participation and personnel searches to year-end stockholder reporting.

The future will not diminish private banking's correspondent relationships. If anything, what has been sketched for the years ahead indicates a further drawing together and strengthening of those bonds. One of the most valuable things to be derived, for instance, will be, increasingly, the knowledge and experience of "lead" banks, whether they are large or small, in developing and extending new services to the various publics.

In the evolution of some such national credit exchange network, it is unlikely that, given the measure of competition between banks, any single system will be established. Undoubtedly, credit exchanges will be set up by one or more banks in a commercial center tied to banks in other cities throughout a state or a geographic region and linked to other regional or center exchanges for operational convenience. Debits arising from this operation could well be settled through the use of balances such as with the system already in use. As such, therefore, it will be a bold expansion of the correspondent banking system and should instill new vigor into a unique American institution.

HB-643

AMERICAN
BANKER
April 14, 1970

Direct Lease Financing At NBs Up to $693.8 Mil.

WASHINGTON.—Direct lease financing operations of the country's national banks climbed to $693.8 million as of Dec. 31, 1969, compared with $646.7 million last June 30 and $541.9 million at the end of 1968, Comptroller of the Currency William B. Camp said.

During the first six months of 1969, the number of national banks engaged in direct lease financing increased from 303 to 341; by the end of the year the total stood at 353.

Direct lease financing involves bank purchase of equipment—such as computers, vehicles, machinery and the like—and its lease to other users on a fee basis. The dollar totals reported by the banks engaged in this service reflect the leasing contracts outstanding.

Fifteen California banks reported $276,598,000 in direct lease financing outstanding at the end of 1969, while 10 New York banks reported $113,547,000 and 27 Illinois banks reported $68,853,000 in outstanding leases. Various amounts of direct lease financing were reported by national banks in all but seven states in the country.

Totals disclosed reflect a continuation of the trend toward both increased volume of direct lease financing and a rising number of banks engaged in the service since the Comptroller first requested such information as part of call report data.

LEGAL NOTICES

GRENADA COMPUTING CO.—NOTICE IS HEREBY GIVEN, in accordance with and pursuant to the provisions of Article 8 of the Partnership Law of the State of New York that a Certificate of Limited Partnership was filed February 10, 1970 in the office of the County Clerk of New York County in the State of New York, which Certificate reads as follows: I. The name of the partnership is GRENADA COMPUTING CO. II. The character of the business to be conducted by the partnership, within or without the State of New York, is a computer services business for the transformation of documents into computer readable form by means of, but not limited to, the process of key punching and/or optical character recognition and such other business or businesses as may be consented to in writing by those Partners whose contributions to the capital of the partnership, as of the time of such consent, shall aggregate at least 90% of the then capital of the partnership. III. The location of the principal place of business of the partnership shall be 7316 Wisconsin Avenue, Bethesda, Maryland 20014 and the location of its principal office in the State of New York shall be c/o Roseliman Colin K[illegible]

JKR

JOHN K. ROBERTSON
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STATE OF ALASKA
DEPARTMENT OF COMMERCE
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II

The Case for Bank Holding Companies

The arguments in support of bank holding companies may be classified into four broad categories: (1) improved operating results of individual banks; (2) strengthened capital structure of banks, thereby adding to depositor safety and reducing supervisory problems; (3) additional banking services to the communities served by subsidiaries of these companies; and (4) better allocation of bank credit. In the terminology of the Bank Holding Company Act of 1956 the first two arguments relate to the "banking factors," while the last two relate to the "convenience and needs" of the community. Each argument is considered below.

IMPROVED OPERATING RESULTS

In virtually all applications from bank holding companies for additional acquisitions, it is argued that the operating efficiency of the acquired bank will improve as a result of affiliation. Bank holding company groups, by their very nature, have more possibilities for organizing the production of banking services than independent banks. The latter must produce banking services themselves or "buy" them from correspondents. Banks in a holding company group, however, may produce their own services or may buy them from nonaffiliated correspondents, from the lead bank [12] of the holding company group, from the holding company, or from a nonbanking subsidiary of the holding company. This greater flexibility may enable bank holding companies to use more efficient operating techniques.

For example, it may be more efficient to have the lead bank of a holding company or a nonbanking subsidiary provide computer services to all banks in a bank group than to have the same number of independent banks purchase such services from correspondents or produce the services for themselves.[13] In other words, to the extent that economies of vertical integration exist in banking, a holding company can take advantage of them. Economies of scale are not the relevant consideration here, for if economies of scale exist in the production of banking services, they will exist for the large correspondent bank as well as for the lead bank

[12] Refers to the dominant bank in the group.

[13] The services that a bank might purchase from its holding company or another affiliate—or which a nonaffiliated bank might buy from its correspondent—include check clearing and collection services, investment advice, foreign banking services, purchases of equipment and supplies, employees benefit programs, and many others. For a comprehensive list of services offered by correspondent banks, see U.S. Congress, House, Banking and Currency Committee, 88th Cong., 2d sess., *Correspondent Relations: A Survey of Banker Opinion* (Oct. 21, 1964), pp. 25-26.

of a holding company or a nonbanking subsidiary.

Another potential source of differences in operating efficiency, which is closely related to basic organizational structure, is in the quality of management. One of the major arguments in support of the holding company arrangement is that the holding company can acquire and train, for its affiliates, managers who are superior to the managers of comparable independent banks. This argument may be valid even though large city banks offer training programs to the managements of their small correspondents, because, it is argued, bank holding company systems are able to attract more talented individuals to the banking industry. They are able to do this because such a system can presumably offer greater challenges and opportunities for advancement to capable young men than can the typical independent bank.

Bank holding companies may also contribute to greater labor mobility within the banking industry and thus foster a more efficient allocation of labor resources, particularly management resources. The holding company can allocate its labor resources in a way that maximizes its profits, although not necessarily the profits of a particular subsidiary bank. Thus, while an independent bank is unlikely to suggest the transfer of one of its capable officers to one of its correspondent banks in order to overcome a management problem at the latter, a holding company would effect such a transfer between subsidiaries if the holding company would benefit. Further, common pension plans within a holding company system can assist in overcoming some of the institutional barriers to labor mobility that currently exist in this country.

The above arguments support a position that subsidiary banks are able to operate more efficiently than comparable independent banks. However, improved operating results may also come from larger revenues. There are strong arguments to support a position that holding company subsidiaries are able to earn a greater return on assets. One is that the superior management capabilities of holding companies enable the subsidiary banks to earn a greater return on their investments through better investment management. Another is that subsidiary banks are able to commit a greater proportion of their assets to a high-yielding asset —loans. (This argument is examined in the discussion of bank credit, beginning on page 8.) Thus, the higher loans/assets ratio and the greater return on investments that subsidiaries can presumably achieve enable them to earn a larger return on assets than can comparable independent banks.

STRENGTHENED CAPITAL STRUCTURE

The second category of arguments in favor of bank holding companies is that they strengthen a bank's capital structure. A bank's capital may be increased by the sale of stock and/or the retention of earnings. Banking tradition and the pressures of bank examiners cause banks to maintain relatively conservative capital/deposits, capital/assets, and other capital ratios. Consequently, if a bank is to continue to meet the expanding credit and service demands of its community, it must continually increase its capital. The problem of maintaining capital ratios is particularly acute for banks located in rapidly growing areas.

For additions to capital, the independent bank must rely upon the sale of its own stock and/or upon its own retained earnings. Because no active market exists for the stock of

small banks, these banks may have difficulty in securing sufficient capital from stock sales; and as a result, banking services in the community may suffer. Most independent banks are not able to import equity capital from other regions of the nation because, for all but the largest ones, the market for a bank's stock is largely confined to the bank's service area.

Economists who have analyzed bank holding companies have consistently concluded that the subsidiaries of bank holding companies have significant advantages over independent banks in acquiring new capital.[14] The reason is that the stocks of most bank holding companies are traded in active national or regional markets. Thus, if the subsidiary banks are in need of additional capital, the holding company can acquire it by selling its own stock in these markets. It can also be said that holding companies are able to achieve a better allocation of equity capital than independent banks. Through stock sales the holding company is better able to acquire capital from capital-surplus areas and transfer this capital to banks that are located in areas characterized by a shortage of capital.

In addition, holding companies are capable of achieving a more satisfactory distribution of the retained earnings of banks. Under independent banking one might find some banks, especially those in slow-growth areas, building their capital ratios to levels in excess of that which is considered necessary, while other banks in rapidly growing areas may find their capital positions impaired because retained earnings are currently inadequate. The holding company, however, has the ability to allocate the aggregate retained earnings of the bank group in accordance with the needs of the individual banks.[15]

ADDITIONAL BANKING SERVICES TO THE COMMUNITY

The quantity and quality of banking services are somewhat related to the operating results of banks. A more efficient banking organization can offer banking services at a lower price or can offer additional or better services at the same price. However, holding companies also assert that they can provide some services to a community through their subsidiaries that a comparable independent bank cannot provide —services such specialized business loans, special checking accounts, trust services, consumer credit, and so forth, that require highly specialized knowledge. A holding company subsidiary has the advantage of being able to draw upon specialized managerial talents from any of the banks in its bank group. While correspondent banks can assist in the provision of specialized services, it is argued that the holding company arrangement results in closer cooperation among affiliated banks than would be the case with independent correspondent banks. Moreover, the ability to supply specialized banking services still depends to a large extent upon the capabilities of management at the individual bank; and holding companies declare that they are able, for reasons cited above, to supply their banks with better management.

[14] See for example, W. Ralph Lamb, *Group Banking* (1961), pp. 148–51.

[15] The extent to which a bank holding company can achieve a more rational allocation of equity capital is dependent upon the degree of autonomy possessed by the directors and managements of the subsidiary banks. In order to achieve the optimum distribution of equity capital (or of bank credit), the managements of the subsidiary banks must desire to maximize the profits of the *holding company*, not necessarily their own bank's profits. The "carrot approach" to instilling this desire is to grant options on the stock of the holding company to the managements of the subsidiary banks.

BETTER ALLOCATION OF BANK CREDIT

The potential supply of bank credit available to a given community depends in large part upon the income and the wealth of economic units in the community. The availability of bank loans to economic units in the community, however, is largely determined by the types of assets bankers choose to hold. If a bank has relatively large amounts of U.S. Government securities and "due from" balances in its asset structure, it is clear that large amounts of potential bank credit are being transferred away from this community. If there is little loan demand, this is desirable in terms of the optimum allocation of bank credit; but if potential bank credit is being transferred out of the community because the bank's management lacks the ability to make some specialized types of loans or because of restrictions imposed by the bank's lending limit, then the best allocation of bank credit is not being achieved. Holding companies assert that because they can provide management with the requisite skills and can overcome at least some of the limitations imposed by lending limits at individual banks, their banks can more adequately meet the credit needs of the community.

Benefits to the Community

The basic nature of the holding company form of banking organization permits component banks to commit a greater proportion of potential bank credit to the communities in which the subsidiary banks are located. Bank holding companies are generally comprised of banks located in different communities or in different sections of large metropolitan areas. Consequently, the combined portfolios of all of the subsidiaries of the holding company are more diversified than the portfolio of a single bank and, therefore, less risk would be associated with the holding company portfolio. Moreover, each individual subsidiary bank can assume that, should difficulties arise, assistance would be available from its coaffiliates. For these reasons, the risk associated with a given level of loans would be less for a subsidiary bank than it would for a comparable independent bank; hence, with risk preference being equal, a subsidiary bank would have a higher loans/assets ratio than a comparable independent bank.

Correspondent banking operations in the United States supplement to some extent the capacity of unit banks or limited-branch banks to adequately meet the credit needs of their communities. Traditional banking practices call for the maintenance of deposit balances by small outlying banks (country banks) in large banks located in metropolitan areas (city banks). Part of the balance is maintained in order to facilitate the performance of the check-clearing service that the city bank renders to the country bank. The remaining or excess balance is maintained to compensate the city bank for other services that it renders to the country bank. Hence, the "cost" of these correspondent services to the country bank is the return that would have been earned on the excess balance if these funds had been used to purchase earning assets. This excess balance may be reasonably assumed to be required by the city bank and, therefore, should not be considered excess reserves. Were these excess balances not required, a high percentage of such funds would likely be channeled into local loans and into the purchase of local municipal bonds. Consequently, the "cost" to the outlying community of this correspondent banking arrangement is the loss of potential local bank credit.[16]

[16] If country banks paid fees for correspondent services, the outlying community would gain. The country bank's profit would be unaffected, because the fee paid for the correspondent services is presumably equal to the income that the bank could derive by shifting its excess correspondent balances into earning assets. But the community served by the country bank would have additional credit resources available to it. For a discussion of the fee system and banker reaction to it, see U.S. Congress, House, Banking and Currency Committee, 88th Cong., 2d sess., *Correspondent Relations: A Survey of Banker Opinion* (Oct. 21, 1964), especially p. 63.

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Greater Credit Mobility

Credit mobility is required to meet the credit needs of many communities because (1) some communities will be capital-surplus areas while others will be capital-deficit areas; and (2) some borrowers in a given community will have credit needs that exceed the lending limits of the local banks. Two important arrangements that the banking system in the United States has used to achieve mobility are participation loans and the sale of loan paper from one bank to another and from banks to other financial intermediaries. These arrangements have not been fully available to the subsidiaries of a bank holding company because of certain provisions in the original 1956 Act. Under the original Act the sale of loan paper and the granting of a loan by one banking subsidiary to another bank in the same holding company were prohibited. Because of these restrictions, loan participations between banks in the same group had to be arranged at the time the loan was made. Such restrictions did not, however, apply to transactions between an independent country bank and its city correspondent. Critics of the original Act argued that these restrictions prevented, in some degree, the realization of one of the significant advantages of bank holding companies—greater interregional mobility of bank credit.

Though the provisions of the original Act appeared to place subsidiaries of bank holding companies at a disadvantage to independent banks in terms of making loan participations and of buying and selling loan paper,[19] strong arguments remained in support of a position that greater credit mobility could be achieved via a holding company arrangement than via independent banks linked by conventional correspondent relationships.[20]

The extent to which loan participations are employed clearly depends upon the willingness of small banks to request participation by their city correspondent and upon the willingness of the latter to do so. Small independent banks are often reluctant to seek participations from the large correspondent banks for fear that the customer will be lost to the large bank. This fear is apparently often justified, for in a survey of city correspondents, the large banks

[17] See for example, Governor J. L. Robertson's dissent in the Denver U.S. Bancorporation case. *Federal Reserve Bulletin*, Nov. 1963, p. 1529.

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were asked how many times they would carry overlines of the same borrower before expecting the borrower to establish a direct relationship with them. Typical replies were "2 or 3 years" and "no set number of times, but we do feel that the local bank should assist us in obtaining a direct relationship if the borrower has permanently outgrown the lending limit of his local bank."[21]

A holding company subsidiary is less likely to be reluctant to seek loan participation from the lead bank of its group because the holding company would probably prohibit one of its banks from pirating the account of a customer of another of its subsidiary banks. Also, in securing loan participation the small independent bank is in a relatively poor bargaining position with respect to, say, the large money-market banks. A subsidiary of a bank group, given that the banks in the group have substantial interbank balances with a money-market bank, would be in a much better position to bargain for loan participations.

In addition to arranging loan participations, local banks can meet the excess credit demand of the community by selling their existing loan paper to other commercial banks or other financial intermediaries. Despite the prohibition that was placed on the sale of loans to holding company subsidiaries, the holding company arrangement probably enabled a subsidiary bank to dispose of loan paper more easily than a comparable independent bank because the latter could not generate the volume of loans needed to interest institutional buyers of loan paper, such as, life insurance companies and savings and loan associations. The bank holding company, however, can make arrangements with these institutions to purchase the loan paper of all of the subsidiaries in the bank group and thus assure the institution of a steady flow in reasonably large volume. The ability of the holding company to standardize credit procedures further aids in facilitating such transactions.

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The restrictions upon loan participations and upon the sale of loan paper between banking subsidiaries of the same holding company were based on section 6 of the original Bank Holding Company Act. This section was repealed by the 1966 amendment; but section 23A of the Federal Reserve Act was amended so that its restrictions on banking affiliates were also applied to the subsidiaries of bank holding companies.[22] These restrictions state that a banking affiliate may not loan or otherwise extend credit to another affiliate or to the holding company if the total amount of loans or extensions of credit to the other affiliate exceeds 10 per cent of the lending affiliate's capital and surplus or if the total amount of loans or extensions of credit to all affiliates (including the holding company) exceeds 20 per cent of the lending affiliate's capital and surplus. (Under the original Act, loans from one banking subsidiary to another or to the holding company, that is, "cross-stream" and "upstream" loans, were prohibited.) However, because the purchase of loan paper without recourse is not considered an extension of credit, it appears that no significant restrictions now exist on the purchase of loan paper by one subsidiary from another or on loan participations between subsidiaries.

The extent to which the restrictions of the original Act prevented holding companies from achieving their desired allocation of bank credit is not known; but whatever the extent, these barriers now appear to have been substantially eliminated.

[22] Under section 23A, a banking affiliate includes any corporation of which a member bank owns or controls more than 50 per cent of the voting shares. In the amended section 23A, affiliate now includes, with respect to any insured bank, any bank holding company of which such bank is a subsidiary as defined by the 1956 Bank Holding Company Act, and any other subsidiary of this bank holding company.

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II

The Case for Bank Holding Companies

The arguments in support of bank holding companies may be classified into four broad categories: (1) improved operating results of individual banks; (2) strengthened capital structure of banks, thereby adding to depositor safety and reducing supervisory problems; (3) additional banking services to the communities served by subsidiaries of these companies; and (4) better allocation of bank credit. In the terminology of the Bank Holding Company Act of 1956 the first two arguments relate to the "banking factors," while the last two relate to the "convenience and needs" of the community. Each argument is considered below.

IMPROVED OPERATING RESULTS

In virtually all applications from bank holding companies for additional acquisitions, it is argued that the operating efficiency of the acquired bank will improve as a result of affiliation. Bank holding company groups, by their very nature, have more possibilities for organizing the production of banking services than independent banks. The latter must produce banking services themselves or "buy" them from correspondents. Banks in a holding company group, however, may produce their own services or may buy them from nonaffiliated correspondents, from the lead bank [12] of the holding company group, from the holding company, or from a nonbanking subsidiary of the holding company. This greater flexibility may enable bank holding companies to use more efficient operating techniques.

For example, it may be more efficient to have the lead bank of a holding company or a nonbanking subsidiary provide computer services to all banks in a bank group than to have the same number of independent banks purchase such services from correspondents or produce the services for themselves.[13] In other words, to the extent that economies of vertical integration exist in banking, a holding company can take advantage of them. Economies of scale are not the relevant consideration here, for if economies of scale exist in the production of banking services, they will exist for the large correspondent bank as well as for the lead bank

[12] Refers to the dominant bank in the group.

[13] The services that a bank might purchase from its holding company or another affiliate—or which a nonaffiliated bank might buy from its correspondent—include check clearing and collection services, investment advice, foreign banking services, purchases of equipment and supplies, employees benefit programs, and many others. For a comprehensive list of services offered by correspondent banks, see U.S. Congress, House, Banking and Currency Committee, 88th Cong., 2d sess., *Correspondent Relations: A Survey of Banker Opinion* (Oct. 21, 1964), pp. 25-26.

of a holding company or a nonbanking subsidiary.

Another potential source of differences in operating efficiency, which is closely related to basic organizational structure, is in the quality of management. One of the major arguments in support of the holding company arrangement is that the holding company can acquire and train, for its affiliates, managers who are superior to the managers of comparable independent banks. This argument may be valid even though large city banks offer training programs to the managements of their small correspondents, because, it is argued, bank holding company systems are able to attract more talented individuals to the banking industry. They are able to do this because such a system can presumably offer greater challenges and opportunities for advancement to capable young men than can the typical independent bank.

Bank holding companies may also contribute to greater labor mobility within the banking industry and thus foster a more efficient allocation of labor resources, particularly management resources. The holding company can allocate its labor resources in a way that maximizes its profits, although not necessarily the profits of a particular subsidiary bank. Thus, while an independent bank is unlikely to suggest the transfer of one of its capable officers to one of its correspondent banks in order to overcome a management problem at the latter, a holding company would effect such a transfer between subsidiaries if the holding company would benefit. Further, common pension plans within a holding company system can assist in overcoming some of the institutional barriers to labor mobility that currently exist in this country.

The above arguments support a position that subsidiary banks are able to operate more efficiently than comparable independent banks. However, improved operating results may also come from larger revenues. There are strong arguments to support a position that holding company subsidiaries are able to earn a greater return on assets. One is that the superior management capabilities of holding companies enable the subsidiary banks to earn a greater return on their investments through better investment management. Another is that subsidiary banks are able to commit a greater proportion of their assets to a high-yielding asset —loans. (This argument is examined in the discussion of bank credit, beginning on page 8.) Thus, the higher loans/assets ratio and the greater return on investments that subsidiaries can presumably achieve enable them to earn a larger return on assets than can comparable independent banks.

STRENGTHENED CAPITAL STRUCTURE

The second category of arguments in favor of bank holding companies is that they strengthen a bank's capital structure. A bank's capital may be increased by the sale of stock and/or the retention of earnings. Banking tradition and the pressures of bank examiners cause banks to maintain relatively conservative capital/deposits, capital/assets, and other capital ratios. Consequently, if a bank is to continue to meet the expanding credit and service demands of its community, it must continually increase its capital. The problem of maintaining capital ratios is particularly acute for banks located in rapidly growing areas.

For additions to capital, the independent bank must rely upon the sale of its own stock and/or upon its own retained earnings. Because no active market exists for the stock of

small banks, these banks may have difficulty in securing sufficient capital from stock sales; and as a result, banking services in the community may suffer. Most independent banks are not able to import quity capital from other regions of the nation because, for all but the largest ones, the market for a bank's stock is largely confined to the bank's service area.

Economists who have analyzed bank holding companies have consistently concluded that the subsidiaries of bank holding companies have significant advantages over independent banks in acquiring new capital.[14] The reason is that the stocks of most bank holding companies are traded in active national or regional markets. Thus, if the subsidiary banks are in need of additional capital, the holding company can acquire it by selling its own stock in these markets. It can also be said that holding companies are able to achieve a better allocation of equity capital than independent banks. Through stock sales the holding company is better able to acquire capital from capital-surplus areas and transfer this capital to banks that are located in areas characterized by a shortage of capital.

In addition, holding companies are capable of achieving a more satisfactory distribution of the retained earnings of banks. Under independent banking one might find some banks, especially those in slow-growth areas, building their capital ratios to levels in excess of that which is considered necessary, while other banks in rapidly growing areas may find their capital positions impaired because retained earnings are currently inadequate. The holding company, however, has the ability to allocate the aggregate retained earnings of the bank group in accordance with the needs of the individual banks.[15]

ADDITIONAL BANKING SERVICES TO THE COMMUNITY

The quantity and quality of banking services are somewhat related to the operating results of banks. A more efficient banking organization can offer banking services at a lower price or can offer additional or better services at the same price. However, holding companies also assert that they can provide some services to a community through their subsidiaries that a comparable independent bank cannot provide —services such as specialized business loans, special checking accounts, trust services, consumer credit, and so forth, that require highly specialized knowledge. A holding company subsidiary has the advantage of being able to draw upon specialized managerial talents from any of the banks in its bank group. While correspondent banks can assist in the provision of specialized services, it is argued that the holding company arrangement results in closer cooperation among affiliated banks than would be the case with independent correspondent banks. Moreover, the ability to supply specialized banking services still depends to a large extent upon the capabilities of management at the individual bank; and holding companies declare that they are able, for reasons cited above, to supply their banks with better management.

[14] See for example, W. Ralph Lamb, *Group Banking* (1961), pp. 148–51.

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Sec. 10. AS 06.05.235 is repealed and AS 06. is amended by adding a new chapter 06 Bank Holding Companies to read:

06.06.005 - DEFINITIONS. (a) "Bank holding company" means any company (1) that directly or indirectly owns, controls, or holds with power to vote 10 per centum or more of the voting shares of any bank or of a company that is or becomes a bank holding company by virtue of this chapter or (2) that controls in any manner the election of a majority of the directors of any bank; and, for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing, (A) no bank and no company owning or controlling voting shares of a bank shall be a bank holding company by virtue of such bank's ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section, (B) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis, and (C) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation.

(b) "Company" means any corporation, general or limited partnership, joint adventure, business trust or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the

effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by the State of Alaska.

(c) "Bank" means any financial institution in this state that accepts deposits that the depositors have a legal right to withdraw on demand.

(d) "Subsidiary", with respect to a specified bank holding company, means (1) any company 10 per centum or more of whose voting shares is directly or indirectly owned or controlled by such bank holding company, or is held by it with power to vote; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company.

(e) The term "successor" shall include any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank.

(f) "Commissioner" means the commissioner of commerce.

(g) For the purposes of this chapter

(1) shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company;

(2) shares held or controlled directly or indirectly by trustees for the benefit of (A) a company, (B) the shareholders or members of a company, or (C) the employees (whether exclusively or not) of a company, shall be deemed to be controlled by such company; and

shares
(3)/transferred after the effective date of this act by any bank holding company (or by any company which, but for such transfer, would be a bank holding company) directly or indirectly to any transferee that is indebted to the transferor, or has one or more officers, directors, trustees, or beneficiaries in common with or subject to control by the transferor, shall be deemed to be indirectly owned or controlled by the transferor unless the Commissioner, after opportunity for hearing, determines that the transferor is not in fact capable of controlling the transferee.

06.06.010 - ACQUISITION OF BANK INTERESTS. (a) It shall be unlawful, except with the prior approval of the Commissioner, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank: or (5) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 5(b) and except as provided

in paragraphs (2) and (3) of section (5) g, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after the effective date of this act in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

(b) The Commissioner shall not approve

(1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking, or

(2) any other proposed acquisition or merger or consolidation under this section whose effect may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless the Commissioner finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

(c) In every case, the Commissioner shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

(d) No application under this section shall be approved unless the resulting bank holding company or bank holding companies maintains its principal office and conducts its principal operations in Alaska.

06.06.015 - ACQUISITION OF NONBANK INTERESTS. (a) Except as otherwise provided in this Act, no bank holding company shall

(1) after the effective date of this Act acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the effective date of this Act or the date it becomes a bank holding company, whichever is later, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or a bank holding company or engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank of which it owns or controls 10 per centum or more of the voting shares.

The Commissioner may, upon application by a bank holding company, extend the period referred to in paragraph (2) above from time to time as to such bank holding company for not more than one year at a time, if, in his judgment, such an extension would not be detrimental to the public interest, but no such extensions shall in the aggregate exceed three years.

(b) The prohibitions in this section shall not apply to

(1) shares of any company engaged or to be engaged solely in one or more of the following activities: (A) holding or operating properties

used wholly or substantially by any banking subsidiary of such bank holding company in the operations of such banking subsidiary or acquired for such future use; or (B) conducting a safe deposit business; or (C) furnishing services to or performing services for such bank holding company or its banking subsidiaries; or (D) liquidating assets acquired from such bank holding company or its banking subsidiaries or acquired from any other source prior to the effective date of this Act, or the date on which such company became a bank holding company, whichever is later;

(2) shares acquired by a bank in satisfaction of a debt previously contracted in good faith, but such bank shall dispose of such shares within a period of two years from the date on which they were acquired, except that the Commissioner may upon application by such bank holding company extend such period of two years from time to time as to such holding company for not more than one year at a time if, in his judgment, such an extension would not be detrimental to the public interest, but no such extensions shall extend beyond a date five years after the date on which such shares were acquired;

(3) shares acquired by such bank holding company from any of its subsidiaries which subsidiary has been requested to dispose of such shares by any Federal or State authority having statutory power to examine such subsidiary, but such bank holding company shall dispose of such shares within a period

of two years from the date on which they were acquired;

(4) shares held or acquired by a bank in good faith in a fiduciary capacity, except where such shares are held under a trust that constitutes a company as defined in section 5(b) and except as provided in paragraphs (2) and (3) of section 5(g);

(5) shares which are of the kinds and amounts eligible for investment by national banking associations under federal law;

(6) shares of any company which do not include more than 5 per centum of the outstanding voting shares of such company;

(7) shares of an investment company which is not a bank holding company and which is not engaged in any business other than investing in securities, which securities do not include more than 5 per centum of the outstanding voting shares of any company;

(8) shares retained or acquired with the approval of the Commissioner in any company performing any activity that the Commissioner has determined, after notice and opportunity for hearing, is functionally related to banking in such a way that its performance by a subsidiary of a bank holding company can reasonably be expected to produce benefits to the public that outweigh possible adverse effects;

(9) shares lawfully acquired and owned prior to the effective date of this Act by a bank which

is a bank holding company, or by any of its wholly owned subsidiaries.

06.06.020 - LIABILITY OF BANK HOLDING COMPANIES. A bank holding company is primarily liable for the payment of the debts of its subsidiaries which are banks.

06.06.025 - ADMINISTRATION. (a) Within one hundred and eighty days after the effective date of this Act, or within one hundred and eighty days after becoming a bank holding company, whichever is later, each bank holding company shall register with the Commissioner on forms prescribed by the Commissioner, which shall include such information with respect to the financial condition and operations, management, and intercompany relationships of the bank holding company and its subsidiaries, and related matters, as the Commissioner may deem necessary or appropriate to carry out the purposes of this chapter. The Commissioner may, in its discretion, extend the time within which a bank holding company shall register and file the requisite information.

(b) The Commissioner is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.

(c) The Commissioner from time to time may require reports to keep him informed as to whether the provisions of this chapter and such regulations and orders issued thereunder have been complied with; and the Commissioner may make examinations of each bank holding company and each subsidiary thereof, the cost of which shall be assessed against, and paid by, such holding company. The Commissioner shall

use available reports of examinations by federal and state supervisory authorities for the purposes of this section.

(d) All administrative proceedings under this chapter shall be conducted in accordance with AS 44.62.330 - 630.

06.06.030 - EXEMPTIONS. This chapter does not apply to bank holding companies which are registered under the Federal Bank Holding Company Act of 1956.

06.06.035 - INJUNCTIONS AND PROSECUTION OF OFFENSES. (a) Whenever it shall appear to the Commissioner, either upon complaint or otherwise, that the provisions of this chapter, or of any regulation prescribed under its authority, have been or are about to be violated, he may, in his discretion, either require or permit any person or company to file with him a statement in writing as to all the facts and circumstances concerning the subject matter which the Commissioner believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commissioner that any person or company is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any regulation prescribed under its authority, he may in his discretion, bring an action in the Superior Court for the State of Alaska, to enjoin such acts or practices, and upon a proper showing temporary or permanent injunctive relief shall be granted. The Commissioner may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute appropriate criminal proceedings.

06.06.040 - PENALTIES. Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Commissioner pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter, or any regulation or order issued by the Commissioner pursuant thereto, shall upon conviction be fined not more than $10,000 or imprisoned not more than one year, or both. Every officer, director, agent and employee of a bank holding company or a subsidiary who willfully makes false entries in any book, report, or statement of such bank holding company shall upon conviction be fined not more than $10,000 or imprisoned not more than 5 years, or both.

06.06.045 - JUDICIAL REVIEW. Any party aggrieved by an order of the Commissioner under this chapter may obtain judicial review in accordance with AS 44.62.560 - 570.

CAB/TAB HEARINGS

EXHIBIT "B"

EXHIBIT
ATC No. 1

IN THE MATTER OF:

THE ALASKA SERVICE INVESTIGATION

DOCKET 20826

POSITION PAPER

ALASKA TRANSPORTATION COMMISSION

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POSITION PAPER

OF

ALASKA TRANSPORTATION COMMISSION

STATE OF ALASKA

The official position of the Alaska Transportation Commission (ATC) in this proceeding, the ALASKA SERVICE INVESTIGATION, can be summarized as follows:

1. That this investigation of primarily-intra-Alaska service should have been initiated by the Civil Aeronautics Board (CAB) as a joint board proceeding (as provided for in 49 USC 1324) thereby combining the regulatory efforts of both the CAB and this Commission in this matter. However, having failed to initiate it as a joint proceeding, the investigation should, nevertheless, be concluded in that vein with a joint decision.

2. That the Alaska Transportation Commission is a state regulatory agency with responsibilities on the state level similar to the responsibilities of the CAB on the federal level; that the limited role of "party" relegated to the Commission, notwithstanding its major function as a decision making body, is highly inappropriate in this proceeding; that this Commission cannot and should not develop recommendations as to specific route authorities, realignments, competitive service, subsidies, mail service, etc., without first having before it all evidence, briefs, etc., of all parties; that further, this Commission cannot and should not make any such specific recommendations without close coordination of its policies and conclusions with the policies and conclusions of the CAB; and that this review and close coordination can only be accomplished at the decisional level of this proceeding.

3. That the standards of performance and adequacy of service being provided by CAB certificated carriers in Alaska bear directly and forcibly upon the issues in this proceeding; that the importance of these questions pervades the entire spectrum of issues; and that fact-finding, public hearings as provided for

in CAB regulations [302.14 and 399.61(c)], are an essential ingredient of this proceeding if an informed decision on the issues is to evolve.

4. That the CAB is completely out of touch with the real operational conduct of its carriers in this State; that that conduct as measured in terms of service, effort, concern, public interest and operational integrity is deplorable; and that these conditions must weigh heavily in the CAB's determination of its future course of action in the exercise of its jurisdiction.

5. That the recent mergers and purchases of CAB-regulated carriers engaged in Alaska air transportation appear to have led to a substantial deterioration of intrastate service to virtually all communities and areas except those major cities where competition exists in fact.

6. That a formal and thorough investigation into matters of rate levels, rate discrimination, other discriminatory practices, accounting practices relating to separation of scheduled air transportation activities from other activities, efficiency, claims and refund practices and other matters of similar nature of Wien Consolidated Airlines and Alaska Airlines should be initiated by the CAB on its own motion as a logical outgrowth of this Service Investigation.

7. That approximately 95 percent of the scheduled intrastate air service in Alaska is being provided directly or indirectly by carriers certificated by the CAB over routes authorized thereto by the CAB and thus far regulated exclusively by the CAB. This situation has outlived its justification and has become a substantial burden on the public of Alaska.

8. That the exercise of regulatory authority by the State of Alaska should be substantially extended (preferably in cooperation with the CAB) over intrastate routes and over all carriers serving such routes. Over those routes where it remains essential or otherwise desirable for the CAB to exercise primary jurisdiction, the

machinery should be established for joint regulation by the CAB and the ATC, or in the alternative, regulation by the CAB upon consultation with the ATC.

9. That the practice whereby CAB-certificated carriers subcontract the scheduled performance of segments of their routes to local state-regulated carriers is not in the public interest. It is the position of this Commission that such subcontracts are unlawful and constitute a usurpation by the CAB carrier of the regulatory jurisdiction of this Commission.

10. That the contractual arrangements for the intrastate transportation of mail are outdated, inadequate and inappropriate. This matter needs a complete review toward the end of providing better service and adequate compensation to the carrier actually performing that service.

11. That matters relating to subsidy needs of, and payments to, carriers engaged in intrastate air service (including mail service) and the use to which such subsidies are put in competitive practices are of major concern to this Commission as well as to the CAB. A realistic and imaginative review should be made of the basis and need for subsidy and the qualifications for and the formulas under which subsidies should be paid.

12. That all carriers which serve Alaska and are regulated by the CAB, including those providing on-line interstate gateway service, should be required by the CAB to file concurrently with the ATC copies of all applications for routes, exemptions, tariff changes, transfers, and all other such documents which relate to Alaskan air commerce and which are filed with the CAB. It is essential that the State of Alaska be adequately and fully apprised of those matters affecting air commerce to and within the State.

13. That there is a serious need for closer cooperation and consultation between the CAB and the ATC. This Commission recognizes that the actions taken by each agency can, and frequently do, have a significant effect on those carriers regulated

by the counterpart agency. The expertise, long experience and competent staff of the CAB could be of great benefit to this Commission. Similarly, this Commission could materially assist the CAB with its need for local information, surveillance and general local contact.

INTRODUCTORY NOTE

The foregoing summary delineates those matters upon which the Commission takes a position at this time. The body of this Position Paper elaborates on the points raised in the summary. It provides in greater specificity some of the more important reasons for stressing those points, and it develops in greater depth some rather compelling considerations involving jurisdiction and cooperation between the CAB and the ATC.

Submitted also are a number of exhibits in three separate series groups. The "100" series is composed of ATC requested or prepared exhibits presented primarily in an informational context. The "200" series contains published economic studies relating to the economy of individual communities or areas. The "300" series consists of statements, etc., pertaining primarily to sufficiency and standard of service.

So as not to unnecessarily burden this proceeding with repetitious evidence pertaining to sufficiency and standard of service, the Commission determined to present rather extensively the views of a single community as representative of prevailing views throughout the State. This approach presupposes, of course, that a substantial identity of view exists among people throughout the State as to compatibility of evidence. Indeed, after an extensive survey, the Commission found that such an identity or view does exist to a substantial degree.

The rather extensive written expressions received from the Bethel area (Exhibits ATC-300-312) are accordingly submitted as representative of views not only throughout the Wien Consolidated route system, but (to a slightly lesser degree) throughout Alaska Airlines' system as well. 1/

These expressions from Bethel form a major part of the ATC-300 series; the remainder of that series consists of a few typical written expressions from various other communities throughout the State. The Common elements in all these expressions will easily be noted.

1/ Views of the people of Anchorage and Fairbanks and their immediate environs were not surveyed and have not been considered in arriving at these conclusions.

The official position of this Commission is expressed in this Paper and comparison of that position with the community expressions in the ATC-300 series will indicate substantial identi y of view. In fact, this Paper will refer hereafter to some of those exhibits as supporting basis for various aspects of the Commission's position. The Commission does not necessarily concur in all of the community and individual views expressed in the ATC-200 and 300 series of exhibits.

THE ALASKA TRANSPORTATION COMMISSION, REGULATORY ARM OF THE STATE

The Alaska Transportation Commission was created as a separate and distinct State regulatory agency in 1966 (Chapter 139 SLA 1966, establishing Chapter AS 42.07). Prior to that time, the Alaska Air Commerce Act of 1960 was administered by the Alaska Public Service Commission. The ATC was substantially reorganized by Chapter 104 SLA 1969 in which a three-man Commission was provided in place of the previous two-man Commission.

The Commission is responsible for the administration and enforcement of the Alaska Air Commerce Act of 1960. As a general proposition, that Act provides for the regulation of air commerce within the State of Alaska in the public interest.

Three general classifications of air carrier are established by the State Air Commerce Act. They are the scheduled carrier, air taxi carrier, and the contract carrier. The Alaska law provides that for a carrier to engage in intrastate air commerce within the State, it must first be certificated by the Alaska Transportation Commission within one of these three general classifications.

In addition to certification, the Commission also regulates in varying degrees (depending upon the classification) the routes, rates, tariffs, safety of operations of aircraft, base of operations, etc., of intrastate air carriers.

The Commission also has the authority to grant exemptions to the certification requirements under specified conditions and for a limited period of time. In all cases, applications for new or revised authority must meet public convenience and necessity tests.

MORE THAN 75 PERCENT OF TOTAL PASSENGER TRAFFIC CARRIED BY CAB CARRIERS BETWEEN ALASKAN POINTS IS INTRASTATE -- THE SUBJECT OF STATE REGULATION

A review of the informational responses of Alaska Airlines and Wien Consolidated Airlines discloses that the vast majority of passengers carried between Alaskan points by CAB carriers is actually moving in intrastate commerce only.

Wien's Exhibit (WC-IR-201) containing O & D information for the month of October, 1969, shows that slightly over 90 percent of all of Wien's passenger load (including on-line and inter-line traffic) was intrastate only. And, if the number of interstate passengers who did not move intrastate beyond the points of entry into Alaska (other than between Juneau and Fairbanks) is subtracted, it can be seen that approximately 96 percent of the passenger movement over Wien's intrastate interior system was in no way involved in interstate commerce.

Similar information is not so easily developed for Alaska Airlines. However, a close examination of the Southeast Alaska network of Alaska Airlines reveals that at least as to that part of its system, the vast majority of the passenger movement between Southeast Alaska communities is strictly intrastate.

With some exceptions, Alaska Airlines did not disclose October, 1969, O & D information for most of its Southeast Alaska bush route system. However, from the information that was provided as well as other information available to this Commission including special O & D information requested by this Commission of Southeast Alaska air taxi subcontractors and other operators, it appears that over 90 percent of the scheduled inter-community passenger movement in Southeast Alaska in October, 1969, was intrastate.

Summer tourist traffic substantially increases the volume of interstate passengers moving between Alaskan points both in the Southeast Alaska system of Alaska Airlines and over the system of Wien Consolidated Airlines. The air tours offered by tour operators and the airlines bring a substantial influx of visitors to the State. The through-intrastate movement of these tourists, however, is generally limited to only the very few points covered in the tours.

It is also true that the summer movement of purely intrastate passengers increases very substantially. It can be seen, for example, in Exhibit ATC-105 that the Third Quarter Air Taxi passenger movement is more than twice that of the Second and Fourth Quarters, and more than three times that of the First Quarter. O & D information submitted by the carriers (to the extent that it can be so broken down) also indicates a much larger intrastate movement in the summer.

Thus the ratio of intrastate to interstate passenger traffic in the summer would probably be not less than 70 percent for the route systems discussed above.

ALL INTRA-ALASKA ROUTES REGULATED BY THE CAB REFLECT A MAJOR CAB-ATC JURISDICTIONAL OVERLAP

In most respects, the responsibilities and objectives of the Alaska Transportation Commission in intrastate air commerce matters are similar to those of the CAB in interstate air commerce matters.

Due to the long-standing and intimate involvement of the CAB in Alaska's air commerce, it would be impossible to draw a fine line between the jurisdiction of the CAB and the jurisdiction of this Commission. This ALASKA SERVICE INVESTIGATION itself epitomizes the jurisdictional overlap in integration of federal and state regulatory practices and policies.

Excluding the Seattle/Portland gateway services, virtually all point to point service and routes being considered in this proceeding are intrastate in nature. With respect to much of this service, interstate commerce is incidental or insignificant compared with intrastate service requirements. It is estimated that carriers regulated primarily by the CAB provide in excess of 95 percent of the scheduled intrastate air service within Alaska. This appears to be a most unusual situation, as well as one of questionable validity, if the CAB jurisdiction is exercised unilaterally.

It follows that in Alaska where air transportation is one of the most important transportation modes and a basic necessity to the entire economy of the State, it is essential that the State exercise major, if not primary, regulatory jurisdiction.

EXCLUSIVE CAB REGULATION OF SPECIFIC INTRASTATE AIR ROUTES AND CARRIERS HAS PROVEN TO BE NON-RESPONSIVE TO THE NEEDS OF LARGE SEGMENTS OF THE STATE

The matter of the exercise of so broad a jurisdiction by the CAB over intrastate routes is not in and of itself the major problem. What is unfortunate, however, is the unresponsiveness of this arrangement to the needs and complaints of the people who are presumably being served. It appears that the remoteness of the CAB from the area of operations of its regulated carriers substantially influences the objectives of the CAB in its regulatory policy as applied to intra-Alaskan services. This remoteness tends to insulate the CAB from operational and service matters (other than those which may be called to its attention by the carriers), the result being that the Board primarily concerns itself about only those problems, such as subsidy payments, which are its direct and exclusive responsibility. It appears that with respect to Alaskan carriers the overriding objective of the CAB is, and has for some time been, the elimination of subsidies with all possible dispatch.

There is little doubt that this primary objective is being achieved. However, it is also quite apparent to anyone familiar with Alaskan air transportation services that this primary objective is being achieved at great sacrifice in public service.

The CAB cannot be totally unaware of the vast deterioration in intra-Alaska air service over the past three or four years. But, it seems certain that the Board does not fully recognize or appreciate the magnitude and implications of these conditions.

THE DOMINANT OBJECTIVE IN THIS PROCEEDING -- REASONABLE ADEQUACY AND PERFORMANCE OF CARRIER SERVICE; THE APPROACH TO ACHIEVING THAT OBJECTIVE -- JOINT INVESTIGATION AND REGULATION

The instigation of the ALASKA SERVICE INVESTIGATION is unquestionably an important and commendable undertaking by the CAB. However, the issues which have been delineated by the Board reflect a continuing and virtually exclusive preoccupation with the subsidy issue and a most unfortunate lack of appreciation for the standards and adequacy of service.

It is the position of this Commission, however, that the adequacy and standards of service dominate as issues and the Board should and must consider them in this proceeding. Assuming the accuracy of this contention, it becomes at once apparent that

there are major deficiencies in the procedures adopted by the CAB in this Service Investigation.

We call the Board's attention to the provisions of the Federal Aviation Act of 1958 (49 USC 1324), titled Cooperation With State Aeronautical Agencies:

> "(b) The Board is empowered to confer with or to hold joint hearings with any State aeronautical agency, or other State agency, in connection with any matter arising under this chapter within its jurisdiction, and to avail itself of the cooperation, services, records, and facilities of such State agencies as fully as may be practicable in the administration and the enforcement of this chapter."

We cannot conceive of a more appropriate occasion for the Board to have implemented the above quoted statute than the instant proceeding. The fact that it did not do so strongly suggests that the Board considered this Service Investigation to be little more than a fairly routine route proceeding. And, perhaps having little more to go on than the carriers' side of the story, the Board could justify that conclusion. However, even if it were routine, the fact that so great a proportion of the routes under investigation are primarily intrastate in nature, should have been sufficient for the Board to have proposed a joint board proceeding. It is elementary that the role of this Commission as simply a party in this proceeding effectively precludes participation by the State in the decisions affecting nearly all scheduled service in intrastate air commerce.

The Commission recognizes that the CAB has not specifically made an issue of the bush route services to those communities listed in Appendix C, but not shown in Appendices A and B, of CAB Order 69-3-68. Nor has the CAB determined to take up the issue of the relative jurisdiction of the CAB and this Commission. However, these issues are necessarily an integral part of this proceeding and, as previously stated, the issue of adequacy and standards of service over the bush route segments of the CAB carriers' authority is one of the dominant issues to be considered. It can be seen that these issues are interrelated. The exclusive regulatory jurisdiction heretofore exercised by the CAB over the Alaska routes has not resulted in reasonably satisfactory or adequate service to most of the communities in the State.

Additionally, the broad assumption of regulatory jurisdiction on an exclusive basis by the CAB seriously subverts effective local regulation. It encourages CAB regulated carriers to avoid state regulation and to look only to the CAB for route changes, tariff changes, etc. (See, for example, Exhibit ATC 104). The State seldom receives timely notice of such requests.

HEARING PROCEDURES ADOPTED BY THE CAB IN THIS INVESTIGATION PRECLUDE AN ADEQUATE EVIDENTIARY RECORD ON DOMINANT ISSUES -- ATC PUBLIC HEARINGS MAY PARTIALLY REMEDY THIS PROBLEM

In a proceeding such as this ALASKA SERVICE INVESTIGATION, where historical carrier performance is a matter of major significance, it is imperative that the consumer public be liberally afforded an opportunity to speak its piece.

Unfortunately, the restriction to a formal hearing process sans less formal public participation effectively thwarts this objective. It is well known that a good cross section of public opinion cannot be obtained in a matter of this sort without holding public, forum-type hearings.

To partially remedy the public participation problem, this Commission belatedly requested and was granted (with concurrence of all other parties) an extension of time in which to conduct open public hearings on its own and outside the CAB record.

During the latter part of February and early March, 1969, the ATC held open, public, forum-type hearings throughout the State and made numerous personal contacts with people throughout the State for the purpose of determining (1) the major concerns and views of the community in regard to air transportation and (2) the manner in which the people of this State may be better served in air commerce.

Hearings were held at the following places: Barrow, Kotzebue, Nome, Unalakleet, Andreafski (St. Mary's), Bethel, Dillingham, King Salmon, Kodiak, Kenai, Cordova, Valdez, Tok, Fort Yukon, Haines, Sitka, Juneau, Petersburg, Wrangell, and Ketchikan. Each of these hearings was conducted by one or more of the three Commissioners. The time, place and nature of these hearings was noticed in advance by public media and individual correspondence although notice was necessarily very short. There were in attendance from a handful to

forty or more people at each hearing. Anyone who desired to speak was permitted to do so. All testimony was recorded and most of these recordings were subsequently reviewed by the Commissioners. Portions thereof were transcribed for further, more detailed review.

People attending these hearings were encouraged to submit their views in writing and a fair representation did so.

Based upon these hearings, letters and numerous other contacts with people throughout the State, the Commission has determined that there are major and inexcusable deficiencies in the service provided by those CAB carriers serving intra-Alaska routes. This is poignantly clear in the so-called bush route areas. Such matters as extreme delays in mail and freight deliveries; inexcusable schedule delays or cancellations; inability to have claims and refunds settled within several months of filing; frequent and unannounced schedule changes; untrained personnel; discriminatory rates and improper charges; commonplace misinformation on flight arrivals and departures; frequent frustration in attempting to make interline connections; substantial failure to meet published departure and arrival times; inability of local people to obtain space on flights to and from tourist centers because all seats booked solid for several days at a time by tour passengers; the frequent unavailability of scheduled flights theoretically being performed by subcontractors, etc., were common complaints throughout the State. Most of these problems are presented in varying forms in Exhibit 300 series statements.

THE ALASKA TRANSPORTATION COMMISSION RECOMMENDS THAT THE ALASKA HEARINGS TO BE CONDUCTED BY THE CAB EXAMINER BE BROADENED IN SCOPE TO INCLUDE A PUBLIC EXPRESSION MISSION

It is the conviction of this Commission that the service conditions previously enumerated do predominate in most areas of the State. However, we do not presume complete agreement by the carriers involved.

Therefore, the ATC strongly urges that the forthcoming hearings to be held by the CAB in Alaska should likewise be of a nature that would allow general public participation and oral testimony.

CARRIER MERGERS AND CONSOLIDATIONS APPEAR TO HAVE LED TO MAJOR DETERIORATION OF INTRASTATE SERVICE THROUGHOUT THE STATE

Within the last three years there have been several mergers and purchases of CAB certificated carriers serving Alaska. In very brief summary, these mergers and consolidations were:

1. Wien Airlines and Northern Consolidated Airlines to form Wien Consolidated Airlines, Inc., April, 1968.

2. Western Airlines purchased Pacific Northern Airlines, July, 1967.

3. Alaska Airlines with Cordova Airlines, and with Alaska Coastal Ellis Airlines, surviving as Alaska Airlines, Inc., February and March, 1968.

There appears to be a direct correlation between the merger of the larger CAB carriers serving Alaska and the deterioration in air service to outlying communities and areas.

Western Airlines, for example, has been systematically ridding itself of what might be properly termed "local service obligations." It has suspended its service to King Salmon, Cordova, and Yakutat. It seeks to rid itself of its route between Anchorage, Kenai, Homer and Kodiak. In essence, it appears that Western's real objective in absorbing Pacific Northern Airlines was to acquire only the high-traffic-density, Seattle/Portland gateway routes to Alaska, and to succeed to the favored position of PNA in its application for Anchorage-Hawaii authority as consolidated in the Trans-Pacific Route Investigation.

Having accomplished these objectives, Western Airlines now shows no interest in the air service needs of the remainder of those communities previously served by PNA.

Alaska Airlines, in its two mergers, has gained access to the Anchorage-Juneau-Sitka-Seattle-Portland market. Ketchikan has not yet been added to this service route by the CAB, but the result of this omission has been the creation of some abnormal and unsatisfactory scheduling and service conditions in the Ketchikan, Juneau, Sitka feeder service from other Southeastern Alaska communities.

In essence, what the CAB has done in Southeast Alaska over the last five years is to substitute in substantial part Alaska Airlines and Wien Consolidated Airlines for Pan American World Airways in the interstate service to Southeast Alaska. This

substitution has never met the approval of the people of this area.

Alaska Airlines inherited by its merger a multiplicity of intra-Southeast Alaska routes. Many of the services previously provided by Alaska Coastal Ellis Airlines have been discontinued by Alaska Airlines entirely. A large number of the remaining point to point routes which Alaska purportedly continues to serve are in fact served by air taxi operators under subcontract with Alaska Airlines (Exhibit ATC-103).

It was anticipated that the merger of Wien Airlines and Northern Consolidated Airlines would provide a materially strengthened carrier which would result in a better service to the public than either carrier was capable of providing individually.

Unfortunately, the emerged carrier, while providing more sophisticated equipment and service to the large competitive markets, has retracted its service to the outlying communities. In markets where Wien Consolidated is not competing with another carrier, its service and performance have deteriorated markedly.

Between 1957 (the first year Northern Consolidated subcontracted out part of its route) and November 1, 1967, Northern Consolidated and Wien Alaska subcontracted a total of 34 points on their routes. Since May 1, 1969, Wien Consolidated has subcontracted thirty additional points (Exhibit ATC-103).

The inverse relationship between mergers and deteriorating service to outlying communities appears to be a very real one. Apparently when a carrier reaches substantial size, gains access to major markets, and places into operation sophisticated jet equipment, it loses its interest and perhaps capability to provide adequate service over marginal routes.

Unfortunately, the bush-level scheduled carriers, which develop from these circumstances, do not inherit any of the better traffic markets because those markets are already occupied by the large carriers.

CAB CARRIER SUBCONTRACTS ARE UNLAWFUL AND CONTRARY TO PUBLIC INTEREST

Wien and Alaska have submitted into the record copies of their agreements with air taxis under which the latter provide

local scheduled service. Exhibit ATC-103 graphically portrays the networks of such service routes. In each case, the subcontractor is a State-certificated air taxi operator. However, only two of the fifteen subcontractors are certificated by the State as scheduled carriers. And, even in those instances where the subcontractor is certificated to provide scheduled service, many of the points listed in his State route authority are different from those he serves under subcontract.

Further investigation also reveals that the subcontractor generally serves the contract points both as a scheduled carrier and as an air taxi operator. In many instances, the volume of traffic carried as an air taxi to such points substantially exceeds the volume carried as the subcontractor. It may be that in many such cases traffic which the subcontractor is carrying under the contract limited to multiple coupon, involving travel over more than one ice leg.

Air taxi operators are required by State law to charge only those rates which have filed with this Commission. It is immaterial whether service is being provided on a trip by trip basis or under a long-term contract.

Thus, for such an operator to comply with the laws of the State of Alaska as to the charges which he may make, he cannot charge the rates and the tariffs of the CAB contracting carrier, unless such rates happen to coincide with those of the air taxi operator which are on file.

Under some of the contracts the operator is paid a flat hourly rate by the mainline carrier irrespective of the number of passengers, volume of freight, etc. The mainline carrier then collects its tariff rates from the sub's passengers and shippers.

Other subcontractors apparently collect and keep as their compensation the published CAB tariff rates of the mainline carrier.

The air taxi operator's tariff normally reflects hourly rates. The cost per passenger would depend on the number of passengers travelling between two given points on the same flight. Thus it would appear that there is only one point in the passenger-time relationship at which the air taxi rate per passenger could be the same as the passenger rate of the scheduled CAB carrier.

This subcontract approach is even further clandestine in that the CAB carrier, rather than this Commission, makes the determination as to which, if any, local Alaska certificated carriers will become scheduled carriers and will be allowed to carry mail for compensation. This leads to an unhealthy control by a major airline of the independent operations of locally-certificated carriers. It also leads to a reduction in competition and service through a mutual arrangement not to compete. Although the CAB regulated carrier remains ultimately responsible for the actions and performance of the subcontractor, they in fact exercise no supervision over the sub, do not know what the sub is doing or not doing, and apparently couldn't care less. With many of the subcontractors, the only scheduled service provided occurs on mail flights (if there is room) and mail is delivered sporadically.

One further point should be made before leaving the matter of subcontracts. There is no assurance that a contract will not be terminated on short notice; or that it will be renewed upon expiration; or that it will not be given to a different local operator; or that the CAB carrier itself will not terminate the contract and initiate the service itself. Thus, the State-certificated operator builds his operation and his capability with no assurance that he may continue to provide that service for any length of time.

The CAB carrier is neither qualified nor authorized to designate local carriers upon which it will bestow operating privileges within this State.

There have been numerous complaints to the effect that some subcontractors of CAB carriers are providing poor, sporadic, inadequate and unsatisfactory service to the people they supposedly serve. These conditions add emphasis to the impropriety of the route subcontracts.

IT APPEARS THAT THE AIR TAXI OPERATORS, PARTICULARLY IN SOUTHEAST ALASKA, NOW PROVIDE THE ONLY DEPENDABLE BUSH ROUTE SERVICE

The Commission has requested confidential O & D information of Southeast Alaska air taxi operators for the months of August and October, 1969. The response to this request was sufficient to indicate that the air taxi operators are now carrying a very

substantial percentage of the passenger traffic between communities presumably being served by Alaska Airlines.

The response to the Commission's request represents about one-third of the total volume of passenger movement by air taxi operators. The information submitted shows a weighted average of approximately 60 percent of the passenger load carried by the responding air taxi operators in the Third Quarter of 1969 as passengers moving between points on Alaska Airlines' scheduled route. It is believed that this average may be somewhat high as a reflection of the total Southeast Alaska air taxi movement. However, even if the percentage was reduced to 44 percent (the lowest of the reporting operators) it would mean that in the Third Quarter of 1969 air taxi operators in Southeast Alaska transported approximately 26,000 passengers between points listed on Alaska Airlines' scheduled route. This matter is well highlighted by the fact that Alaska Airlines in its informational response (IR-AS-1) shows the number of O & D coupon passengers carried by it between Juneau and Hoonah in the month of August, 1969, as 184. However, one air taxi operator alone shows a total of 840 passengers transported between Juneau and Hoonah during the same month.

It is the Commission's belief that these circumstances vividly reflect a virtually-complete abandonment by Alaska Airlines of its responsibilities under its CAB certificate to provide a dependable scheduled service to these outlying communities. In essence, the people of Southeast Alaska must look to the air taxi operator if they are going to receive a modicum of dependable service between the communities of Southeast Alaska.

The extent to which the results of the Commission's survey in Southeastern Alaska can be translated to other areas of the State is not known. However, the Commission has received considerable indication that the ratios may be similar in the Northwest, Southwest, and Interior areas as shown in Exhibit ATC 105.

UNILATERAL DECISION BY THE CAB WOULD BE IMPROPER IN THIS PROCEEDING

As procedural matters now stand, the decision in this Service Investigation is to be made unilaterally by the CAB.

This approach places the Alaska Transportation Commission in a rather unique position (since it is the regulatory body on

the State level). As pointed out earlier in the text of this Paper, the regulatory jurisdiction of the State is at least as substantial as that of the CAB.

Therefore, what the Commission is apparently being asked to do is decide for itself the issues in this proceeding without benefit of the evidentiary record and briefs and thereupon make its recommendations to the CAB as would any other party.

Such an approach, even if it were practical, would serve little purpose. It is essential that the jurisdictional questions be squarely faced and the utmost in cooperative effort be pursued by both the CAB and the ATC. This Commission currently has in its files a substantial number of applications for intrastate scheduled authority. The Commission has deferred consideration of all such applications (upon which hearings have not been held in the past six months) pending the outcome of this ALASKA SERVICE INVESTIGATION. Even where hearings had been held previous to this policy decision, the granting of authority where warranted by the public convenience and necessity has been limited to a one-year period.

It is intended by the Commission to systematically review the scheduled service requirements of limited geographical areas in a series of State area service investigations and to provide for the certificated service so badly needed in many areas of the State.

It would be a complete frustration of regulatory responsibility if the CAB and the ATC failed to integrate their efforts in these matters which so vitally affect the public interest.

DATED at ANCHORAGE, ALASKA, this 14th day of April 1970.

ALASKA TRANSPORTATION COMMISSION

Dennis L. Marvin

Dennis L. Marvin, Commissioner

George L. Benesch

George L. Benesch, Commissioner

James J. Johnson

James J. Johnson, Commissioner

EXHIBIT "C"

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF COMMERCE

ALASKA TRANSPORTATION COMMISSION

750 MACKAY BUILDING
338 DENALI STREET—ANCHORAGE 99501

May 5, 1970

This letter was sent to applicant air carriers representing 13 docketed applications for intrastate scheduled carrier authority.

SUBJECT: Your Application for Scheduled Carrier Authority -- Docket No. _____.

Dear Mr.

The purpose of this letter is to inform you as to the status of your subject Docketed Application for Scheduled Air Carrier authority.

As you may already know the Commission is a party in the ALASKA SERVICE INVESTIGATION of the Civil Aeronautics Board, Docket No. 20826. Upon a close investigation, we believe that the issues in the CAB proceeding touch upon all existing or proposed scheduled service between all points within the State. We have, therefore, taken the position that neither the CAB nor this Commission should act wholly unilaterally in developing an adequate, efficient, feasible and statewide intrastate network of scheduled service

In keeping with this policy the Commission has for the last several months deferred final consideration of all new applications for scheduled service not previously acted upon unless such deferral would create a serious public hardship in a particular case or the application may otherwise be non-controversial. We intend to continue this policy of deferral over the next few months, at least until the direction the AIASKA SERVICE INVESTIGATION is going to take has been demonstrated.

It is the contention of this Commission that much of the intrastate service such as that for which you have applied is and should be regulated by the State. At the same time, the Commission recognizes that a proliferation of numerous intrastate scheduled carriers could significantly affect the operations of the carriers heretofore regulated exclusively by the CAB. We believe the public interest demands that the regulatory efforts

of the Federal and State governments be substantially coordinated to avoid duplication of effort, conflicting decisions and objectives, adverse effects on the carriers and the public, etc.

This Commission has therefore placed itself in a posture whereby such coordination and joint effort can be accomplished. We are assuming, of course, that the CAB is similarly interested in such cooperation and coordination.

At such time as these applications for scheduled service are again considered (hopefully within the next few months) we propose to initiate local area service investigations for the purpose of developing an adequate, viable, feasible network of local carriers. This program will be preceded by a rule-making proceeding for the purpose of adopting guideline regulations and to give the industry and public an opportunity to be heard on the procedure, problems and objectives.

We appreciate your continued patience and understanding in this matter.

Sincerely yours,

George Benesch

George Benesch
Commissioner

EXHIBIT NO. D

An examination by the staff of the Alaska Transportation Commission as of May 4, 1970, shows that the matters set forth below are pending before the Commission.

There follows hereinafter an analysis of these pending matters. The analysis attempts to group the matters so as to reflect the type of issues and problems involved. It further attempts to explain the general nature of each group and seeks to explain the responsibility of the Commission in deciding these matters so that reasonable time factors can be applied to the determination of each group of matters.

1. Contested Matters: This class of cases involves applications for permanent authority to operate air taxi, scheduled carrier, and contract carrier in air commerce; applications for temporary and emergency temporary authority for operation as an air taxi, scheduled carrier, and contract carrier in air commerce; applications for permanent and temporary authority for what are known as common carriers - freight, common carriers - passenger, and contract carrier - freight, in motor carrier commerce. Other classes of cases involve authority to operate air cushion vehicles and water carrier (ferry) vessels. Each of these cases has been protested by one or more individuals or companys and each application will require public hearing estimated to average from 4 to 5 days.

   Contested cases requiring hearing 87

2. Uncontested Matters: This class of cases involves matters in which there have been no formal protests but in which either an informal or formal hearing will be required by the Commission in order to determine whether it is in the public interest to authorize either air, surface, air cushion, or water (ferry) carriage. This class of cases also includes those matters in which formal oral argument is required by the Commission on either or both contested cases (which have been heard) or uncontested cases.

   Hearings on uncontested cases or cases which require argument and Commission decision 66

3. Other Matters: This class of cases involves matters which require Commission study and perhaps additional hearings (not included above). These cases involve such matters as complaints alleging violations of the transportation law, requests for interpretations of the law, review of policy determinations made by prior Commissions, review of the operation and practices of operating carriers in which the public interest is involved.

Cases involving so-called Other Matters 13

4. Pending Decisions: This class of cases involves matters that have been heard by the Commission and cases which have not required a public hearing but which require the study, examination and exercise of judgment and discretion of the Commission. In all cases formally or informally heard by the Commission under the present law it is necessary for each Commissioner to fully study and analyse the record and all exhibits presented before entering into conference for decision.

Cases involving Pending Decisions 6

5. Special Matters:

(a) The Commission during the past several months has held over 20 hearings throughout the state in connection with the Civil Aeronautics Board's Alaska Service Investigation (Air Route Investigation). These hearings have averaged from 2 to 4 days per hearing (including travel time). Upcoming are six hearings within Alaska and at least two hearings in Washington, D.C. (Please see explanation of the nature and scope of these hearings, supra). These hearings are policy making in nature and hearing officers would not be able to attend to these matters nor exercise the discretion and judgment required.

Estimated time for CAB hearings	30 days
Estimated time for briefing and argument	30 days

(b) The transportation industry of Alaska has changed dramatically during the last few years. The industry is no longer a 'small-time' matter. Regulations of the Transporation Commission as they now exist were based on a much smaller and less complicated industry. The regulations have proven to be grossly inadequate and incomplete to meet the needs of our modern and growing industry. This fact is widely known throughout the industry particularly among attorneys practicing within this field. The regulations must be completely revised. Revision of regulations of the transportation industry is a vast and major task. There is no provision under the law for this task to be accomplished by other than the Commission itself. The revision necessary of regulations

governing air, motor carrier (freight and passenger), air cushion vehicles and water (ferry) carriers will require extensive research and study and may take as long as one year. This work must be performed by the Commission because these regulations involve many involved issues of policy, practice and procedure. Work on this revision of regulations which is very immediately necessary will require time that is now devoted to the hearing of cases.

Estimated time for revision of regulations 1 year

(c) In addition to revision of the transportation regulations there is an urgent need for a reclassification of carriers within each of the groups, i.e., air, surface, air cushion and water. The Commission now has planned at least three reclassification hearings. These hearings will involve the taking of testimony from all interested members of the industry, and the public.

Estimated time for reclassification hearings 30 days

EXHIBIT "A"

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

ALASKA SERVICE INVESTIGATION DOCKET 20826

PETITION BY ALASKA TRANSPORTATION COMMISSION

FOR JOINT BOARD PROCEEDING

Communications with respect to this document should be sent to:

G. KENT EDWARDS
ATTORNEY GENERAL
By Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission
338 Denali St., 750 Mackay Bldg.
Anchorage, Alaska 99501

Anchorage, Alaska

April 28, 1970

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

ALASKA SERVICE INVESTIGATION DOCKET 20826

PETITION BY ALASKA TRANSPORTATION COMMISSION
FOR JOINT BOARD PROCEEDING

COMES NOW the ALASKA TRANSPORTATION COMMISSION (ATC) and petitions the Civil Aeronautics Board to implement the provisions of the Federal Aviation Act of 1958 (49 USC 1324) which authorize the C.A.B. to hold joint hearings and otherwise perform such acts, to issue such orders and to make such procedure as necessary to carry out the provisions of the Act relating to cooperation with State regulatory agencies; and in keeping with the objectives of such provisions, the ATC petitions the C.A.B. to reconstitute the Alaska Service Investigation as a Joint Board proceeding to be conducted and decided jointly by the C.A.B. and the ATC.

In support of its petition, the ATC respectfully states as follows:

I

The ATC is the duly constituted regulatory agency of the State of Alaska as provided by law (Chapter AS 42.07); and as such, is the agency responsible for the regulation of intrastate air commerce under the Alaska Air Commerce Act, Chapter AS 02.05.

II

The ATC is presently a party intervenor in the Alaska Service Investigation and as such is limited to participation on the evidence-producing level and to making recommendations to the C.A.B. without first having benefit of a complete record.

III

Approximately 95 percent of all scheduled intrastate air service in Alaska is provided by air carriers regulated exclusively by the C.A.B.; and between approximately 75 and 95 percent of all traffic moving between points in Alaska is intrastate rather than interstate movement and subject to regulation by the State.

IV

The ATC has conducted informal public hearings throughout Alaska in connection with the Alaska Service Investigation. It has done this as a

response to numerous requests of the public for such hearings and by virtue of the commendable understanding of the Board's Hearing Examiner in the Alaska Service Investigation who granted an extension of time to the Commission for this purpose. (All parties concurred in an extension of time substantially as requested by this Commission.) As a result of such hearings, and the Commission's additional investigations and familiarity with the intrastate air commerce needs of Alaska, the Commission has submitted, as a direct exhibit, a Position Paper directed primarily to the matters of CAB-ATC jurisdiction, regulatory objectives, and essentiality of substantially closer cooperation between the C.A.B. and this Commission. The summary of this Position Paper is attached to this petition and by reference made a part of this petition in support thereof.

V

It is essential that the jurisdictional questions be squarely faced and the utmost in cooperative effort be pursued by both the C.A.B and the ATC. This Commission currently has in its files a substantial number of applications for intrastate scheduled authority. The Commission has deferred consideration of all such applications (upon which hearings have not been held in the past six months) pending the outcome of this Alaska Service Investigation. Even where hearings had been held previous to this policy decision, the granting of authority where warranted by the public convenience and necessity has been limited to a one-year period.

It is presently intended by the Commission to systematically review the scheduled service requirements of limited geographical areas in a series of State regional service investigations and to provide for certificated service as needed in the many areas of the State.

If the C.A.B. and the ATC failed to integrate their efforts in these matters which so vitally affect the public interest, effective regulation would be very substantially frustrated.

The ATC recognizes that these matters and this petition should have been submitted to the C.A.B. at a much earlier stage in the Alaska Service Investigation proceeding (ideally at its inception or at least prior to the prehearing conference).

Unfortunately, this was not possible. The Commission was completely reorganized by repeal and reenactment of the Alaska Transportation Commission Act in May 1969 (Chapter 104, SLA 1969).

The policy developed herein is that of the new three-man Commission which Commission was not complete until January 1970. (Only one of the present three Commissioners was appointed to office prior to the prehearing conference in September 1969.)

It is the Commission's belief, however, that the Alaska Service Investigation proceeding can still be restructured as a Joint Board proceeding even at this less timely stage particularly since no new issues will be added to delay the present proceeding schedule.

WHEREFORE, the Alaska Transportation Commission respectfully requests the Civil Aeronautics Board to reconsider the unilateral nature of the Alaska Service Investigation and to more appropriately in the overall interest of the public, reconstitute it as a Joint Board proceeding by the C.A.B. and the ATC.

Respectfully submitted,

G. KENT EDWARDS
ATTORNEY GENERAL

By: Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission

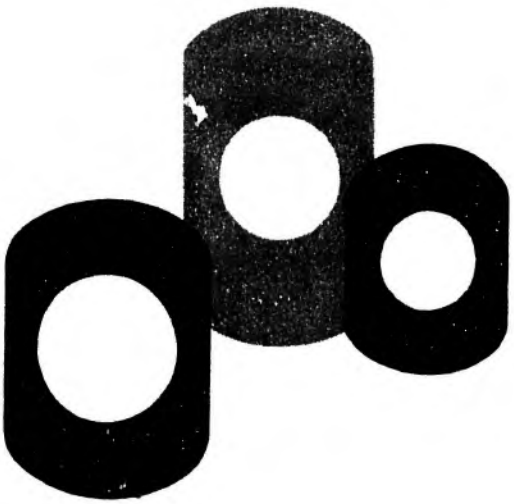
April 28, 1970.

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of April 1970 mailed true and correct copies of the PETITION BY ALASKA TRANSPORTATION COMMISSION FOR JOINT BOARD PROCEEDING, properly addressed and postage prepaid to all parties of record in this proceeding.

Shirle A. Debenham
Assistant Attorney General
Attorney for Alaska Transportation Commission

COLL.
BARG.

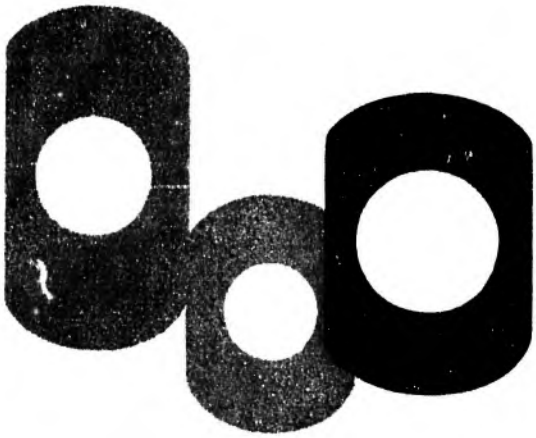




CHALLENGES TO COLLECTIVE BARGAINING

Proceedings of Conference

edited by Benjamin C. Sigal



LABOR-MANAGEMENT EDUCATION PROGRAM

Industrial Relations Center
College of Business Administration
and
College of General Studies
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September 1968

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September 1968

SPEAKERS

BENJAMIN AARON	Professor of Law and Director of the Institute of Industrial Relations, University of California, Los Angeles. Labor Arbitrator and Umpire for various industries. Former Public Member of the Wage Stabilization Board.
NATHAN P. FEINSINGER	Professor of Law, University of Wisconsin. Labor Arbitrator. Former Chairman of Presidential Fact-Finding Boards on Steel and Meat Packing Industries and former Chairman, National Wage Stabilization Board.
THEODORE KHEEL	Attorney. Labor Mediator and Arbitrator. Member of many presidential fact-finding and arbitration boards. Executive Director, Foundation Employees Health, Medical Care and Welfare, Inc.; Partner-Battle, Fowler, Stokes and Kheel; former Chairman, New York Regional Board, National War Labor Board.
HAROLD S. ROBERTS	Senior Professor of Economics, and Director of Industrial Relations Center, College of Business Administration, University of Hawaii. Labor Arbitrator and Consultant on personnel problems. Former Chief of Collective Bargaining, Bureau of Labor Statistics, U.S. Department of Labor.
JACK STIEBER	Professor of Economics and Director of the School of Labor and Industrial Relations, Michigan State University. Served as Executive Secretary to the President's Advisory Committee on Labor-Management Policy and as Research Consultant to the International Labour Organization. Consultant to public and private agencies.

PREFACE

The discussions contained in this publication were presented in a Conference on Challenges to Collective Bargaining held in Honolulu, Hawaii on August 11, 1967. The Conference was held under the auspices of the Labor-Management Education Program of the University of Hawaii. Both the Conference and this publication were made possible by funds allotted under Title I of the Higher Education Act of 1965.

The basic theme to which the discussions were directed was that changes are required in our attitudes, our concepts, and our laws, in order to deal effectively with new problems arising in labor-management relations in both the public and private sectors. The material in this volume makes a useful contribution to public understanding of many of the complex issues involved.

Harold S. Roberts, Director
Industrial Relations Center
July 1968

Benjamin C. Sigal, Director
Labor-Management Education Program

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A New Approach to Strikes in Public Employment

Jack Stieber

The U. S. Department of Labor reported 142 work stoppages in public employment last year, involving 105,000 workers who were idled for 455,000 days. This made 1966 the biggest year, by far, for strikes in Government. There were more than three times as many strikes as in 1965 and more than twice as many as in the previous peak year of 1952 during the Korean War. All but nine of the strikes in 1966 were in local government, with schools, sanitation, protection services, and hospitals and other health services, in that order, accounting for close to 90 percent of the total. There were only two stoppages in public transportation, including the celebrated New York City transit strike in January, but they caused more than half of all time lost due to government strikes in 1966. In addition to reported stoppages, which include only those involving six or more workers and lasting at least one day or shift, there were undoubtedly others of a few hours duration, not to mention mass resignations by teachers and nurses, "reporting sick," "work-ins" and other strike substitutes. This article will deal primarily with the strike problem at the local level where it is most pressing.

While still insignificant in number of strikes, workers involved, and days lost, as compared with any other industry, strikes in public employment pose a major problem in labor-management relations in the United States today. There are several reasons why so few strikes should occasion so much concern.

First, all strikes in government are in violation of the law. They are specifically prohibited by the Taft-Hartley Act, by all states which have public employment relations laws, and by numerous court decisions. The willingness of so many otherwise law-abiding citizens to violate and defy the law poses a moral issue as well as a practical problem of how to deal with such stoppages.

Second, many government services are vital to the normal functioning of the community. Strikes by policemen, fire fighters, and prison guards are intolerable and even the organizations to which these employees belong do not assert the right to strike. Strikes in hospitals, sanitation, and public utilities may present a threat to health or safety if they last more than a few days. Public transit, especially in a few large cities, is so important to the convenience and economic well-being of the people that many would classify it as an essential service. And, strikes which close schools disrupt the social, economic and emotional lives of more people than almost any other kind of work stoppage.

Third, strikes in public employment are bound to increase because government is the largest and fastest-growing industry in the United States and public employees are joining unions at a rapid rate. In October 1966 there were 11½ million government employees--2.9 million Federal, 2.2 million state and 6.4 million local. This total is expected to grow to 15 million by 1975 when one out of every five employees will be working in government. In the AFL-CIO, almost the only unions which are growing rapidly are those operating in government. The American Federation of Government Employees, which organizes Federal employees, claims 250,000 members; the State, County and Municipal Employees, 350,000; and the Teachers' Union, 132,000; increases of 300 to 500 percent for each union over the last decade. Equally important are professional associations which, under pressure from union competition, act more and more like unions. The largest and most powerful of these is the million member

National Education Association and its state and local affiliates. To most people, employee organization and strike go together and there is nothing in the record of recent years to dissuade them of this belief.

Actually, concern over the strike issue has overshadowed the great progress that has been made in public employee-management relations in the last few years. The 1960's have already earned a place in labor relations history as the decade of the public employee. Executive Order 10988 signed by President Kennedy in 1962; comprehensive state laws in Wisconsin, Michigan, New York, Connecticut, Massachusetts, Delaware and Minnesota and more limited laws in other states; and municipal ordinances in a number of the largest cities, including New York, Philadelphia and Cincinnati, have finally given government employees rights accorded to private employees thirty years ago: the right to join unions, to have their organizations recognized by employers, and to negotiate over wages, hours and conditions of employment. All the state laws have been passed or substantially liberalized since 1960 and every year finds additional states added to the roster of those with public employment relations laws. However, most states still have no statutes dealing specifically with public employees and a number of others expressly prohibit collective bargaining in government or have declared negotiated agreements to be unenforceable.

Because strikes are prohibited, the states with public employment relations laws have recognized a special responsibility to develop procedures to resolve impasses in negotiations. The principal methods used are mediation and, if that fails, fact-finding with public recommendations. Wisconsin has had the most experience with fact-finding. Between 1962 and 1966, fact-finders were appointed in 38 disputes and their recommendations served as the basis for settlement in 70 percent of the cases. Michigan, whose law was passed in 1965, has resorted to fact-finding in some 50 disputes, with salutary results. Arbitration is provided in most states only at the request of the parties, although a few prescribe compulsory arbitration for disputes involving policemen, fire fighters and public utilities.

Most negotiations in public as in private employment are resolved by the parties with or without the assistance of government mediators. The use of fact-finding--a procedure which is reserved for emergency disputes in private industry but is available in even the smallest and most inconsequential public dispute under most state laws--will result in settlement of all but a few really hard-core disputes. But what about impasses after all efforts to resolve the dispute have failed? Should public employee organizations be denied the ultimate weapon which is available to unions in private industry? What should be done about employees who strike in violation of the law? These questions have aroused great passions among some public employee unions and have led to considerable disagreement among impartial experts in the industrial relations field.

With respect to the second question, the trend is away from laws calling for automatic dismissal or other severe penalties, including re-employment only under extremely harsh conditions, for striking public employees. Experience has shown such laws to be ineffective because elected public officials will almost never invoke them. This was the case in New York under the Condon-Wadlin Act and in Michigan under the old Hutchinson Act. Most states with statutes governing labor relations in public employment do not specify automatic penalties for employees who violate the law by striking. However, the 1965 Michigan law states that a public employer may discipline a striking employee up to and including discharge, and the New York State law, passed in 1967 over bitter union opposition, provides penalties against unions rather than employees. The New York law calls for injunctions to halt public employee strikes and prescribes fines against unions that disobey such court orders, equal to one week's membership dues or $10,000, whichever is less, for each day that the strike continues.

Some of those who oppose a blanket prohibition on strikes in government argue that there cannot be genuine collective bargaining without the right to strike. Take away the strike threat and employers, public and private alike, will realize that they have the upper hand and not engage in real collective bargaining. Unions can cite case after case in which a government employer contended he could not negotiate certain issues but changed his tune quickly when a strike was threatened or actually called. Then, apparently, unsurmountable obstacles to negotiation seemed to fade away and an agreement was reached in short order.

Others consider it illogical and inequitable to deny the right to strike to government employees when it is not denied to employees in private industry doing the same work. Thus, the government, at one level or another, owns and operates printing plants, electric utilities, transit facilities, hospitals, cafeterias, liquor stores and other establishments which are indistinguishable in almost every way from similar facilities in the private sector. In some cases, direct public employment shades over into government-owned but privately-operated enterprises. In atomic installations, for example, collective bargaining modeled on the private sector has been permitted, including strikes, although the operation is wholly financed with public funds. Looking at the problem in another way, one may ask why clerks and office workers in the state capitol or in the highway authority should be prohibited from striking, while electric utility, transit or even hospital employees may strike as long as they work for private employers. Surely, the services supplied by the first group of public employees are less essential to the community than those furnished by the second group of private employees.

Those who support the prohibition against all government strikes do so primarily on three grounds: (1) fear that the principle of sovereignty will be imperilled by legalizing any strikes in government, (2) difficulty in differentiating between essential and non-essential activities, and (3) belief that the strike is an economic weapon which, in government, is not matched by countervailing power normally available in private industry.

The sovereignty doctrine holds that any strike of public employees is an attack upon the state and a challenge to government authority. It has been used for many years and is still cited in some states to deny government employees the right to bargain collectively. However meaningful state sovereignty may be to political scientists, it carries little weight with government employees when it comes to their relationship to the state as employer. Secretary of Labor Wirtz put it succinctly when he said: "This doctrine is wrong in theory; what's more, it won't work." It is interesting to note that other countries do not regard all strikes by government employees as a threat to state sovereignty. Most West European countries limit but do not prohibit all public employee strikes and, in 1966, Canada passed a law which expressly permits Federal employees to strike. The Canadian statute gives unions of government employees a choice between compulsory arbitration or strike action in the event of an impasse in negotiations. The union must indicate which course it will follow at the beginning of each negotiation and may not alter its choice throughout that negotiation.

The essential versus non-essential services approach to government employee stoppages has usually been rejected because of the difficulty of classifying activities in each category. Furthermore, this approach would have to take into account the distribution of employment at the local level, where most all government strikes have occurred. Of the 6.4 million local government employees, more than 3½ million are employed in schools--2.3 million as teachers and 1.2 million in non-instructional activities. An additional 1.6 million are employed in police and fire protection, public welfare, hospitals and health, sanitation, correctional institutions and public utilities. Only 1.3 million are engaged in activities that are clearly non-essential in the sense that interruption of service could be endured for an extended period without posing a threat to the health, safety or welfare of the populace. The employment

distribution will, of course, vary from one community to another. It is clear from these statistics that, if it is to be meaningful, any law which limits the prohibition of strikes to essential government services would have to be narrowly construed and would certainly have to exclude schools, where more than half of all local government employees are concentrated. A law which extended the right to strike only to a small minority of all public employees, most of then unorganized and without the power to carry out a successful strike, would be a hoax.

While the classification of essential and non-essential services would be difficult, I am not convinced that it represents an insurmountable obstacle to legislation which would distinguish between prohibited and permissible stoppages in government employment. This is an administrative problem no more difficult than many others handled by government agencies, and particularly by the National Labor Relations Board in its day-to-day administration of the Taft-Hartley Act.

The third argument against relaxing the prohibition on government strikes is that public employers cannot long withstand stoppages which victimize the community. It is argued that private employers may resort to a variety of weapons to combat strikes: they may lock out their employees; try to operate with other workers; suspend operations, secure in the knowledge that pent-up demand or strike insurance will mitigate economic losses; or even go out of business entirely. The knowledge that potent weapons are available to the opposing sides exerts reciprocal pressures upon the parties to modify their positions to the extent necessary to bring about a settlement. Both unions and employers know from experience that jobs can and have been lost and markets seriously depleted as a result of strikes or settlements leading to non-competitive price increases.

The government employer is in an entirely different position. He cannot lock out his employees or decide to go out of business. Extended suspension of government services is not politically feasible. While government may, in an emergency, call upon the National Guard or the Army to perform certain essential services, this solution does not lend itself, even on a temporary basis, to such public services as education and hospital care. Besides, such action involves political risks which elected officials would be reluctant to take.

The economic and market pressures which operate upon unions and private employers do not usually exist in the public sector. Competitors will not teach children, write relief checks or provide case work services to welfare clients; consumers will not find ready substitutes or learn to do without garbage collection or medical care; excessive settlements will not price most government services out of the market, although the resulting tax increase may drive elected officials out of office.

Certainly there are important differences between strikes in government and work stoppages in private industry. At the same time, strikes by public and private employees have the same economic objectives--the improvement of wages, hours and working conditions. Given the low salaries and poor conditions which often characterize employment in our schools, hospitals, social agencies and other public services, one is loathe to deprive these employees of any legitimate weapon to improve their situation, unless it is clear that irreparable injury may result to the community at large.

The United States has come a long way in dealing with public employee-management relations during the last few years. Future progress will depend, in part, upon how we handle the difficult problem of public employee strikes. What are the lessons of past experience for future policy on this issue?

1. The right to join employee organizations and to negotiate with their employers through representatives of their own choosing should be guaranteed to all public employees at all levels of government, by Federal legislation, if necessary. Government employees in backward states should not be denied these fundamental rights.

2. Governments have a responsibility to promote settlements without interruption of public services. This includes provision for mediation and fact-finding with recommendations in all disputes in which an impasse has been reached in negotiations.

3. Employee organizations and public employers in all government services should be encouraged to develop their own procedures to resolve disputes without interruption of work, including the use of voluntary arbitration. Long experience in private industry has demonstrated that the parties are usually better satisfied with their own solutions than with those imposed from the outside.

4. Regardless of preventive measures or prohibitions and penalties provided by law, strikes in government will occur. Government policy towards such stoppages should take into account the nature of the service provided and the impact upon the public. There is no more reason to treat all strikes in government alike than there is to apply the same yardstick to all stoppages in private industry. Just as a work stoppage on the railroads or waterfront is handled differently from a strike in a widget factory, so should a strike of policemen or fire fighters be regarded differently from an interruption of service in state liquor stores.

5. Public services should be classified into three categories: those which cannot be given up for even the shortest period of time, those which can be interrupted for a limited period but not indefinitely, and those services in which work stoppages can be sustained for extended periods without serious effects on the community.

   –With respect to the first category, which in my opinion would include only police and fire protection and prisons, compulsory arbitration should be used to resolve negotiation impasses but only after all other methods have failed.

   –Strikes in the second group of services, which would include hospitals, public utilities, sanitation and schools, should not be prohibited but should be made subject to injunctive relief through the courts when they begin to threaten the health, safety, or welfare of the community. The courts, in deciding whether or not to issue injunctions, should consider the total equities in the particular case and should utilize their traditional right to adapt sanctions against those violating injunctions to the particular situation, as recommended in the report of the Advisory Committee on Public Employee Relations to Michigan Governor George Romney. The term "total equities" includes not only the impact of a strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations.

   –Work stoppages in government activities which do not fall into either of the above classifications should be permitted on the same basis as in private industry.

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These changes in public policy will come slowly, if at all. Experimentation with different approaches in the states is desirable and should be encouraged. Eventually, however, I believe that laws dealing with employee-management relations in government will tend towards greater uniformity because the nature of public employment differs little among states, and employee organizations, which are national in scope, will insist on equality of treatment for all government employees.

Can Collective Bargaining Deal Effectively with Problems Created by Automation?

Theodore W. Kheel

If anyone in the audience is kind enough to say that he is disappointed that I cannot be with you today, I assure you his distress in no way compares with my own. I looked forward to this conference with great expectations and planned to come early and leave late. I was last in Hawaii 49 years ago and I still have a vivid recollection of its loveliness. I wanted to return to verify the memories I have carried with me all these years.

The beginning of the end of my revisit occurred at 4 a.m. Tuesday, July 18, while I was fast asleep in a hotel in Paris, France. It was 11 p.m., Monday, July 17, in Washington at that hour and President Johnson had just signed the bill ending the railroad strike. I was awakened by the phone ringing in my room and, believe me, had no idea that I would as a result not be able to come to Hawaii. I will leave for reminiscing in smaller groups a description of my first reaction when a man's voice at the other end of the Atlantic Ocean announced that the President was calling. I do not know if I can converse easily with a President under any circumstances. I do know I did not at 4 a.m. on July 18. Of course I said "yes" when the President asked me to serve on the Board to settle the railroad dispute.

I returned the next day, but actually I was on my way back from a conference in Rome on Automation, Full Employment and a Balanced Economy, co-sponsored by the American Foundation on Automation and Employment, Inc., its counterpart in Great Britain, the British Foundation, and the Federations of Swedish Employers and Trade Unions. The American Foundation was formed by labor and management in 1962 to encourage the use of automation by solving the employment problems it creates. The work of the Foundation and the subject matter of the conference are both relevant to the topic assigned to me today.

Full employment is an objective everyone favors, like peace and prosperity. Its attainment was designated a national objective in legislation passed nearly 20 years ago, but it is doubtful if we are any closer to it than we were when that law was passed. Yes, there have been statistical improvements. But we have been measuring our distance from this goal with an index which was, at least until recently, as comparable in precision to our needs, as Galileo's telescope is to modern day radar for measuring the earth's distance from the moon. We now know, for example, that unemployment affects different people in different ways. There are age, sex, color, area, and skill differences, to name merely the obvious. Statistics alone do not and cannot tell the full story.

Until fairly recently, the main drive against unemployment came almost entirely from the labor movement. At the least the riots of this summer have underscored the need for national concern.

Labor's apprehension was most acute in 1963 when the unemployment rate soared over six percent. It has diminished now that shortages have developed, particularly among skilled employees, in many areas of the country. But it still becomes heated when, for example, automation threatens drastically to eliminate jobs in a particular industry.

Collective bargaining can and does help cope with such situations, perhaps not as

fast as employers and others might wish but more significantly than most realize. Adjustments are constantly being made. Moreover, even if labor were disposed to stop automation, it could not succeed. American businessmen have a unique ability to compete. If they are stopped from moving in one way, they invariably devise another. Nor is the labor movement blind to the realities of change, for that is what automation means–dynamic change. Individual leaders may interpose roadblocks at particular times and if they failed to, other leaders would replace them who would. But I find a willingness to explore alternatives, to accept change if its immediate impact can be eased, and to seek to bring the rank and file along on the need for and inevitability of, change. But it doesn't do any good at all if union leadership gets so far ahead of the membership that it cannot help develop and shape worker attitudes.

This is basically the philosophy of the Foundation and it is subscribed to by many unions as well as employers. We not only accept automation as inevitable but welcome it for the benefits it can bring. But we do not shut our eyes to the vast changes it imposes on employees. By seeking to ameliorate those changes, we think automation will encounter less resistance and advance more rapidly.

Most people view automation merely as affecting the blue collar workers and some of the less skilled white collar ones. It is true that they are most obviously affected. But our Foundation made a study of automation's impact on middle management. This study attracted such wide attention that we are now bringing out a second printing. The title is *Automation and the Middle Manager–What Has Happened and What the Future Holds.* I would like to quote to you some of the many conclusions:

> "The computer has already cut deeply into the need for middle managers. But, as a result of our booming economy, there is no evidence of widespread unemployment among middle managers, to date, resulting from installation of computer systems in American Industry. Those displaced have gotten other jobs. Normal attrition thus far has been enough. Nor has there been, as yet, any marked change in the job content of middle management. The job reduction has stemmed mainly from the elimination of clerical functions and the assumption of minor decision-making by the computer.
>
> "The storm signals as well as the potential for the future cannot safely be ignored or overlooked, either by top or middle management or by government planners and manpower specialists. An impressive number of participants in this study have marshalled a persuasive case: The middle manager's job stability in terms of the number and kind of jobs there will be is subject to a far more serious threat and open to greater possibilities than past experience and expected trends in the immediate future would suggest.
>
> 1. While the decisions now being made by computers are characteristically those of employees of lesser rank than middle managers, there are vast areas of middle-management decision-making within the existing capabilities of the computer which are not being realized.
>
> 2. It is not the inherent limitations of computer technology that have prevented a further intrusion by the machines into the traditional preserves of the manager, but the following human deficiencies:
>
>   a. Top management's resistance to change; its skepticism or lack of

orientation to the potentialities of computer systems; and improper use when installed

b. Middle-management hostility to change and conflicts between computer specialists and traditional managers

c. Lack of personnel trained in the programming and operations of computers

d. Failure to structure the work situations of management in ways adaptable to the machine

e. High cost of computer installations.

3. When these difficulties are overcome–and it is a matter of when, not if–it seems clear that the social implications of displacement of managers will not serve as a deterrent to computerization; and that existing industry programs for retraining and early retirement are woefully inadequate to meet the displacement patterns arising as computers approach their maximum utility. Because of the time span involved in removing the human limitations on full computer development, however, there is still the opportunity to (a) recognize the full capability of the machine and (b) plan intelligently for the necessary adjustments in manpower utilization.

"Although there is dissenting opinion as to the foregoing propositions, there is near-unanimous agreement among the company spokesmen interviewed that:

1. There will be a drastic change in the job content of the middle manager: The repetitive tasks will vanish and he will be confronted with a greater variety of information, requiring more rigorous analysis in decision-making. Although his job will be more intellectually demanding, he will find more freedom, more flexibility, and more creativity in it.

2. Middle managers of the future will not be chosen solely from the ranks of computer specialists; among those who remain, there will be a premium on the traditional virtues of leadership, ability to make critical judgments, courage and vision.

3. The corporate structure will contain fewer levels of management responsibility. There will be a greater degree of centralization in the information-gathering, but not necessarily in the decision-making process.

4. Resistance to change by middle managers and hostility between them and computer specialists, though a frequent and sometimes frustrating component of the installation of machine systems, can be minimized by careful top-management planning.

5. There is as yet no radical change in the hiring patterns of middle management; the business administration graduate is still favored over the pure technician, although business-oriented trainees now have had more exposure to scientific disciplines than in the past.

6. The companies surveyed have not introduced, in connection with computerization, programs to retain and upgrade the skills of their middle managers despite their obvious need. Employers and the individual

middle manager have a joint responsibility for remedying potential skill deficiencies through company training programs and self-improvement.

7. American colleges and universities must update and broaden their curricula to meet the future managerial needs of industry. Business schools are under heavy attack for failing to offer either (1)sufficient computer technology or (2) insight into the practical problems of operating an enterprise. But companies are hardly in a position to complain in view of their own training deficiencies.

"The fact is that most managements are not yet prepared for the computer and, in part as a result, the computer has not advanced significantly in the area of middle management. Now is the time for intelligent preparation for the human problems which have delayed the use of the computer and will undoubtedly intensify in the future, for surely the computer will move relentlessly forward as competition and new technology forces its use."

So much for the middle managers.

Let us now examine the impact of automation on collective bargaining, and how collective bargaining is attempting to deal with the problem.

Automation has already profoundly influenced collective bargaining. It has brought the most difficult of bargaining issues--the clash of productivity with job protection--into the forefront of most negotiations. It has contributed materially to the decline in the size of unions and it has placed two expanding groups seemingly beyond the present reach of organized labor: the unemployed and white-collar and technical employees. It has also weakened labor's bargaining strength in certain industries.

All of this has led some observers to conclude that collective bargaining is on the decline or already on the way out. Actually, collective bargaining is working better today than it ever has. There are fewer strikes and more negotiated settlements. Arbitration is being used effectively in settling in-plant grievances. Procedures for inter-union conflicts are being refined. Around-the-year bargaining in joint study committees, such as the Human Relations Research Committee in basic steel, is providing labor and management with new insights and keys to the solutions of their most difficult problems.

Yet the impact of automation on jobs has posed the most critical challenge collective bargaining has ever faced. Because the problems of automation and technological change cannot be solved solely by private parties in collective bargaining, the steps toward constructive answers thus far developed constitute a tribute to the viability of this remarkable institution of voluntary adjustment. I intend to underscore the need for extending rather than contracting the bargaining process as an indispensable adjunct to the mechanics of change.

Organized labor is in effec[illegible]ommitted by policy to the machine and is unwilling as a body to resist industrial progress. Indeed, some unions openly encourage automation. Besides, organized labor knows too well how violently the general public is opposed to "featherbedding" to make this the cornerstone of its policy on automation even if it were inclined to do so. Obviously, there are exceptions. This is not, however, the public view of labor's attitude toward automation. Unfavourable publicity about featherbedding and widespread reporting of a few special situations involving manpower changes have led many to believe that labor is opposed to automation. Thus when George Meany referred to automation as a "curse" at the

biennial convention of the AFL-CIO, in November 1963, his remarks were incorrectly interpreted as opposing automation. But they were more an expression of fear about what automation was going to do and were, in that way, a call for action to cure its consequences. He did not urge, nor has he ever suggested, that automation should be stopped or slowed as a means of avoiding this "catastrophe."

The basic approach of organized labor was best expressed by A. J. Hayes, Co-chairman of the American Foundation on Automation and Employment, in a speech delivered at the University of Portland:

> Properly absorbed and applied, automation can improve the life of workers both on and off the job. It can release millions of human beings from heavy, hazardous, dirty, and monotonous jobs.
>
> More importantly, automation is a means of releasing mankind from the grip of historic scarcity and building a world without want.
>
> Despite our concern, American labor has not reacted to technological change as did the Luddites who roamed the English countryside in the early 19th Century smashing the textile looms that were destroying their jobs. We know that it will not serve society to smash the machines that are today destroying jobs.

Despite the clash of productivity and job security, labor-management relations are maturing and improving. Difficult problems are being solved through collective bargaining, and labor and management are evolving adjustments to the manpower challenge.

The principal methods which private parties have employed to facilitate the adjustment of employees who have been displaced through automation or technological change were listed by Derek Bok. They are:

1. Advanced Notice of Layoff or Shutdown
2. Methods of Avoiding Layoff
   (1) Attrition
   (2) Early retirement
   (3) Retraining
   (4) Transfer
   (5) Relocation allowances
3. Methods of Easing the Burden of Unemployment
   (1) Severance pay
   (2) Supplemental unemployment benefits
   (3) Vesting of pension rights
4. Methods of Facilitating New Employment
   (1) Placement and referral services
   (2) Training for jobs outside the plant
   (3) Union-sponsored training programmes
   (4) Apprenticeship
   (5) Other forms of training
   (6) Antidiscrimination policies

There have been a variety of agreements, many very inventive, designed to reduce the impact of automation. The Kaiser Steel Company–United Steelworkers Long Range Sharing Plan relies on sharing of actual savings in production costs on a month-to-month

basis resulting from improvements in technology and work methods, and also offers several types of employment and income security. The Pacific Coast shipping industry, under an agreement with the International Longshoremen's and Warehousemen's Union, has put up a sum of money to protect employment in West Coast ports.

Basic Ingredient

Intrinsic to these solutions is the use of attrition as the primary ingredient: spare the worker but not the job. As workers leave for one reason or another, or are encouraged to leave through early retirement plans, the existing work force, or as much of it as can be saved, is protected in exchange for the right to introduce new machinery and/or work methods which eliminate jobs. This method of adjustment, of course, does nothing for the unemployed or the new entrant into the job market. Unions naturally concern themselves with the members at hand. They are the dues payers, the ones who attend meetings, who seek job protection from their leaders–with the implied threat of getting other leaders if they do not succeed. The use of attrition has furthered the trend toward reduced employment in unionized industries, and has other consequences as well, such as a constant rise in the average age of the work force. But, whatever its limitations, it is likely to continue.

The reliance on attrition is adversely affecting bargaining by decreasing the number of employees subject to it. This is unfortunate, since experience has shown that collective bargaining is the most effective and efficient method of adjustment employer-employee relations in a democratic society.

Collective bargaining can legally embrace the wages, hours and working conditions of workers represented by a union.

It cannot help those who have not been hired or those who have been let go without reinstatement rights. Obviously, a union's main concern is going to be with the workers on hand who pay dues for representation. But there are some activities which can help those outside the organization who are now in such desperate need. We have not nearly begun to explore the possibilities of labor-management assistance in job training for the unskilled and untrained, constituting so large a portion of the Negro unemployed in ghetto areas.

I like to believe, in addition, that a labor-management organization like our Foundation can also make a substantial contribution. We have recently purchased permanent headquarters in New York City which we call Automation House. We intend to establish there, among other labor-management activities, a Center for Job Training Information. We have found that there is throughout the United States a burgeoning industry of teaching machines, devices, and programs which can materially speed up the learning process for the unskilled and uneducated, especially in equipping them for work. We intend to have on hand there detailed information about these developments with motion pictures, video and audio tapes, slides and brochures to demonstrate how they can be used. Unique devices will be on display and

trained experts will explain their use. We will also conduct lectures and seminars and provide anyone from industry, labor, government or the public generally with information about the latest techniques in job training.

Labor and management will always be antagonists at the bargaining table, and there is nothing wrong with that. But they have many areas of mutual interest. These can be encouraged without diminishing the vigor of the bargaining process. Indeed, it can help. That is what we are trying to do at Automation House through the Foundation.

I regret more than I can say that I could not enjoy the opportunity of telling you of these activities in person. At least I believe I have a valid excuse for not attending. Please accept my very best wishes for a most successful conference.

Thank you.

Labor Relations Law: An Assessment

Benjamin Aaron

Any survey of the present state of labor relations law in the United States must take account, at the outset, of at least four major characteristics which, in this particular combination, distinguish it from that of other industrialized countries. First, despite its common-law origins, in almost all significant details it has been created by statute rather than by the gradual accretion of judicial decisions. Second, it is of relatively recent origin, the oldest significant statute presently on the books being the Norris-LaGuardia Act, which was adopted in 1932. Third, those labor relations laws of the greatest importance are federal laws, and the authority of the several states over labor-management relations has been almost completely eroded by the doctrine of federal preemption. Fourth, although the single most important principle underlying what we choose to call our "national labor policy" is the commitment to "free" collective bargaining in the private sector, the United States has a more comprehensive and bewildering array of restrictive laws regulating the relations between employers and unions than does any other industrialized country.

There are several other significant features of American labor relations law which, if not as unique as those already mentioned, nevertheless have a substantial impact upon collective bargaining in this country. In typically pragmatic fashion each of the several federal statutes was enacted to deal with one or more specific problems; but, unfortunately, almost none of these has taken sufficient account, if any, of the need to accommodate the new law with the policies and procedures of those already on the books. As a result, we have built up, not an integrated and internally consistent body of federal labor relations law, but a collection of individual statutes that are mutually inconsistent in some important particulars, that overlap in others, and that manage, nevertheless, to leave some vital areas of labor-management relations totally uncovered or covered inadequately.

Partly as a consequence of these developments, Congress has assigned much of the task of administering the various labor relations laws to a number of administrative tribunals, independent agencies, and executive departments. The Supreme Court has added to the decentralization of decision-making by construing some statutes as requiring judicial deference to awards rendered by private arbitrators.

In my talk I shall illustrate with appropriate examples the impact of American labor law on collective bargaining. My thesis is that the time has come to review the entire body of this law: to enunciate or redefine policies in certain critical areas, to repeal unnecessary legislation, to reconsider questionable judicial and administrative doctrines, and at least to begin thinking about the possibility of drafting a comprehensive, internally consistent labor code

Federalism and Labor Relations Law

Within the past 30 years, Congress and the Supreme Court have gone a long way toward establishing federal law as the supreme and exclusive instrument for dealing with all but the most minor labor disputes. The constitutionality of that arrangement is now beyond challenge: it rests upon the Supremacy Clause of the United States Constitution and upon the indisputable power of Congress to legislate in respect to conduct "affecting commerce." The manner in which Congress has exercised that power, however, as well as the construction

placed upon its enactments by the Supreme Court, have created serious doubts in the minds of many persons about the wisdom of the resulting policy.

The passage of the Wagner Act in 1935 heralded the end of diverse local controls of labor-management relations and the beginning of a national labor policy uniformly applicable throughout the nation. Whatever doubts may originally have existed concerning the necessity or desirability of a national policy inevitably gave way before the increasing evidence of the impact of local labor disputes on enterprises and activities far removed from the scene of actual conflict. But the extent to which the states are precluded from passing supplementary legislation covering labor-management relations, or to which their courts are barred from affording remedies neither specifically permitted nor prohibited by federal law, has been a subject of continuing debate.

Thus far, however, Congress has refused to abolish an exception to the uniform national policy that it incorporated with the 1947 Taft-Hartley amendments to the NLRA. Section 8(a)(3) of the amended Act permits the voluntary execution of union-shop agreements, with certain safeguards. Section 14(b) provides, however, that states or territories may prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. The constitutionality of this provision has been sustained against attacks by labor unions, and the rather mild endorsement by the present Administration of a proposal to repeal Section 14(b) has been insufficient thus far to secure congressional adoption of that amendment.

Apart from the emotional and irrational reactions that public debate of union security clauses invariably engenders, the basic case against Section 14(b) is that it is illogical, untidy, and unnecessary. If a uniform national policy of labor-management relations is desirable, then it makes no sense to exempt from that policy one of the most explosive of all collective-bargaining issues. Moreover, the present rule produces uneven results: a national agreement between a union and a large corporation with plants in many states provides the same basic benefits to bargaining-unit employees in all plants, but denies the union the benefit of a negotiated union-shop and checkoff provision in those states with right-to-work laws. To add to this inequality of treatment, the Railway Labor Act, amended in 1951 to authorize union-security clauses similar to those permitted under the NLRA, contains no provision corresponding to Section 14(b) and supersedes all contradictory state laws applicable to railroad and airline employees. Finally, Section 14(b) provides no real protection to individual workers against abuse of power by their bargaining representative. All it can do is make the union less effective in dealing with the employer.

Equally inconsistent with a national labor policy for rail transportation are state "full-crew" laws requiring interstate carriers to employ a minimum-size engine and train crews operating within their borders. These laws were all enacted many years ago, and have repeatedly been sustained by the Supreme Court against charges that they violated the Fourteenth Amendment and the Commerce Clause. The national interest is not well served, however, by allowing a minority of states to prevent ad hoc adjustments to technological change by Procrustean rules laid down in archaic statutes.

Other reservations of state power in the labor relations field governed by the LMRA are more easily defended. As the Court pointed out in *San Diego Building Trades Council v. Garmon* (1959), states have been permitted "to grant compensation for the consequences, as defined by the traditional law of torts, of conduct [growing out of a labor dispute] marked by violence and imminent threats to the public order." They have also been permitted to enjoin this type of conduct. This is "because the compelling state interest, in

the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." Similarly, power to regulate has not been withdrawn from the states "where the activity regulated was a merely peripheral concern" of the LMRA, or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," an inference that Congress had deprived the states of power to act would not be warranted.

However, as Justice Frankfurter observed in *International Association of Machinists v. Gonzales* (1958), "the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." This process is a continuing one, and it has not always been easy to understand why the Court has permitted the states to act in some areas after having broadly prohibited exercise of state power in others. In the *Garmon* case, in which the doctrine of federal preemption achieved its most luxuriant growth, the Court declared that "when an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Yet the Court has recently ruled–in *Linn v. United Plant Guard Workers* (1966)–that a state court does not lack authority to entertain an action for defamation arising out of a labor dispute nor to award damages when the complainant can show that the defamatory statements were circulated with malice and caused him damage.

In two other kinds of disputes that are "arguably subject to Sec. 7 or Sec. 8 of the Act," and hence presumably within the primary jurisdiction of the NLRB, the Supreme Court has decided that neither state nor federal courts, nor private arbitrators, "must defer to the exclusive competence" of the Board. Section 301(a) of the LMRA provides that suits for violation of contracts between employees and unions in industries affecting commerce may be brought in an appropriate federal district court without respect to the amount in controversy or to the citizenship of the parties. Some suits based on an alleged breach of contract involve conduct that is also arguably or admittedly an unfair labor practice; for example, the breach may consist of a violation of a contractual provision not to discriminate against employees for privileged union activity. If the accusation of contract violation is also an arbitrable grievance, the aggrieved party may submit the issue to arbitration, rather than file a charge of unfair labor practice with the Board. If the complaint is not arbitrable, the aggrieved party may sidestep the Board and exercise his federal right under Section 301 to sue his opponent in court.

However, as held in *Textile Workers Union v. Lincoln Mills* (1957), disposition of the dispute by arbitration, or its adjudication by a federal or state court, results from the application of a new body of federal substantive law, fashioned by the federal courts, under the guidance of the Supreme Court, in obedience to the congressional mandate inferred from Section 301 of the LMRA. Thus, preexisting state laws that would have left to the state courts the discretion to refuse either to order arbitration of a grievance or to enforce an arbitrator's award, are no longer effective to the extent that they conflict with substantive federal law. By the same token, although state courts may assert jurisdiction over suits for breach of contract brought under Section 301, they must apply federal law.

The statutory scheme under the Railway Labor Act is substantially different. The law creates rights and imposes duties similar to those established by the NLRA, but it does not denominate any conduct by employers or unions as an "unfair labor practice," and neither the National Labor Adjustment Board (NRAB) nor the National Mediation Board (NMB) has functions or powers similar to those of the NLRB in unfair labor practice cases.

Unsettled controversies growing out of the interpretation or application of collective agreements (commonly known as "minor disputes") are referred to the NRAB, which has the powers of a compulsory arbitration board. The parties may, however, establish by mutual agreement their own private arbitration machinery (called a system board of adjustment) as a substitute for the NRAB. With few exceptions, state and federal courts are precluded from entertaining actions for declaratory judgments to construe collective agreements under the RLA.

Still a different arrangement is applicable to airline employees. In 1936 the RLA was extended to include the air transport industry. The one section of the Act not made applicable was that dealing with the NRAB. Instead, Section 204 of the amended Act requires carriers and unions representing their employees to establish boards of adjustment for the settlement of grievances.

The Supreme Court has held in *International Associations of Machinists v. Central Airlines, Inc.* (1963) that a contract executed under Section 204 is to be interpreted and enforced according to federal law; "for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law, or if a contract were struck down though in furtherance of the federal scheme."

In the present state of labor relations law, three questions concerning federal-state relations are paramount: First, is it desirable or possible to develop a broad statutory policy applicable to all the situations previously discussed, that will dispose of most of the line-drawing problems created by preemption doctrine? Second, whether Congress promulgates such a policy or, as is more likely, continues to abdicate its authority in this area in favor of the courts, should the states be accorded more or less power than they presently have to apply their own procedural and substantive laws to labor disputes occurring within their boundaries? Third, is there any justification for differing degrees of federal control over labor-management relations under the LMRA and the RLA? Is there, indeed, a continuing need for two separate statutes?

Meanwhile, it has become increasingly apparent that Congress lacks both the talent and the will to deal with the "formidable intellectual and political difficulties" of allocating power between state and federal governments, and the courts have necessarily had to fill in the gaps and reconcile conflicts in statutory policies on a case-by-case basis. The result is a patchwork quilt of decisional law, with some parts notably out of harmony with others.

Rights of Individual Employees

At common law the individual employee's rights amounted to little more than his largely illusory right of "freedom of contract." Modern statutes have guaranteed him protection against hostile discrimination for union activity or on grounds of race, creed, color, sex, national origin, and age. Even these protections are not uniformly provided, and may be limited or entirely absent in certain industries, occupations, establishments or localities.

The more fundamental protections against arbitrary or unfair treatment in the matter of promotions, remuneration, dismissal, and retirement are provided, however, if at all, by a collective agreement negotiated between the union, as exclusive bargaining representative of all employees in the appropriate unit, and the employer. Section 301 of the LMRA treats these agreements as contracts that may be enforced by the principal parties--

the employer and the union–against each other. But what, if any, rights established by a collective agreement become vested in each individual employee and can be asserted and enforced by him, irrespective of the union's approval or opposition? This question, with its many ramifications, has given rise to some of the most perplexing problems in contemporary labor relations law.

The question also raises a fundamental issue of policy. As we shall see, rights of individual employees have been treated quite differently under the RLA than under the LMRA. It is important to inquire whether these differences are necessary or desirable.

All that can be said with certainty about individual employee rights under either statute is that the law is still far from settled. Starting with the premise that a labor organization which derives from federal law its right of exclusive representation of all employees in the appropriate bargaining unit (NLRA) or craft or class (RLA), and thus owes a duty fairly to represent all employees in the unit, the Supreme Court has enforced that duty in appropriate cases, the majority of which have involved racial discrimination by unions covered by either the NLRA or the RLA. And despite the provisions in both statutes for the referral of disputes arising thereunder to administrative agencies (i.e., the NLRB, the NMB, and the NRAB), the Court has ruled that when these agencies have been unable or have failed to provide the necessary protection against illegal discrimination by unions, or by unions and employers acting in collusion, the affected employees may obtain redress in the form of an injunction or damages directly from the courts.

At the same time, the Court has recognized that in bargaining on behalf of large numbers of employees, many of whom have differing long-term interests and immediate objectives, a union must be allowed to make compromises which, in its judgment, are in the best interests of the majority and which, equally importantly, strengthen its own institutional position. Thus, in *Ford Motor Co. v. Huffman* (1953)the Court has unanimously held that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

In the day-to-day administration of the collective agreement, however, and especially in the handling of individual grievances, questions concerning the propriety of union conduct and the rights of employees to the benefits of the agreement assume a baffling subtlety and complexity. Underlying these questions is the still-unresolved issue of the nature of the collective agreement itself. To say that it is, among other things, an enforceable contract does not entirely dispose of the problem. Clearly, the union and the employer have the right to enforce the terms of the agreement against each other; but what of the rights of individual employees? Is it true, as contended by Professor Summers, that "the individual employee has rights under the collective agreement, the enforcement of which are not subject to the union's exclusive control," and that "the union and the employer cannot block the enforcement of these rights by agreeing between themselves that those rights can be compromised or ignored without the individual's consent or authorization"? Is Professor Cox more persuasive in arguing that the union should be given a free hand to evaluate the individual's claim in the collective interest, and therefore must be allowed to refuse to process the grievance, so long as it acts in good faith? Or is it possible to adopt a middle course, as urged by Professor Blumrosen, and permit individual employees to compel unions to process grievances involving only the "critical job interests" of discharge, compensation, and seniority?

Adoption of one of these theories, or perhaps of another, is only the first step

in dealing with the practical problems arising under the collective agreement. To illustrate the nature of these problems, let us consider two hypothetical cases. In the first, suppose that an individual grievance arising out of an allegedly unfair dismissal is rejected by the union, after investigation, on the ground that the discharge was for just cause. Suppose further that the grievant suspects that the union has not represented him in good faith, but has colluded with the employer to secure his discharge for some reason unconnected with union membership or nonmembership. In the second, suppose that the grievant's wage or seniority claim is processed by the union but is dropped or compromised without the grievant's consent and against his wishes, or is handled in an allegedly inept or negligent fashion. What channels of relief, if any, are open to the grievant in each of these situations?

To this question administrative agencies and courts have provided a bewildering array of answers, many of them based on mutual y exclusive theories. Moreover, the law which has developed under the Railway Labor Act is again in some respects entirely different from that which has evolved under the Labor-Management Relations Act.

Let us first consider the situation under the RLA.

Exclusive of claims of unlawful discharge or discipline, the majority of "minor disputes" submitted to the NRAB involve "time claims"–demands for money under the complicated wage payment rules that prevail in the industry. It has long been the practice of the parties to compromise these claims without the prior knowledge or consent of the employees involved. In *Elgin, Joliet & E. Ry. v. Burley* (1945) the Supreme Court held that the bargaining agent must be authorized to act on behalf of an employee "in some legally sufficient way" before it can compromise his claim without his knowledge or permission.

A very high percentage of railroad workers are union members, and most, if not all, railroad unions have authorization provisions in their constitutions and bylaws; thus, in practice, time claims by individual employees are regularly compromised without their prior knowledge or express approval. Accordingly, an employee's chances of upsetting a settlement of a time claim on the ground that his union represented him incompetently or unfairly are virtually nonexistent.

In the discharge case which the union refuses to handle the grievant has a theoretical but wholly illusory right to carry his grievance to the NRAB for final disposition. In practice, however, the grievance is invariably rejected on procedural grounds by the NRAB, because the union and employer representatives on the Board simply reiterate the positions of the employer who discharged the grievant and of the labor organization that refused to handle the grievance. Consequently, the grievant has only one practical course to follow: he may abandon the attempt to secure reinstatement with or without back pay and, instead, sue the employer for damages for wrongful discharge.

In the case of wrongful discharge, the Supreme Court has recognized an exception to rule that the NRAB has exclusive jurisdiction over "minor disputes." In *Moore v. Illinois Central R. R.* (1941) it explained the reason as follows:

> A common-law or statutory action for wrongful discharge differs from any remedy which the [Adjustment] Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court handling such a case must consider some provisions of a collective-bargaining

agreement, its interpretation would of course have no binding effect on future interpretation by the Board.

Even under this reasoning, however, the grievant's chances of securing a court determination of the merits of his case are not certain. The cause of action for wrongful discharge is created by state law, not by the Railway Labor Act. If the state law requires an employee to exhaust his remedies under the contract grievance procedure and the RLA before bringing suit for wrongful discharge, he must comply; and this process might take years. State laws on this question are far from uniform: some do not require exhaustion; others do not; and in at least one an employee may not maintain a cause of action for damages for wrongful discharge under any circumstances.

A final and often insurmountable obstacle in the grievant's path to relief is the doctrine of election of remedies, which holds, in effect, that he may proceed either under the RLA for reinstatement or under state law for damages, but may not do both. Thus, if a state law governing the damage action requires the prior exhaustion of contract-statutory remedies under the RLA, the grievant will automatically be precluded by the election-of-remedies doctrine from bringing the action for damages after he has exhausted the contract-statutory procedures for securing reinstatement.

The law governing these types of cases under the Labor-Management Relations Act has developed differently. Section 9(a) of the NLRA, as amended by the LMRA, provides that a union designated or selected as collective bargaining representative by a majority of employees in the appropriate bargaining unit shall be "the exclusive representative of all employees . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." This plenary authority is limited in the following manner:

> *Provided,* that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective-bargaining contract or agreement then in effect: *Provided further,* that the bargaining representative has been given opportunity to be present at such adjustment.

The NLRB did not, until quite recently, assert jurisdiction over the employee's complaint unless it involved activity protected by Section 7, in which case the employee could file an unfair labor practice charge against the union, the employer, or both. The relief available to the employee would then be limited to reinstatement with back pay in accordance with the Board's rules. Assuming the Board to be without jurisdiction, the employee could sue the employer for damages for wrongful discharge; sue the union for breach of its duty of fair representation; or sue for an injunction either to compel the employer to arbitrate his grievance or to compel the union itself to appeal the grievance to arbitration.

Here, again, court decisions lack uniformity and are based on conflicting theories. Although individual plaintiffs have been successful in a minority of cases, judgment has generally been in favor of the defendant employer or union. In some instances the employee has relied upon the proviso to Section 9(a) of the NLRA. According to the majority view, however, as expressed by the Second Circuit in *Black-Clawson Co. v. International Association of Machinists* (1962), this proviso does not confer "an indefeasible right upon the individual employee to compel compliance with the grievance procedure up to and

including . . . arbitration"; rather, it merely sets up "a buffer between the employee and his union 'permitting' the employee to take his grievances to the employer, and 'authorizing' the employer to hear and adjust them without running afoul of the 'exclusive bargaining representative' language of the operative portion of section 9(a)."

If the employee relies upon the grievance and arbitration procedure of the collective agreement, rather than on the Section 9(a) proviso, he is likely to be rebuffed in his efforts to compel arbitration on the theory that these procedures usually state that only the union may demand arbitration. Suppose, then, that the employee sues the employer under state law for damages for wrongful discharge. Under the prevailing state laws, employees have also usually been unsuccessful either in suing the employer for wrongful discharge or in bringing an action against the union for breach of its fiduciary duty of fair representation.

These state court decisions have been substantially affected, however, if not rendered completely irrelevant, by recent developments. The first and most important is the rapid growth of case law under Section 301 of the LMRA, which provided the basis for a new body of substantive federal law governing the enforcement of collective agreements. In *Humphrey v. Moore* (1964) the Supreme Court held that an employee may sue his union under Section 301 for violation of his contractual rights. The case was a class action by employees for injunctive relief against implementation of the decision of a union-employer grievance committee, made pursuant to contractual procedure, which deprived the employees of their seniority rights and threatened to result in their discharges. In ruling against the plaintiffs on the merits, however, the Court majority reaffirmed the principle first enunciated in the *Huffman* case and added: "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."

In *Smith v. Evening News Association* (1962) the Supreme Court decided that a suit for breach of contract may be brought under Section 301, even though the act complained of is arguably or admittedly an unfair labor practice; but so far as the individual employee is concerned, the barriers to such a suit are as formidable as ever, and perhaps more unyielding than before. In *Republic Steel Corp. v. Maddox* (1965) the Court held that an employee who brought suit for severance pay allegedly due him under a collective agreement, without first exhausting the contract grievance and arbitration procedures, was barred from maintaining the court action. The Court's opinion stated the prevailing rule to be that "unless the contract provides otherwise . . . the employee must afford the union the opportunity to act on his behalf."

Although the Court strongly hinted that the same principle should apply to discharge cases arising under the RLA, it has so far declined to overrule contrary precedents.

A second development that may affect the rights of employees covered by the NLRA, who are discharged or discriminated against for reasons unconnected with union activity, is the doctrine adopted by a majority of the NLRB in *Miranda Fuel Co.* (1962) and explained by them as follows:

> Section 7 [of the NLRA] . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that . . . labor organizations, when acting in a statutory representative capacity, [are prohibited] from taking action against any

employee upon considerations or classifications which are irrelevant, invidious, or unfair.

The case in which this doctrine was first enunciated did not involve racial discrimination, but there is some reason to suppose that the Board majority had that problem uppermost in its mind. Historically, the Board has avoided or temporized with problems of racial discrimination by unions and employers, and Congress has repeatedly refused to proscribe that form of discrimination in labor legislation. Increasing pressure has been put on the Board in recent years to change its policies in this regard, and it has responded affirmatively in a variety of ways. Not long after announcing its decision in the *Miranda* case, the Board in *Hughes Tool Co.* (1964) applied the same doctrine for the first time to a situation involving racial discrimination.

If the *Miranda* doctrine were to become established, it would obviously have a profound effect upon rights of individual employees, as well as on the liabilities of employers and unions, under the NLRA. An employee claiming that his bargaining representative had, for any reason, not represented him fairly in the administration of the collective agreement could file an unfair labor practice charge against the union with the NLRB. Not only would the number of cases coming within the Board's jurisdiction be greatly increased, but the prevailing concept of the union's control of the grievance procedure would almost certainly be revised.

At first it seemed doubtful that the *Miranda* doctrine would prevail. Enforcement of the Board's order in that case was denied by the influential Court of Appeals for the Second Circuit. In *United Rubber Workers, Local 12 v. NLRB* (1966) the Fifth Circuit held, however, contrary to the Second Circuit's ruling in *Miranda*, that a union's failure to represent bargaining-unit employees fairly, by refusing to process grievances based on well-founded charges of racial discrimination, restrained the grievants in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the NLRA. The court also concluded that if an employee's complaint of unfair treatment at the hands of the union is made independently of a charge of contract violation, the issue thus raised falls within the exclusive jurisdiction of the NLRB.

This latter proposition was expressly rejected, however, by the Supreme Court in *Vaca v. Sipes* (1967), which dealt with the question of an employee's remedy after his attempt to exhaust the grievance procedure had been frustrated by the union's decision not to carry the grievance to arbitration. Without approving or disapproving *Miranda*, the Court held that the NLRB does not have exclusive jurisdiction over questions of fair representation; that both state and federal courts have jurisdiction over such cases; but that federal law must be applied. Under that law, the employee must exhaust the contractual grievance procedure, if any, before bringing suit against his employer for breach of contract? and in order to recover damages he must first prove that the union has violated its duty of fair representation.

Individual reactions to all the developments reviewed in this section are apt to depend upon the kinds of assumptions one makes about cases. In some instances the union appears to have exercised its control over the grievance procedure in an almost unbelievably arbitrary way; in others, the employee's claim of unfair treatment seems to have been too flimsy to warrant serious attention. But in most of the cases the relative merits of the competing equities are more evenly balanced, and we are left with a direct and often irreconcilable conflict between the union's institutional objectives and the rights and interests of its individual members or constituents. Despite the desirability of developing a general principle

applicable to all situations of this type, none of those yet suggested is entirely satisfactory.

Employer Responses to Economic Strikes

The typical "economic strike"–so called because it is not provoked by an employer's unfair labor practice–occurs when the parties have bargained to an impasse over the terms of a collective agreement. Traditionally, the battle has not begun until the union has called the employees out on strike; thus, unions have held the initiative, and therefore the advantage in at least the initial phases of economic conflict. They have controlled the timing and, less frequently, the duration of work stoppages; employers, on the other hand, have been limited for the most part to defensive responses. These have usually consisted in simply remaining closed and seeking to outlast the union in a test of economic strength, or in continuing to operate with temporary or permanent replacements. Prior to and in anticipation of a strike, employers have sometimes stockpiled production inventory.

None of these defensive weapons has proved generally satisfactory to employers. Remaining closed for the duration of the strike may impose greater costs on the employer than he can sustain. Hiring replacements may exacerbate the dispute and make settlement more difficult; moreover, replacements may be hard to find and expensive to train. The value of stockpiling depends on a variety of factors, including the nature of the product, the constancy of production and of demand, and the duration of the strike.

In recent years some employers have sought to seize the initiative from unions by locking out employees before the union could call them out on strike. Others have resorted to mutual aid pacts to enhance their financial staying power. Each of these tactics merits some attention.

With few exceptions, the Board has usually held lockouts by individual employers to be unfair labor practices. Recent developments, however, have brought significant changes in the applicable law.

The most common form of lockout today is the multi-employer lockout, which occurs when nonstruck members of the bargaining group lock out their employees in response to a "whipsaw" strike against a single member. In *NLRB v. Truck Drivers Local 449* (1957) the Supreme Court held that in these circumstances the lockout is not an unfair labor practice under the NLRA. The Court reasoned that inasmuch as multiemployer bargaining is lawful under the NLRA, multiemployer lockouts must be permitted to preserve the stability of the unit. Recognizing that "conflict may arise . . . between the right to strike and the interest of small employers in preserving multiemployer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms," the Court declared that "the ultimate problem is the balancing of the conflicting legitimate interests."

In *NLRB v. Brown* (1965) the Court reaffirmed the validity of multiemployer lockouts; but in so doing it appears to have broadened considerably the range of circumstances under which these lockouts were previously thought to be permitted by the *Buffalo Linen* decision. In the *Brown* case the multiemployer bargaining unit consisted of retail food stores. After an impasse had been reached between the employers' group and the union over the terms of a new agreement, the union struck one store and all of the others locked out their employees, on the ground that a strike against one was a strike against all. The unusual feature of the case was that the nonstruck stores continued to operate, through the use of managerial personnel, their relatives, and a few temporary employees. After a new

agreement had been executed and all employees had returned to work, the union charged the employer group with having violated Section 8(a)(1) and (3) of the NLRA.

The NLRB held that the employers had violated the NLRA, not because they had acted either out of hostility toward the union or in reprisal for the whipsaw strike, but because their conduct "carried its own indicia of unlawful intent, thereby establishing, without more, that the conduct constituted an unfair labor practice." A majority of the Supreme Court disagreed, observing that "where, as here, the tendency to discourage union membership is comparatively slight, and the employer's conduct is reasonably adapted to achieve legitimate business ends or to deal with business exigencies, we enter into an area where the improper motivation of the employer must be established by independent evidence. . . ." The Court majority concluded that such evidence was lacking in this case.

The majority approached the problem as a "judgment as to the proper balance to be struck between conflicting interests." Starting from the premise that a single struck employer may lawfully continue operations with temporary or permanent replacements, it reasoned that nonstruck employers will not lock out unless they too may continue to operate; otherwise, they will lose business and patronage to the struck employer. But if the integrity of the multiemployer unit is to be preserved, the nonstruck employers *must* lock out their employees when any member is struck; therefore, continued operation with temporary replacements becomes a necessity.

It is apparent that the Court will now find justification for a lockout that is not in defense of the integrity of a multiemployer unit. *American Ship Building Co. v. NLRB* (1965), decided the same day as the *Brown* case, involved a single employer, who shut down his shipyard following a bargaining impasse over a new contract, claiming this action was necessitated by lack of work due to customers' fears of a work stoppage. The union, which had given assurance that there would be no strike and had offered to extend the existing contract, charged the company with unfair labor practices designed to force the union to abandon its contract demands. The NLRB found, by a divided vote, that the employer had no reasonable fear of a strike, and that his use of the lockout as an "offensive" economic weapon violated the statute. The Supreme Court unanimously reversed, although three justices concurred with the decision for different reasons than those relied upon in the court's opinion. The latter accepted the Board's factual conclusion, but held that "the employer's use of a lockout solely in support of a legitimate bargaining position is [not] . . . inconsistent with the [employees'] right to bargain collectively or with the right to strike," and that a violation of Section 8(a)(3) cannot be predicated on an "intention merely to bring about a settlement of a labor dispute on favorable terms."

The *Brown* and *American Ship Building* cases raise several interesting questions. First, how realistic a balance can be struck between the conflicting legitimate interests involved in lockout cases? If the union must show that the employer lacked both a "legitimate bargaining position" and "an intention merely to bring about a settlement . . . on favorable terms" before the balance is struck in its favor, the act of balancing will be pure formality and the lockout will almost invariably be permitted. If, however, as is suggested in the *Brown* case, the employer's resort to a lockout must be "reasonably adapted to achieve legitimate business ends," there is more leeway for balancing. Finally, if the tendency of the lockout to discourage union membership is also thrown into the balance, and in other cases is regarded more seriously than it was by the Court in the *Brown* case, the balancing of conflicting legitimate interests is likely to be an exercise of considerable delicacy.

Second, who is to do the balancing: the Board or the courts? In the *American Ship Building* case the Court found that the NLRB had "in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer 'too much power.'" The Court held in this case and in *Brown*, as it has

held before, that the Board lacks "a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." These precedents, plus the Board's proclivity for developing "per se rules," which have not generally been well received by the courts, suggest that the latter will continue to exercise an independent judgment on these matters.

Finally, to what extent, if any, is the decision in the *Brown* case applicable to concerted activities by employers who are not members of a multiemployer bargaining unit? The problem is illustrated by the case of *Detroit Newspaper Publishers Association v. NLRB* (1965). Two Detroit newspapers, the Free Press and the News, began separate bargaining sessions with the same union. The News obtained a promise from the Free Press that it would not yield on three specific issues; in return, the News agreed to lock out its employees if the Free Press were struck. The Free Press was struck, and the News suspended publication, even though it was still bargaining with the union.

The Board held, prior to the Supreme Court's decisions in the *Brown* and *American Ship Building* cases, that the News had committed an unfair labor practice because the two newspapers did not constitute a multiemployer unit. The Sixth Circuit, acting on the case after the two Supreme Court decisions had been announced, found no proof of unlawful motivation in the form of antiunion animus or avoidance of collective bargaining, and vacated the Board's order. The Supreme Court vacated the judgments of both the Board and the court of appeals, and instructed the latter to remand the case to the Board for further consideration in light of the *American Ship Building* case. What this action by the Court portends nobody knows; but the Court may have felt that the multiemployer lockout doctrine was inapposite in this context.

Historically, the lockout was a classic device to punish employees for concerted activities and to crush unions. In the contemporary context, however, it clearly has its legitimate uses. Of course, any lockout is likely to have a dampening effect on the ardor of some employees in the exercise of their right to engage in concerted activities; but surely this is only one element, and not a very substantial one, to be weighed in the balance of conflicting legitimate interests. Neither the *Brown* nor the *American Ship Building* decisions have dealt crippling blows to unions; rather, they seem to have restored to some employers a limited freedom of action too long denied them.

The *Detroit Newspaper Publishers* case, however, seems clearly distinguishable, even if one ignores the absence of a multiemployer bargaining unit. The secrecy of the pact between the two employers raises a serious issue; for it is highly desirable, if not an essential, aspect of good-faith bargaining, that each party advise the other of what it may do in the event of strike or lockout. Also, the attempt by one employer to affect the wage structure in another bargaining unit raises the possibility of antitrust violations, for reasons to be discussed in the following section. Finally, it appears from the record in this case that no bargaining impasse had been reached in the negotiations between the union and the News when the latter initiated the lockout. Permitting either party to resort to economic force prior to impasse is inimical to the public interest in the peaceful settlement of labor disputes through collective bargaining.

Employer mutual-aid pacts, although serving the same objectives as multiemployer lockouts, not only constitute a completely different tactical device, but also, because they have so far been confined to the railroad and airlines industries, offer an illuminating comparison between the public policies served by the Railway Labor Act and by the LMRA.

In general, the mutual-aid pacts provide for economic assistance to the struck carrier by nonstruck carriers. Under the airlines agreement, the nonstruck members are obligated to turn over to the struck carrier increased revenues, less increased costs, derived from carrying the struck carrier's traffic. Under the railroad agreement, each member contributes to an insurance fund. When a member is struck, it is paid amounts sufficient to cover its fixed costs and daily expenses. Each nonstruck member must contribute its proportionate share of the cost of indemnifying the struck carrier.

Neither agreement automatically provides for financial assistance when a member is struck; instead, each prescribes the conditions under which the right to subsidy may be invoked. Under the railroad agreement, the right arises when the strike is contrary to the RLA; or is to enforce demands contrary to recommendations of an Emergency Board convened pursuant to Section 10 of the RLA; or is in resistance to the application of Emergency Board recommendations. The airlines agreement provides for financial assistance to a carrier under the second condition specified in the railroad agreement or when a strike is called before the pre-strike procedures of the RLA have been exhausted, or is otherwise "unlawful." Both types of agreement have been upheld by administrative agencies and the courts.

Despite the judicial and administrative approval accorded mutual-aid pacts, the decisions were in each instance narrowly circumscribed and cannot be taken as a broad license for concerted economic action by employers in the railroad and airlines industries. The aid agreements are rather ingenious devices to provide protection for carriers without widening the area of open economic conflict and interrupting operations throughout the industry. This objective is hardly consistent, however, with the tendency in the railroad industry in recent years to convert every local dispute into a national issue requiring the invocation of emergency board procedures.

The RLA obviously places greater importance on the avoidance of any work stoppages than does the LMRA. The emergency disputes procedures of the latter statute have a more restricted coverage, and it does not require the compulsory arbitration of grievances. Given the differing emphases of the two statutes on preventing interruptions of work, the protective devices approved for employers under each–aid pacts under the RLA, multiemployer lockouts under the LMRA–have a logical validity. However, the premise that any threatened halt in rail transportation is inevitably as dangerous to the economy as a "national emergency" under the LMRA deserves far more critical examination than it has yet received. There is an urgent need for a detailed review of bargaining procedures in the railroad industry; in the opinion of some observers those procedures breed emergencies instead of forestalling them.

Summary and Recommendations

The United States has a variety of labor relations laws, each enacted to deal with specific problems, and none designed for accommodation with all of the others. Consequently, the growth of these laws has been excessive and unorganized, frequently creating new problems as it purported to solve others. The most serious inconsistencies exist between the LMRA and the RLA. These inconsistencies are not merely reflections of unique problems and practices in the railroad and air transport industries? rather, they reflect substantially different policies for which there is no longer a reasonable justification.

The various segments of the American economy are now so mutually interdependent that, so far as labor-management relations are concerned, it is no longer possible

dependent that, so far as labor-management relations are concerned, it is no longer possible to speak of "social experiments within the insulated chambers afforded by the several states." There are no "insulated chambers." The extent to which the demands of a truly national labor policy can be reconciled with historical states rights in a federal republic is a question of great complexity that requires for its solution a statecraft of the highest order. Congress has shown neither the willingness nor the ability to face the problem squarely, much less to deal with it effectively.

The continuing prospect of rising levels of wages and prices and the growth of industry-wide or multiemployer collective agreements having at least an indirect effect on product markets reveal the inadequacy of present antitrust laws to provide even a conceptual framework for analysis of these problems. In this area the decisions of the Supreme Court have obfuscated and confused rather than clarified. Congress has neglected its own obvious responsibility to establish a new policy adapted to contemporary needs.

It would be unrealistic to assume that Congress will act on any of these problems unless it is virtually compelled by circumstances to do so, or that it could without guidance and a conviction that it was reflecting consensus of organized labor and management, accomplish substantial legislative reforms. In sort, Congress needs help.

Offers of "help" abound; but, quite naturally, most come from partisans seeking special benefits. The basic job to be done--a detailed review of the principal labor laws in action--should be undertaken by a neutral commission, preferably with, but if necessary without, specific authorization from Congress. The commission should issue findings and recommendations, which should then be reviewed and criticized by labor, management, and consumer groups. The recommendations should concentrate on possibilities of repealing unnecessary laws or specific statutory provisions, eliminating conflicts and inconsistencies in present laws, and developing new policies if they are required.

Whether from such an effort would emerge a consensus that would encourage Congress to act is unlikely but not impossible. Scholars and practitioners alike would learn much from the undertaking, regardless of its legislative consequences. Finally, if the reach of this proposal appears to exceed by a considerable margin the probable grasp of accomplishment, we have at least, as Thomas Reed Powell once remarked, the poet's authority in favor of the differential.

COLLOQUIUM

Jack Stieber

Benjamin Aaron

Nathan P. Feinsinger

Harold S. Roberts, *Moderator*

DR. ROBERTS: Our procedure this afternoon will be to get the reactions of the individual panel members to the presentations of the other panel members. I'm going to ask each of them to speak briefly and answer any of the questions raised, with the exception of the paper by Ted Kheel. After we have a go around on the panel, we'll take a look at some of the questions that have come in from the floor. So to start we'll have Ben Aaron.

DR. AARON: I'll just make a couple of comments about Jack Stieber's analysis this morning with which mainly I agree. The difference between us is really a matter of detail and of emphasis. I liked very much his notion that it would be a good idea if we could divide the kinds of stoppages by public employees into categories of extreme, moderate, and relatively no severity, and govern our policies accordingly. I do not agree with him that it is just about as simple as the kinds of decisions that the National Labor Relations Board makes, nor do I think that most state legislatures will be willing to delegate their authority to an administrative body within the state. I think there is a kind of inconsistency between the notion that we should have a federal law uniformly applicable throughout the states with respect to the right of public employees to organize and bargain collectively and with the notion that we should allow experimentation within the states. That is to say, Jack is for limited experimentation within the certain guidelines. I'm inclined to think that we ought to have a federal law, but I'm wondering how much experimentation will be feasible. I like the idea of experimentation, but I'm not sure that it would work out quite as helpfully as Jack seems to think. But generally speaking, I myself feel with Jack and with Nate that it does no good to simply pass a law saying that there will be no strike. I'm more inclined to emphasize those procedures that make strikes unnecessary. And there are two states, Michigan and Wisconsin, and a few others, where we've seen some major emphasis on fact-finding and mediation for the first time in a long time. I don't myself feel that we've had anywhere near the ingenuity and hard work done on these aspects of dispute settlement procedures than we've had with respect to others that are so well suited to the public sphere.

DR. STIEBER: With regard to Aaron's talk, there was one thing that I liked very much and I think it is very important. As he put it, there is an utter lack of protection for unorganized employees in the United States. This came home to me in doing some work in Western European countries. While we have a great many labor laws, perhaps more than any other country, we do not have laws with respect to certain basic conditions of employment that other countries, who do not have as much labor relations law as we do, do provide through their own legislation. For example, we do have the laws in the United States regarding hours of work and hours of overtime, and this insures reasonable likelihood that even in unorganized plants where there are no contracts, these employees also will have a certain maximum hours and after that they will receive overtime. Most European countries go beyond this with regard to these fundamental necessities that are guaranteed to employees. For example, most countries guarantee certain number of weeks of vacation to all employees regardless of contract, so that in addition to hours law they provide that all employees are entitled to, let us say, a week or two weeks' vacation.

Now unions and employers are at liberty to negotiate for more liberal provisions,

but at least we know in those countries that in an unorganized sector (and there are unorganized sectors in all of the countries that I am talking about), those employees will also have vacations. In the United States we really do very well with regard to fringe benefits where there are contracts, especially where unions are reasonably strong. But I dare say that there are plenty of people who work year in and year out without any vacation because they either are not organized or they are not in a position to bargain for a decent vacation period.

Another illustration of where the individual unorganized employee is at a disadvantage in the United States is with regard to dismissal notice. In the United States you can dismiss such an employee without any notice. Most employers who follow good personnel practices will try to give some notice. However, there is no requirement for this except where there are labor-management agreements which spell out a grievance procedure, and a discharge procedure, and a right to arbitration, and so forth. It seems to me that this is really a basic right that every individual ought to have, so that even if he is working in an unorganized plant, if he is no longer needed, or even if he is going to be discharged for cause, there ought to be some period of time during which he would receive notice, whether it be two weeks, or one week, or even a month. Generally, this is spelled out by law in most European countries. Let alone an opportunity to appeal a discharge through some kind of a procedure which would take the place of a grievance procedure with final and binding arbitration. I think this is what Ben meant when he was talking about the lack of protection for unorganized employees, and this is an area which we ought to explore. We take it for granted that where there are unions, they are going to negotiate rights and privileges for their members, tending to forget that there is a very large number of people who not only are not members of unions, but who do not work under union contracts even if they are members, and are not covered by any agreement.

As to Ted Kheel's paper, there is a matter that was not mentioned which is related to the subject of technological change and automation. Again it is a difference between American practice and West European practice. There is legislation in a number of European countries providing that before employers make collective dismissals for economic reasons--which means relatively large numbers of employees, in the range of 5 percent or more of the work force of a given employer--they must give notice to the employment service before they start laying off employees. This is especially true where the layoffs are due to technological change, and according to some of the people from Sweden particularly, this has worked out quite well. Most employers have not found that giving two months notice of their intention to make large scale layoffs creates any hardship for them.

I have found that employers in the United States generally feel that it would be almost impossible in certain lines of businesses to be able to tell even as little as a month in advance whether they will have to make a layoff of a substantial number of people because of technological change or for economic reasons. It may be interesting to discuss whether it would be feasible in the United States to have some kind of requirement that employers give a certain period of notice before making what I have referred to here as collective dismissals.

Finally, with regard to some of the things that Mr. Aaron mentioned on the public employee strikes question. There is of course an inconsistency, as he says, in asking on the one hand for more federal regulation, and on the other hand, asking for state experimentation. But I resolve it by saying that just as we have certain constitutional rights which are laid down by the U. S. Constitution which apply to everybody, there is still room for experimentation in other areas once you are within the overall constitutional guarantees. Similarly, I would say that the right of organization and the right to negotiation would be made a right that is guaranteed to all public employees. But then we would go further and recognize that there are different ways of dealing with some difficult problems, one of them being public employee

strikes, that nobody knows the answer, and that, therefore, this would be an appropriate area for state experimentation. They must still keep in mind, however, that they cannot experiment to the degree of denying the basic rights of organization and collective negotiations.

DR. ROBERTS: Would you care to distinguish between collective negotiations and collective bargaining? The courts seem to have some difficulty on this.

DR. STIEBER: I think it's an artificial distinction. Perhaps some of my colleagues will disagree on this, but as far as I can see, it is an artificial distinction which has been made between public employment negotiation and private employment bargaining. These distinctions are said to arise because there are problems, for example, as to who is the employer when you are dealing with an agency of a municipality which in itself does not have complete freedom to bargain because it must rely on somebody else for its budget--the board of estimate or city council? Also other problems exist, civil service regulations and so forth, that distinguish public employment from private employment. Consequently, some people have insisted that we should not use the term "collective bargaining" in talking about negotiations in the public sector because there are these differences, and they have, therefore, coined the phrase "collective negotiations" which would distinguish it from "collective bargaining." Perhaps there are more solid reasons for the use of the two terms, but I don't know them.

DR. ROBERTS: In this connection I would like to pose a question to Nate Feinsinger, because it involves Wisconsin and he is a great protector of the State of Wisconsin. At the meeting yesterday of State Labor Relations officials, two lawyers talked about the rights that should be available to public employees. They argued that they should have the same rights in collective bargaining as private employees do--the equal right to strike, and to inconvenience the public by withdrawing their services. One of the speakers said that the Wisconsin statute is a good one and requires collective bargaining. And then he said that the Wisconsin statute does not cover wages, hours, and working conditions. Could you explain this?

DR. FEINSINGER: No, I don't think so. In Wisconsin we have a single board known as the Wisconsin Public Relations Board. It mediates, it arbitrates, it decides unfair labor practice complaints. In my opinion, you cannot have mediation and arbitration vested in the same agency, because if the union knows that it has another step to go, it would turn down the best deal that it could get through mediation and go to arbitration. What the mediator got them while they are at that stage they have in their pockets, and they believe they can't get less when they go to arbitration. There is no other Board that I know that has more than a single function. In New York you have a mediation board, and also a State Labor Relations Board.

DR. STIEBER: In Michigan, the State Labor Mediation Board does have both the functions of mediation and fact-finding and unfair labor practices, and so forth. However, the statute with regard to public employment specifically states that these two functions should be handled by different departments or divisions of the State Mediation Board. The legislature neglected to give it enough money to actually provide for two separate divisions, so what actually happened is they have taken some of the employees who were formerly involved in processing representation elections and unfair labor practices and have assigned them to mediation functions. But there is this dual function within one board which has been criticized, and I would not be surprised if at some point the feeling became strong enough to result in putting them in separate agencies.

DR. FEINSINGER: Let me tell you a story related to this. Our Wisconsin

Supreme Court had said that policemen had no right to bargain; they had no right to strike; they had a right to fact-finding. In the fact-finding process, they had a right to appoint an outside organization, but they cannot join it as their bargaining representative. It seems to me this shows the height of ignorance and unreality itself. You can't join a union; you can't bargain, but you can have a union represent you in fact-finding! How do you account for that? A new judge, that's all.

DR. ROBERTS: I have a question from the floor. Does not the strong potential block voting power which rests in government workers' unions give them a dominant position in any negotiation with their employers, who are usually elected officials? Therefore, wouldn't giving them the ad led power--the strike--tip the scale too much in favor of the government workers?

DR. STIEBER: This might especially be true at the local level where you have a strong union city, and the elected officials may be in position where they are not free to act in the way that they would want to because they believe that these actions will have some impact in the ballot box perhaps in a very short period of time. Now this is just a fact of life. I don't see that you can stop union officials from trying to get their members and even non-members to vote a certain way. This is a right that all citizens and all organizations have. One might say these unions don t need the right to strike. They are so strong that perhaps through the legislative process and their power in the elections they can influence the economic benefits that they get. I think in a way this is true. There are some unions who weren't terribly happy about the changes which introduced collective bargaining into the public sector. For example, I suppose over the years the post office employees have influenced their own pay and benefits through lobbying activities and have done so very effectively. I don't know whether they are likely to do any better through collective bargaining. However, on the other hand, there are many cities in which unions are not all that powerful, and even in those cities where unions are important we all know that union leaders have not always or even frequently controlled the votes of their members when they go into a secret booth to vote. So that I think that the question of whether or not the unions are powerful enough actually to get what they want is debatable and will vary from one community to another. But apart from that, there are those organizations which do not have the power of numbers but are entitled to collective bargaining negotiation to influence the conditions of their employment. And these certainly must depend on some introduction of organization and collective bargaining in the public sector.

DR. FEINSINGER: We are in a transitional period. Here is the Chairman of the County Board of "X" town, who has been running the show; he has never had any discussion with a union, and suddenly he is told by the Legislature he has to bargain collectively. And he says, What's that? He says I don't have to bargain with anybody because I am the sovereign: the sovereign state, the sovereign city, the sovereign county. I cannot share my responsibility with a union. I think the unions will make a mistake if they insist on getting the whole cake right away. You've got to bide your time union, there is a new generation of county chairmen.

One of the newer devices to bridge the gap is known as advisory arbitration. This is a contradiction in terms. It is just like compulsory arbitration but with a different name. It is like saying the Iliad was not written by Homer but by another man with the same name.

DR. ROBERTS: In this connection, I asked the question before about this collective negotiation. The same thing applies to "advisory arbitration" and "mediation to finality." Is it because we're trying to run away from terms which have become objectionable and come up with something which would be acceptable to people as long as they don't recognize the objectionable thing?

DR. FEINSINGER: No, I think the argument against public bargaining is generally nothing better than the old shop-worn argument about the closed shop and the union shop and the agency shop. Those terms are devised for industrial negotiations, not for public negotiations. The "fair-share agreement," I think, is a term that I invented to distinguish the union security problem in public employment from the problem in private employment. It's as simple as that. Besides, it's got a better chance to pass in the Legislature.

DR. ROBERTS: Executive Order 10988 provides for "advisory arbitration." This is a contradiction in terms but perhaps it was the only way to get a form of arbitration into the Executive Order and make it acceptable to government agencies—even though it was not final and binding arbitration. The agencies said that they would not accept a decision by somebody who is not in authority; that the department head has to make the final decision. Although these terms may be classed as gimmicks for those of us who are accustomed to using simple, straight talk, yet, some feel that if you come up with something which gets you over the language obstacle and you can accept it, or get the legislature to pass it, or get the President to sign it, or get the Congress to go along, that it makes good sense. Maybe what we need is a new language in the public sector.

DR. STIEBER: Actually, Harry, the term advisory arbitration is different from final and binding arbitration, and the best evidence of that is that the unions in the Federal sector are not happy with advisory arbitration and they have cited illustrations where the advice of the arbitrator has not been taken. Therefore, one of the changes that they are asking for in Executive Order 10988 is to substitute final and binding arbitration for advisory arbitration so that here it is really not just a matter of semantics. It is actually a difference in the outcome and the way in which the arbitration award is treated.

DR. AARON: I think you missed a point on that, Jack. I think it is a euphemism, not for arbitration, but for fact-finding recommendations and the term advisory arbitration is designed to create the illusion that there is something final and binding when obviously there is not. So it is not a distinction between final and binding arbitration and something else. What it is is the old recommendation procedure clothed in language which was intended to give people the feeling that they were really going to get a final and binding decision. But obviously there was no way that the Executive Order could accomplish that, at that particular time.

DR. ROBERTS: How can you support that old canard that civil servants both state and federal are paid lower wage rates than employees in the private sector? Here in Hawaii private employers are continually losing employees to the federal and to the state agencies.

DR. STIEBER: I suppose I will have to say that this is my first visit to Hawaii, and I am not acquainted with the pay scales either of the private sector or the public sector. I would say that if private employers are losing employees to government organizations then this is evidence that perhaps their rates are not competitive. Generally speaking in most states and the federal government this is not the case. In the federal government, I think that certain employees may start at a higher level, but in terms of the progression that prevails, they do not as a rule pay more, and usually pay less than comparable workers receive in the private sector. I am sure that there are illustrations, not only here in Hawaii but also in some states, where the federal government, because of the importance of the installation and the necessity of attracting workers, especially in blue collar jobs, ordinance and naval installations and so on, where they have flexibility to a point where they are pricing labor away from the private employers. I am sure this is true on some instances.

DR. ROBERTS: I think perhaps you might add too that the shifts in employment

from private to public vary in different types of occupations–that you might get a loss in some and a gain in others. I think there are some factors other than wage rates, which determine whether the employee will move from the private to the public sector.

Here's a question which deals with police strikes. Do any of you want to comment on the experience of police strikes? Have they resulted in increased crime waves?

DR. STIEBER: The most interesting recent development that I know of in this area–it was not responsive to this question–but I think it does illustrate the attitude of unions toward strikes by policemen and perhaps firemen. The State, County, and Municipal Employees recently withdrew the charter that they had issued to a police local because the police local did call a strike that lasted something like two hours. And immediately after that happened, the President of the State, County, and Municipal Employees appointed a board to investigate, and apparently the board's finding was that in fact there had been an actual withholding of labor for a short period of time and since it is the policy of State, County, and Municipal Employees that they do not sanction strikes in these three areas, namely, police, firemen and prison, they withdrew their charter from that organization. But there really are very few illustrations of actual police strikes where we could get enough evidence to answer that question.

DR. ROBERTS: I'd like to note that in a recent visit I made to Canada, one of the things that interested me a great deal were the collective bargaining agreements between public employee organizations and government agencies. The agreements covering police and fire departments had specific provisions which required collective bargaining. If collective bargaining fails, a mediator is assigned by the National Agency or the regional agency. If mediation fails there is a proviso for a tripartite board to meet to make recommendations to the parties. The recommendations, however, were final and binding so that in effect you have compulsory arbitration for firemen and police. Other public employees in the country are free to take economic action, including the use of the strike.

There is a question as to how extensive public employee organizations are in Hawaii. I'd better get somebody from the audience active in the public employee area to answer that. Briefly on the state and local levels, we have four major organizations: the Hawaiian Government Employees' Association, the United Public Workers, the Hawaii Education Association, and the American Federation of Teachers, a total of almost 25,000. The largest of these is the Hawaiian Government Employees' Association. On the federal level I guess the major ones are primarily in the military installations–Pearl Harbor Naval Shipyard being the largest. They have a contract with the Hawaii Metal Trades Council. Any comment from the floor?

COMMENT: The shipyards are saying that approximately one-third of the employees belong to some employee organization. In this State there are some 6,000 federal employees who belong to one organization or another.

DR. ROBERTS: Here is a question addressed to Ben Aaron. Aside from your suggestions for overhauling of the federal labor laws, do you suggest any specific changes in the existing labor laws?

DR. AARON: Well, my particular suggestion for a death warrant is Railway Labor Act, which I think was a great piece of legislation when it was enacted and provided most valuable experience for us, but which I think now is obsolete, and I would strongly favor its repeal and the subsuming of those employees under the National Labor Relations Act with

appropriate modifications to deal with particular problems. So far as I know, I am alone in that recommendation and I don't expect it to come to pass. But I have spent a number of years of my life studying the Act and being tangled up in one way or another in its administration, and my conviction remains the same in that regard even though I don't have many supporters.

I think there are a number of provisions in other laws that might very well be repealed. There are a lot of very foolish provisions in the Taft-Hartley Act relating to national emergency disputes, but they're minor except in the context of a thorough reform. I don't think it is worthwhile mounting a crusade to repeal the ridiculous vote on the employer's last offer, or the procedure for getting a report from an emergency board to a person who has already made up his mind what he wants to do, and which is told to get a report in in a certain time so the Attorney General can get an injunction, although the purpose of the report is to advise him as to whether or not there is a national emergency. That's all very ridiculous but it's not terribly harmful. But if we were going to revise our national emergency disputes procedures, then it seems to be quite clear we ought to get rid of those really quite undignified and ridiculous provisions.

To suggest other aspects of labor reform would require, I am afraid, much more technical discussion on the problems than would be appropriate here. I would mention that I think another very grave aspect of the whole Railway Labor Act situation, and one which isn't known so much, is the whole question of elections. I think their election procedure is vastly inferior to that of the National Labor Relations Board. For one thing it does not permit any choice on the ballot for a no union vote which I think is absolutely essential in any kind of democratic procedure, and I think the whole procedure before the National Railroad Adjustment Board is an outstanding scandal and I strongly favor the elimination of all that.

When we get into the more detailed aspects of the National Labor Relations Act, as we do particularly in boycotts and that sort of thing, I think we are just tearing the seam as well. I think we have too much legislation. That is my basic point, we could do with much less of such legislation.

DR. ROBERTS: Here is a question addressed to Nate Feinsinger. Are you saying in effect that compulsory arbitration in public employment is inevitable?

DR. FEINSINGER: No, on the contrary, I don't think compulsory arbitration is ever inevitable, but I would say in this respect I disagree with Michigan. There's always time for a State Legislature or Congress to adopt the compulsory arbitration system. Therefore, we can try voluntary arbitration.

DR. ROBERTS: Question to Dr. Stieber. In Hawaii we are concerned largely with relations between unions and the federal government, not the State. What has been the attitude of the armed services toward the federal directives on collective bargaining?

DR. STIEBER: I'm really not well enough informed on the Department of Defense and the various armed services and their experience under Executive Order 10988. However, I do read regularly a government employee labor relations letter put out by BNA, and my general impression is that the Navy Department particularly, which seems to be one having considerable organization of their employees, has generally lived reasonably well under the Order. I think that they have had some advisory arbitration. I think that they have accepted the procedure. I have the impression that there is not any strong difference in the acceptance by the armed services with respect to their civilian employees as compared with let us say some other agency. Of course, there are some agencies that are outstanding in the degree of

acceptance. The Labor Department, where one I think might reasonably expect that there would be a strong acceptance of the Executive Order, has gone further than most in the degree to which they have established relations and consultation and negotiations with their employees. The Interior Department has had relations for many years. The TVA, of course, long before Executive Order 10988 had contractual relations with their employees, and was the prime example of a government employer which was negotiating and in every way treating their employees more or less like private employers. I don't have any particular information with regard to any defense services having any significant difficulty under that Order.

Let me mention two other things. When Nate Feinsinger referred to his difference with the Michigan procedure with regard to compulsory arbitration, I know he's clear on it but I want to be sure the rest of you are. He was not referring to the current Michigan law which does not provide for compulsory arbitration for any disputes in public employment. He was referring to the report of a commission established by the Governor which was asked to examine the law and to make recommendations for its improvement, and it was this commission which, among other things, recommended that for a period of three years–every three years–there be some experimentation with compulsory arbitration only for police and fire fighters. They did not go beyond this. The legislature has not acted on any of those recommendations, and therefore, in Michigan our law is no different than it is in Wisconsin.

Just one last point. I don't know why, in trying to answer the question with regard to police, I did not draw on the illustration closest to home. Actually, we have perhaps the best illustration of a non-strike among the policemen in Detroit but one which had a very significant impact, only a month or two ago. The policemen are still very unhappy about a recommendation for their wage increase for next year. They have not called a strike. However, for a period of perhaps two weeks they were calling in sick in large numbers, so that on some days there were as many as 600 policemen reporting sick. It's just a problem of money with regard to the police. They tried to combat this one day by insisting that all policemen who had called in sick report in and have doctors examine them. Well, they were a little unlucky, because one of the men who reported in keeled over when he got there because he obviously was sick. In a police force of several thousand you always will have a percentage of people who are sick. This has not been resolved. It is a case in which a very substantial number of policemen have stopped short of a strike, but they have exercised other alternatives. Among the other things that they did on one or two days was to stop writing traffic tickets. This had quite an impact on the municipal budget. These and other things only illustrate that you don't need to have the right to strike to be able to exert power.

QUESTION: What are the basic differences between collective bargaining in the private sector and collective bargaining in the public sector?

DR. AARON: In the first place, when you're dealing in a private sector, within certain limits the union has the right to withhold its services, to go on strike. The employer has certain limited responses he can make to that–he can just try to wait out the union or he can try to operate during the strike and there are various federal and state agencies which would assist the parties to reach an agreement. The employer makes his own decision. He doesn't have to go somewhere else to decide what kind of an arrangement he can take in settlement of the strike.

If you're dealing with the federal or state government, in the first place you've got limitations on the right to strike, legal limitations at any rate. And secondly–and I think this goes to the heart of the problem of public bargaining–very frequently the agency with which the union and public employees have bargained doesn't have the final say. The union maybe asking for more money from the school board whose budget has already been determined,

and even if the board wanted to grant the union's demands it may find it impossible to do so. That's one of the reasons why in the Taylor Report in New York the commission recommended very strongly that bargaining precede the final determination of what monies would be available for the year, so that when the parties got to bargain the people representing the government would be able to go to their principals and say, "Look, we think this is a fair arrangement and you've got to provide the money." Limitations on bargaining of the government are very, very much more stringent, particularly when the federal agency budget has already been determined by Congress or will be determined by Congress. I don't know if that gets to the heart of the question.

DR. STIEBER: I think in this respect there is much more room and scope for negotiation at the local level than there is at the state or the federal level. For example, you cannot as a classified civil service employee bargain over wages, because wages for civil service employees are set by Congress. I have read some very learned articles which make a very good case for the view that really as long as you cannot negotiate over wages and salaries you really cannot call it collective bargaining.

This is exactly the situation in which I was involved in just before coming out here. I was appointed fact-finder in a school district where they happened to reach an impasse. I went and held a hearing and found that the basic issue was over the salary schedule. The school board had already gone to the voters and gotten authorization for two and a half million tax increase. The main beef of the teachers was that really they had no business asking for only two and one-half million, because the teachers had told the Board that they would need at least five million in order to give the teachers what they wanted. The superintendent of schools said the Board felt that based on the fact that this city had just voted an income tax and the State of Michigan was just about to vote an income tax, they felt that anything above two and one-half million would be voted down, and he cited some very apt illustrations about neighboring communities where they had gone in for a higher millage and had been voted down.

Here was a situation where the teachers were asking for a certain amount of money which the school board was in effect saying we don't say that you're not worth it and that you're not entitled to it, but the fact of the matter is that our budget for next year has been set, and there they were. Now, private situations like that would never occur, because there is nothing in the last analysis to prevent the employer, if he is faced with a situation where the union is demanding more, from making a decision. He might make a decision (1) to raise the price of his product, (2) to close down certain unprofitable operations, or (3) to take a strike or other possibilities. But this is only one illustration of the great difference between bargaining in the public and private sectors.

DR. ROBERTS: Was there a question back there, Art?

QUESTION: What would you do about a strike in a hospital?

DR. AARON: I think one of the big problems in hospital situations is that first of all you've faced with the undeniable fact that while they are beginning very slowly to catch up, most hospital employees all around the country are very, very badly underpaid and over worked, and their general working conditions are pretty bad. The reason I think in part is that in the typical private, non-profit hospital the Board of Trustees usually are wealthy people who are very concerned about providing hospital care and are very cost-conscious. They say we're giving all our time and energy without compensation and we think everybody ought to do the same, you know. They expect their employees to work and make their livelihood under clearly substandard conditions and when the employees want to bargain, they are told how can you do

anything to interfere with providing health services for sick people.

I think we have to bring hospital administrations into the 20th century in terms of their duty to provide for their employees as well as for their patients. The problem is sky rocketing hospital costs. We all know the kind of hospital care and medical care that we want. Everybody wants to go first-class, but none of us can afford it really, and everytime we get increases in benefits for patients or increases in pay and improved working conditions for people who work in the hospitals, we get increased costs to the patients, and we just have to reach some kind of an agreement in our society about how far we are going to go with providing good medical care. We certainly should not ask the hospital workers to subsidize the rest of us. For a long time we've been exploiting the nurses and the nurses finally just got sick of it. Now the nurses are about as militant a group of employees as you will find anywhere. And it's just a matter of time before all the other people who work in the hospitals are going to react the same way. We can't deal with that problem by telling them that they don't have the right to strike.

DR. FEINSINGER: Mr. Chairman, with your permission. I'd like to spend a minute or two to discuss the problem on a broader spectrum.

I started with the assumption that the world of force is gone and to determine disputes of any kind by means of military force, diplomatic, political, and even the judicial–that leaves the question as to how the disputes are to be decided other than by force. The newly emerging nations are saying to us, "Give us back our burdens, Mr. White Man; we will carry it ourselves."

Now mediation in a broader sense includes any kind of voluntary action. With that thought in mind we have established in the past three years at the University of Wisconsin Law School what we call a Center for Teaching and Research in Dispute Settlements with heavy emphasis obviously on civil rights disputes. But it's not limited to civil rights disputes. They cover the war area. They have labor-management disputes; I think some of you are born with just labor-management. I know I am. And the question is, how do you make the mediator? Does he have to be born this? Do you teach a man to become a mediator? That's one thing. The second thing is to take a successful mediator in the labor-management field. Like the rest of us who has made a name for himself, can he transfer those skills from the labor-management field to other fields such as civil rights disputes and international disputes? Then we have a whole host of other terms. Let me give you an example of what we're trying to do.

There is a law suit by the Frank Lloyd Wright Foundation against the City of Madison over a little item of $350,000. The case has gone up to the State Supreme Court, back down. They appointed an Arbitration Board. They have two members of the Senate office, one is their arbitrator, and the other is going to present the case. What a nuisance I admit. Same thing on the other side and with a great deal of difficulty getting a man who would be willing to serve in this group. First one they got died and I agreed to serve and, of course, we have a problem explaining to other people that this isn't a fatal assignment. They finally got him and by this time each side had spent $150,000 with fees of one kind or another and they haven't even got the show off the ground and on the road. What do you get off the ground?

At any rate, the Mayor asked me if I would mediate with a little more preparation than that. Well, the point of it is the city had offered to pay $25,000. But the real difference of opinion is $50,000 as the Foundation had offered to settle for $75,000, not $350,000.

I said, "This is very interesting. I am going to call the newspapers for a press conference. Since each of you has already spent $150,000, the real difference between you is only $50,000. That is not fair because we did intend to get the case all cleared up."

Later a friend of mine who is a very prominent lawyer in Los Angeles told me, "You better stay out of Los Angeles. Your name is mud with the lawyers," and I said, "What's the matter now?" "Oh," he said, "they heard about that settlement you forced on the Frank L. Wright Foundation and they don't like it."

If you use the word mediation to a civil rights man, he'll kill you, not literally. You won't like him because he says mediation means compromise. We are talking here of God-given and Constitutional protected rights and there is no room for compromise. I can understand that, but you see the assumption of mediation is always compromise is not a fair assumption. A lot of times one side or another is out on the limb. It doesn't have a case at all. It's very, very embarrassing to come along with somebody else and save face for him. And now in any case if anybody wants to know something about the mediation settlement, you write me at the Law School. It's just--life is a seamless web--you can't slice it into a labor-management dispute, civil rights dispute, international dispute. It's all one ball of wax. For purposes of this kind and for instruction, you have to divide the world up into slices, this whole industrial relations. I say you should consider labor-management relations as the total concept of the society in which we are living including this whole business of civil rights in the nation.

QUESTION: Is the traditional type of bargaining becoming obsolete? Is there a trend toward bargaining on the real issues from the beginning, instead of waiting for the end of negotiations?

DR. AARON: I think that this is one of the areas where it is very hard to generalize, because we don't have any uniform structure of bargaining throughout industry or in the public sector. There is certainly a marked trend away from so-called crisis bargaining in the sense that nothing can be done until just shortly before the agreement is due to expire. In some of the big industries informal bargaining goes on more or less continuously and parties are constantly working at it the year around. There is a good deal of informal exploration and by the time the parties meet for formal negotiations they pretty well have an idea of what has to be settled. But I think you have to allow for a certain amount of just formal ritual. People expect it. The membership of the union and the stockholders of the corporation would be, I think, a little disconcerted if the parties simply announced that they have reached an understanding.

And of course, as the bargaining continues on a more and more sophisticated level, the problems become much more difficult, so that there really is genuine disagreement. I was interested in a statement reported in the press about the use of computers in collective bargaining, indicating that some day the computer could take over a good part of the bargaining. The implication being that people are really just not sure about the facts, and that's what takes time and causes the trouble, and the computer could run through various proposals and come out with the facts and the parties would be bound by that.

Actually, I think more and more what the parties are arguing about is something far more fundamental; that is, the whole question of what proportionate share of the total income of the corporation should go in the way of profits to the enterprise, to greater benefits to the employees, lower prices to the consumer and so forth. And there is also in negotiations, like this year's auto negotiation, fundamental questions of what should be the nature of the employment relationship. Should all wage earners be switched to salaries for example? Now these are points that, even with careful background preparation, are going to require very hard bargaining and undoubtedly will have to go to some kind of a crisis point before a resolution can be reached.

Well, I think the millenium is far from here, but I do think that there is a great deal

of important ground work and careful preparation for bargaining that has never existed before in some of the major industries, but it will not in my judgment fully supplant the last mile or so of tough bargaining, the long hours, sometimes, of bargaining to mutual exhaustion and so forth.

QUESTION: Was the joint resolution of Congress on the railway disputes mediation, fact-finding, or compulsory arbitration?

DR. AARON: What it is is an attempt to reach some settlement, but with the added sword of Damocles over the heads of the parties indicating that if they cannot reach an agreement then the recommendationsmade by the Commission or Board will become in effect a compulsory arbitration award. I'd like to say just one cool word about that. I was a member of the first compulsory arbitration board that was established in 1963 by Congress to settle the last railroad dispute with the operating brotherhoods. You recall that there were a number of issues that were referred for mediation, but two of them having to do with whether firemen should continue to be employed on diesel engines in freight service, and what should be the size of the train crew. Those two were to be settled by final and binding arbitration.

For some 20 years or more, I've been telling my students that compulsory arbitration is not a good means of settling labor disputes. But every once in a while I doubt the validity of that advice. Having served on this arbitration board I'm happy to report that I think I was telling them the truth all those 20 years. This board met pursuant to a statute that was a model of ambiguity, that had all kinds of restrictions built into it so that the public members, although there were three of them as opposed to two representing the union and two representing management, didn't really have the whip hand at all.

We spent nine weeks in hearings, hearing things that were totally irrelevant to the dispute, that merely rehashed what the parties had done in the preceding 18 months and with the Commission appointed by President Eisenhower, and then we had to make a decision. We were told that that decision would last for two years. Our decision was greeting with ill-concealed joy by the carriers, and with outrage by the brotherhoods who, however, had refused to give us any help in trying to get an equitable solution.

Then we sat back and watched what would happen. Well we knew, first of all, that the decision would be appealed to the courts, which it was. It went all the way up to the Supreme Court of the United States and it turned out that the law was constitutional, which was obvious, and that the decision met the terms of the statute, which I think was equally obvious, but they had just begun to fight. Under the Railway Labor Act any arbitration board can be reconvened at the request of either of the parties to interpret the award. So for the next two years, our arbitration board was reconvened sixteen times, each time for about three days at a time, always on weekends, in almost as many cities. We handed down over 300 separate interpretations of the award. And a great many of those in turn were taken to the courts. Many of the decisions critical to the whole operation of the award are still pending in the courts. At the end of the two years it was not certain as indeed isn't certain yet what the status of the award is.

In short we've settled nothing; absolutely nothing. But in the meantime some 18,000 firemen were put off the railroads. They got for the most part very substantial benefits but a great deal of human misery resulted, and Congress has been investigating it ever since. It's just a terrible way to handle anything, and it seems to me that if ever we needed proof that compulsory arbitration simply will not do what it is supposed to do, which is, to take something and settle it finally, this case is a perfect example of it. Now whether present law will do something better remains to be seen, but at least there the Board has the option of mediating, which

we didn't have, and trying to reach a settlement, and the parties have a little more leeway in which to operate. I hope very strongly and I hope Ted Kheel's absence today help them do some good in this dispute. Maybe they can work out a settlement which will prevent the necessity for compulsory arbitration, but if those compulsory arbitration men were back in the same old muddle we had before, I don't think we will solve any problems at all.

DR. ROBERTS: Well, the word this morning wasn't very good from Senator Morse in the Senate. The law itself provides for a 30-day mediation which ends on the 16th and then there's 30 days of fact-finding. But the series of criteria which they don't have for the third time which I think deal with the guidelines. If that doesn't work, then they make their recommendations and then they have 30 days in which to file and these will last for two years for the effectiveness from January 1, 1967 to 1969.

Our time limit is up and I want to see if any of the members have any comments before we close our discussion.

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ORGANIZATION AND COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

by

Jack Stieber*

Each decade since the 1930s has had at least one major law dealing with labor relations: the Wagner Act of 1935, the Taft-Hartley Act of 1947, and the Landrum-Griffin Act of 1959. All have excluded government employers and employees from their purview. The 1960s, barely half over, have already earned the right to go down in labor relations history as the decade of the public employee. At the Federal, state and local levels of government, public employees are organizing, engaging in negotiations, and giving voice to grievances against their employers; in short, they are beginning to act like all other employees. Equally important, legislatures are passing laws according public employees most of the rights won by workers in private industry thirty years ago.

This paper discusses the growth of public employee organization and collective bargaining, analyses different approaches to some basic issues, and points up implications of this significant development for the future.

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Organization of Government Employees

Government is the largest and fastest-growing industry in the United States. In 1965 one out of every six nonagricultural wage and salary employees was on the public payroll which totaled 10 million, 3 million more than in 1955. By 1975 government employment is expected to increase to about 15 million and comprise one out of every five employees in the country.

Almost all of the increase in government employment since 1955 has occurred at the state and local level. At 2.4 million, Federal civilian employment in 1965 had risen by only 200,000, or 13 percent, over 1955; during the same period the nation's population increased by 17 percent and state and local government employees increased from 4.7 million to 7.7 million, about 65 percent. By 1975, the Bureau of Labor Statistics projects an increase in Federal civilian manpower requirements of less than 10 percent, while state and local government needs will rise by 60 percent, a far greater increase than anticipated for any other industry.[1] Population is expected to rise by about 16 percent during the next decade.

The major reason for this phenomenal growth in government employment is the increased demand for services that are supplied by government, the most important by far being education. One out of every two state and local employees is employed in education. Other government growth industries include the supplying of health and hospital services, highway construction and maintenance, natural resource conservation, national defense and related activities.

Given the tremendous growth in government employment, trade union membership among government employees might also be expected to have increased. This has indeed happened. The BLS reports that union member-

ship in government rose from 915,000 in 1956 to 1,453,000 in 1964, an increase of almost 60 percent.[2] More than 40 percent of the increase occurred between 1962 and 1964, and 70 percent after 1960. During the same eight-year period, 1956 - 1964, trade union membership in the private sector of the economy decreased by more than 700,000 or 4 percent.

As a result of these contrasting trends, government employees comprised 8.1 percent of total trade union membership in 1964 as compared with 5.1 percent in 1956. Furthermore, while the proportion of union members in the entire labor force declined from 25 percent to 22 percent and the ratio to nonagricultural workers dropped from 33 percent to 29 percent, the percentage among government employees rose from 12 percent in 1956 to 16 percent in 1964. This membership was rather unevenly distributed as between the Federal level and state and local governments. In 1964, 900,000 or 38 percent of all Federal employees belonged to unions, while only 550, 000 or 7.5 percent of all state and local government employees were union members.

The rise of public employee unions has been spectacular. In September 1965, the AFL-CIO reported that three of the fastest growing unions during the preceding decade were exclusively in the public employee field: the American Federation of State, County and Municipal Employees (AFSCME) which had 99,000 members in 1955 and 237,000 in 1965; the American Federation of Government Employees (AFGE) which increased its membership from 47,000 to 132,000; and the American Federation of Teachers which rose from 40,000 to 97,000 members.[3] In early 1966 the AFSCME claimed 288,000 members, the AFGE 180,000 members and the Teachers Union 115,000 members.[4]

Organization of government employees is not a recent development. Craftsmen in naval instellations have been organized since the early part

of the nineteenth century. Unions currently affiliated with the AFL-CIO Metal Trades Department have a long history of organization in Federal employment. The most important of these, the International Association of Machinists, established its District 44 in 1904 to work solely in Federal employment and in 1966 reported 44,000 public employee members.

The earliest union composed entirely of Federal postal employees, the National Association of Letter Carriers, was organized in the late 19th century and was one of the first affiliates of the AFL. Today more than a half million postal workers belong to some dozen unions, most of which have existed for many years, frequently in the face of pronounced hostility.

Unions have been far less active in the classified service, which makes up about half of all Federal employment and accounts for almost all Federal white-collar employees. Less than ten percent of these employees are union members. Most of them belong to the AFGE, chartered by the AFL in 1933 and affiliated with the AFL-CIO, and to a large number of independent unions. Thus the history of union organization in the Federal Government parallels that of private industry. The President's Task Force on Employee-Management Relations in the Federal Service noted that "the more similar a government activity is to that of a private activity in which workers are normally organized, the more often it will be found that the government workers are also organized and the relations with management officials approach the pattern of such relations in private industry."[5]

At the state and local level the oldest and strongest national union is the International Association of Fire Fighters affiliated with the AFL-CIO. This union, which had its origins in the local firemen's benefit societies

and social clubs of the late 1800s, claimed 115,000 members in 1964, 90 percent of all eligible employees. More recent arrivals on the scene are the State, County and Municipal Workers and the Teachers Union, mentioned earlier. Other national unions active at the local level include the Teamsters, Building Service Employees, Transport Workers and various building trades.

Important as the gains in union membership have been at all levels of public employment, the predominant form of organization among public employees is still the independent association. By far the largest and most important organization is the National Education Association with about one million national members and a total membership in excess of 1.5 million including state associations. Some 90 percent of the nation's teachers are estimated to be enrolled in the national organization or its state and local affiliates. In many states, associations of civil service employees represent the prevalent form of membership. In California, more than half of all state and local employees belong to some 260 independent associations. In New York, the Governor's Committee on Public Employee Relations reported that there were 650 association-type local employee organizations-- more than twice the number of union locals in the state. In Michigan, the Michigan State Employees Association claims 15,000 members and is the principal rival of the AFSCME in organizing state civil service employees. This picture is duplicated in many other states.

At the Federal level, Executive Order 10988 issued in January 1962 has resulted in a proliferation of organizations representing employees in various agencies. In addition to the 29 affiliates of the AFL-CIO Government Employees Council and IAM District 44 which left the Council in 1966, one finds such organizations as the following competing in representation

elections: the National Association of Government Employees (Independent), Organization of Professional Employees of the U. S. Department of Agriculture, Patent Office Society, National Association of Internal Revenue Employees, Federal Tobacco Inspectors Mutual Association, Air Traffic Controllers Association, Federal Plant Quarantine Inspectors Mutual Association, National Association of Federal Veterinarians, and many others.

The increased organization of Federal employees can be largely ascribed to E.O. 10988. But what accounts for the upsurge of organization at the state and local level?

To some extent unions and associations in the states and municipalities also benefited from E.O. 10988. President Kennedy's espousal of collective bargaining for Federal employees encouraged some states to follow suit and provided an impetus to employee organizations at the state and local level. Several states passed laws providing for recognition of and negotiations with employee organizations. A number of other jurisdictions provided for union recognition through resolutions, ordinances, civil service rules, charter amendments, executive orders, and departmental codes.

These official actions were important. But there were other factors. Labor unions devoted more energy and resources to the task of organizing government employees. They became more militant, they organized demonstrations, picketed, talked tough to public officials and on occasion called strikes to back up their demands, even though they knew such action was prohibited. A few dramatic breakthrough agreements, such as the 1961 contract covering 44,000 New York City teachers, helped union organization in other cities and states. Associations of teachers nurses, and civil

service employees reacted to the union challenge by acting more like unions themselves, while at the same time insisting on their basic professional orientation.

The U. S. Supreme Court's reapportionment decisions in 1962 and 1964 helped the tide along. Reconstituted legislatures, more representative of urban centers, were more friendly to labor and sympathetic to collective bargaining for public employees. Michigan provides a dramatic example of the effect of reapportionment. The first legislature in 20 years controlled by Democrats, drawn heavily from the populated urban areas of the state, passed the Public Employee Relations Act of 1965, amending the punitive Hutchison Act which had provided for automatic discharge of any government employee engaging in a strike but made no provision for recognition of public employee organizations and collective bargaining. The amended Act continued to prohibit strikes but also included provisions governing certification of employee representatives, unfair labor practices, mediation of disputes and fact-finding. In Delaware, a reapportioned legislature also passed a new labor relations law for public employees. Since the impact of reapportionment on state legislatures has only begun, we may find other states changing their laws on organization and bargaining for public employees as the composition of their membership changes.

The relatively unfavorable earnings and fringe benefits of government employees in many states as compared with private industry provide a fertile field for cultivation by unions. Tighter labor markets and rising prices have already boosted negotiated settlements in private industry, possibly widening the gap between employees in industry and government. In addition, personnel management in the public service has not kept pace with the

Professionalization and advances made in private industry since the 1930s, under the impetus of the Wagner and Taft-Hartley Acts and the pressures exerted by unions. These factors, taken together, have improved the environment for the growth of unions and other employee organizations in public employment.

Experience Under Executive Order 10988

As of June 1965 there were some 2,473,000 Federal government employees distributed as follows among three basic categories: 1,260,000 classified employees, 621,000 wage board employees and 592,000 postal employees.[6] Salaries of the classified and postal employees are established by Congressional action. Wage board employees consist largely of blue-collar workers whose wage scales are determined by periodic surveys of prevailing wage rates for similar occupations in the labor market area in which they are employed.

Several months after his inauguration President Kennedy kept his campaign pledge to promote collective bargaining in the Federal service. In June 1961 he appointed a Task Force, chaired by Secretary of Labor Goldberg and made up of high administration officials, to review and advise him on employee-management relations in the Federal Service. Prior to this time the only existing legislation governing relations between Federal employees and agencies was the Lloyd-LaFollette Act of 1912 which provided protection for the right of postal employees to join unions and petition Congress. It was, in effect, Congress's response to the "gag order" first imposed by President Theodore Roosevelt in 1902 and made more restrictive by President Taft in 1909. The order prohibited any Federal employee or official from responding to any request for information from

any committee or member of Congress "except through and as authorised by the head of his department."[7]

The Task Force report noted that although 33 percent of all Federal employees belonged to national employee organizations, membership varied greatly among agencies, from the Post Office in which 84 percent of employees belonged to unions to the Department of State where "a careful search uncovered a total of 11 members."[8] There existed within the Executive Branch no policy on employee-management relations. The result was wide variation among agencies in their dealings with employee organizations. Of 57 departments and agencies studied by the Task Force, 22 had no stated labor relations policies; 11 had the "barest minimum of policy" giving employees the right to join or not to join employee organizations; 21 engaged in discussion with employee organizations on limited local problems. Only the Tennessee Valley Authority and the Interior Department had extensive relations with unions and other employee organizations including mediation and arbitration, and written agreements on pay scales, classifications, hours of work, grievances and fringe benefits.

The Task Force report, submitted in November 1961, served as the basis for Executive Order 10988 which was signed by President Kennedy on January 17, 1962. The Order gave all Federal employees the right to join or not to join organizations of their own choosing, and granted exclusive recognition and the right to enter into agreement with an agency to any organization which represents a majority of the employees in an appropriate unit. In order to attain exclusive recognition, an organization must receive a majority of all votes cast in an election participated in by at least 60 percent of the employees eligible to vote and present

at the installation on election day. The latter requirement goes beyond the Taft-Hartley Act, which requires a simple majority of those voting.

A new feature was introduced by the provision of two lower levels of recognition: formal recognition for organizations with at least 10 percent of the employees in a unit where no other organization has been granted exclusive recognition; and informal recognition for any organization with less than 10 percent membership. Formal recognition carries with it the right to be consulted in the formulation and implementation of personnel policies and practices and on matters affecting working condition. Informal recognition gives an organization the right to be heard on matters of interest to its members.

The Order provided that a dispute over the scope of an appropriate unit be resolved by the Secretary of Labor, who could resort to advisory arbitration. As of April 1966, 43 advisory arbitration decisions had been rendered and all had been accepted by the agency and organization involved.[9]

A Code of Fair Labor Practices, promulgated by the President in May 1963, is roughly equivalent to the unfair labor practices contained in the Taft-Hartley Act, with two important additions: strikes and picketing are prohibited and employee organizations may not discriminate against any employee with regard to terms and conditions of membership because of race, colow, creed or national origin.

During its first four years of operation the program showed the following results:[10]

1. About one-third (835,000) of all civilian employees were represented in 800 exclusive bargaining units.

However, deducting postal employees, this figure decreases to 16 percent or 320,000 employees. For a more meaningful picture we must look at each of the three main types of employment: about 87 percent of all postal employees were in exclusive units and worked under collective bargaining agreements; one-third of all wage-board employees were in exclusive units but only about one-fourth (170,000 out of 621,000) worked under agreements; only 7 percent of all classified employees were in exclusive units and only 4 percent (52,000 out of 1,260,000) were covered by agreements.[10a] Of the three groups, only wage-board employees have shown a significant increase in exclusive unit coverage since 1963 -- from 16 percent to 33 percent of the total.

2. Nine out of ten employees in exclusive units worked in the Post Office Department.

3. AFL-CIO unions represented 87 percent of all employees in exclusive units and 80 percent of employees outside of the post office. Ninety percent of the employees in the AFL-CIO are represented by a postal union, the AFGE, or a Metal Trades Council. In units belonging to independent associations, 90 percent of the employees are represented by an independent postal union, the National Association of Internal Revenue Employees (NAIRE) or the National Association of Government Employees (NAGE).

4. More than half of the 429 agreements negotiated have been in the Defense Department and about 85 percent are with AFL-CIO unions. Outside of the Post Office and the Defense Departments, only a little more than one-half of the employees in exclusive units work under negotiated agreements, most of them with AFL-CIO unions.

5. In 1965, 262 additional exclusive units covering almost 118,000 employees were recognized, and 217 additional agreements covering 158,000 employees were negotiated.

Bargainable issues were severely circumscribed by Section 7 of Executive Order 10988 which enumerated "certain matters" reserved for management decision. These include the right to direct employees, to hire, promote, transfer; to assign employees and to suspend, demote, discharge or discipline employees; to relieve employees from duties because of lack of work or for other legitimate reasons; and to determine the methods, means and personnel by which operations are to be conducted. Section 6(b) of the Order further notes that the obligation to negotiate "shall not be construed to extend to such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work." These restrictions are in addition to such important conditions of employment as salaries of classified employees, pensions, insurance and other fringe benefits, which are established by Congress.

The strong "management rights" clause which is included in every

agreement goes beyond what is usually found in agreements in private industry. The kind of subjects included in agreements negotiated between Federal agencies and employee organizations is illustrated by a 1964 BLS report which listed 44 types of provisions found in such contracts including: hours of work and overtime, holiday pay, rest periods, working and/or cleanup provisions, special clothing, work by supervisors, subcontracting, safety, leave ppolicies, jury duty, craft jurisdiction, wage surveys, promotions and demotions, reductions in force, job descriptions and ratings, apprenticeship and training, check-off of dues, mediation and advisory arbitration of grievances.[11]

Despite the acknowledged success of the Executive Order in promoting union membership and collective bargaining, employee organizations would like to see some changes made in the Order and more particularly in its administration by individual agencies. Their complaints focus on the following issues:[12]

1. Bilateral collective bargaining versus unilateral regulations: Except for the agency-wide agreements in the Post Office and the Railroad Retirement Board, all agreements are negotiated at the local level and must be approved by the agency head. But personnel managers at the agency level have been too restrictive in delegating authority to local managers to permit meaningful negotiations. Too often they issue rules and regulations on matters that should be subject to negotiation.

2. The grievance procedure: There are too many exclusions from the grievance procedure in most agreements, and agencies

have rarely been willing to agree to advisory arbitration in adverse action proceedings. These include position and classification cases, disciplinary cases, and disputes as to the interpretation and application of the agreement if not based on an individual grievance. There have been instances in which management has refused to comply with an advisory arbitration award. This has lead to demands that arbitration be made final and binding.

3. The scope of collective bargaining: Despite necessary limitations on matters subject to negotiations, there is far more room for bargaining than most agencies permit. Wage and salary determination is a good example. While Civil Service determines the content and coverage for grades, an agency can permit union participation in developing policies for determining grades and steps for its employees. But only a few agencies follow this practice. Furthermore, for wage board employees, and under the comparability principle of the Federal Salary Reform Act of 1962, there should be bilateral procedures for selecting comparable firms, key jobs and geographical areas to be surveyed for determining rates of pay.

4. Collective bargaining impasses: Only 10 percent of all agreements provide for outside mediation and 25 percent for fact-finding and referral to higher authority in the agency when an impasse occurs in collective bargaining. Without the strike weapon, these procedures take on added

importance to a union which is already bargaining from a very weak position.

5. Unfair practice charges: Hearing officers, selected from employees of the agency involved, merely rubberstamp the action of supervisors and management officials. A few agencies have offered to use outside arbitrators as hearing officers and the Labor Department has encouraged this practice. Some unions favor turning over administration of the Order to an impartial agency or board similar to the NLRB. Others would like to see the Department of Labor given more responsibility and the Civil Service Commission less in administering the Executive Order.

Agencies too have had complaints, particularly over the amount of time consumed in collective bargaining and handling of grievances. Their major problem however has involved the training of thousands of management officials to carry out their responsibilities under the order. Unions have also faced this problem with respect to training of representatives and stewards. Both have embarked on extensive training programs, making use of universities which have labor and management education programs.

Experience in the States[13]

Legislation governing organization and collective bargaining in public employment ranges from several states with comprehensive laws, to some with laws for particular groups of employees, such as police and firemen, transit workers and teachers. Most states, however, have no labor relations statues dealing specifically with public employees. There have also been

numerous court decisions and opinions by state attorneys general relating to labor-management relations in the public service.

Our definition of a "comprehensive" law is one which applies to a substantial proportion of all public employees and not only contains provisions regarding the right to organize and bargain collectively, but also establishes machinery for determining bargaining representatives, dealing with unfair labor practice charges where they are included in the law, and mediating disputes. The laws in at least six states -- Connecticut, Delaware, Massachusetts, Michigan, Minnesota and Wisconsin -- met these criteria as of June 1966, all but Wisconsin's having been passed or substantially revised within the last two years. Oregon's law gives all public employees the right to organize and bargain collectively, but only classified state employees have a procedure established by the Civil Service Commission for certification of representatives. In addition, California, Connecticut, Oregon, Rhode Island and Washington have separate statutes regulating teacher-school board relations which are administered by state education agencies.[14]

Even the comprehensive state laws do not apply to all public employees and employers: The Connecticut law covers only municipal employees but specifically excludes certified teachers who are dealt with in another law; Delaware includes state and county employees, but a municipality is covered only upon affirmative legislative action by its common council or other governing body and teachers are specifically excluded from coverage; the Massachusetts law does not apply to policemen; state civil service employees are excluded from coverage in Michigan by the 1963 Constitution; the Minnesota law does not apply to teachers; the Wisconsin statute does not apply to employees of the state government who are covered by a separate

law which becomes effective January 1, 1967.

The right of public employees to organize is recognized in almost all states. Ironically, right-to-work laws have been the vehicle for protecting this right in a few states. In Arkansas, a statute prohibiting police officers from belonging to a union was invalidated under the state's right-to-work law which gives employees the right to join or refuse to join unions; and, in Texas, the courts have overturned city ordinances banning union membership by public employees as violations of the right-to-work amendment to the state constitution. In North Carolina, public employees are prohibited from belonging to any labor organization which is affiliated with any national or international union.[15]

The right of employees and the duty of public employers to bargain collectively is less widely recognized. In addition to the states mentioned above, a number of others, including Alaska, California, Idaho, Louisiana, Maine, Maryland, New Hampshire, Oregon and Wyoming, have authorized collective bargaining for public employees generally or for specific groups such as transit workers or fire fighters. Some states, however, have expressly prohibited collective bargaining by public employees or declared any agreements reached to be unenforceable. Included in this group are: Alabama, Colorado, Indiana, Iowa, Kansas, Kentucky, North Carolina, Texas and Virginia. A few states, including New York, permit employees to organize and bargain collectively but do not impose a correlative duty upon employers to bargain.

On one issue, all states, the courts, and opinions of attorneys-general are in agreement: public employees are prohibited from stroking. It is interesting to note that five of the six states with comprehensive

laws, although expressly prohibiting strikes by public employees do not spell out penalties for striking employees. Only Minnesota specifies such penalties, including termination of employment, and if reappointed, employees may not be paid more than before the strike, must wait at least one year for any increase in compensation, serve a two-year probation period and lose tenure rights. These penalties are similar to those contained in the Conlin-Wadlin law of New York State and in other states which detail penalties for strikers.

Laws recognizing the right to organize and bargain collectively are of limited value unless machinery is set up to implement and administer them. The Michigan Act, which is fairly typical, gives the Labor Mediation Board authority to determine the unit appropriate for collective bargaining, and to hold elections and certify and decertify exclusive bargaining representatives. The Act lists "unlawful" employer practices which parallel the unfair labor practices in Section 8(a) of the National Labor Relations Act: interfering, restraining or coercing employees in the exercise of their rights; dominating or interfering with any labor organization; discriminating against employees in order to encourage or discourage membership in a labor organization; discriminating against employees for giving testimony or instituting proceedings under the Act; refusing to bargain collectively. The Michigan law differs from Laws in Wisconsin, Massachusetts and Connecticut in that it does not specify "unlawful" acts on the part of labor organizations. The Chairman of the Labor Mediation Board has stated that the legislature considered a listing of unfair practices for employees unnecessary on the theory that a public employer may discipline or discharge a striking public employee.[16]

The Michigan statute requires that the Board's mediation and labor relations functions be administered separately. The Board also has authority to conduct fact-finding when there is an impasse in collective bargaining. Either the employer or the employee representative may petition to have a Hearing Officer, usually a member of the Board's staff, assigned by the Board, who will hear testimony and submit his report and recommendations to the Board and the parties. The Board then reviews the entire record, including any comments from the parties, and issues its report which may "affirm, modify or reverse" the Hearing Officer's report. This final report is made public but is not binding on the parties. Other states with fact-finding procedures, including Connecticut, Massachusetts, Minnesota and Wisconsin, usually appoint outsiders rather than staff members and publish the fact-finders' report without modification. A few states permit the fact-finder(s) to try to mediate the dispute before issuing a report.

In Michigan and in most other states, arbitration is provided only upon request of the parties. A few states, however, provide for compulsory arbitration of disputes affecting specific groups of employees: Rhode Island for firemen and policemen; Wyoming for fire fighters; Nebraska for disputes involving "government service in a proprietary capacity or service of a public utility"; Maine requires all agreements involving fire fighters to contain a no-strike provision and an alternative method of settling disputes by arbitration.

Of the six states with comprehensive laws, only Delaware does not provide for fact-finding. Wisconsin has had the most experience with fact-finding in public employee disputes, although a number of other states

have utilized this procedure for emergency disputes in private industry. During the first four years of experience under Wisconsin's law, 108 petitions for fact-finding were filed. Fact-finders were appointed in 38 of these cases; 49 were resolved by mediation prior to appointment of a fact-finder; 10 were withdrawn or consolidated with other cases; and 11 cases were pending as of June 30, 1966.[17] Professor James Stern has analyzed the first three years of experience with fact-finding in Wisconsin and concluded that "the law has made a substantial contribution to the improvement of collective bargaining among public employees ..."[18] Over 70 percent of the fact-finding awards have served as the basis for settlement of disputes. Stern specifically noted that the Wisconsin Act has served to avoid the strife experienced in some other states in disputes involving teachers.

No discussion of state laws regulating labor relations in the public sector would be complete without reference to the 1966 experience in New York State which illustrates some of the political obstacles to legislating in this area.

New York City had the first thorough-going code of labor relations for municipal employees anywhere in the country.[19] The program grew out of an Executive Order of 1958, issued by Mayor Wagner, providing for exclusive recognition on the basis of majority rule, procedures for unit determination and certification, and machinery for resolving bargaining impasses. But at the state level there was no statute governing labor relations in public employment, except for the punitive and ineffective Conlin-Wadlin law. The New York City transit strike of January 1966 put added pressure behind efforts to replace this law with a more realistic

and comprehensive statute.

Governor Rockefeller appointed a Committee on Public Employee Relations consisting of five public members and chaired by Professor George Taylor "to make legislative proposals for protecting the public against the disruption of vital public services by illegal strokes, while at the same time protecting the rights of public employees."[20] In New York City, a tripartite panel, originally set up under Mayor Wagner to review the experience under the 1958 Order and to develop "improved collective bargaining procedures", was continued by Mayor Lindsay.[21] Both groups submitted their reports on March 31, 1966.

The Governor's Committee make the following major recommendations:

1. The Conlin-Wadlin Law should be repealed and replaced by a statute which would grant public employees the right to organization and representation; empower the State, local governments and other political subdivisions to recognize, negotiate with, and enter into written agreements with employee organization; and create a Public Employment Relations Board (PERB) to assist in resolving disputes with respect to the representative status of employee organizations in State departments and in local governments.

2. To resolve disputes which reach an impasse in the course of collective negotiations, all written agreements should include procedures, developed by the parties, to invoke in the event of such an impasse in advance of budget submission. Should the impasse persist, the PERB is empowered to mediate the dispute, and if no settlement is reached, to appoint a fact-finding board of public members with power to make public recommendations.

If the fact-finders' recommendations are rejected by either party, the appropriate State or local legislative body should hold a "form of 'show cause hearing'" at which the parties would review their positions prior to final legislative action.

3. Strikes or threats of strikes by public employees should be subject to court injunction. Any organization violating the injunction could be fined in an amount left to the discretion of the court. Individual employees participating in strikes would be subject to reprimand, fine, demotion, suspension, or dismissal, depending on the extent of their misconduct.

The report of the tripartite New York City panel was directed at the specific problems of the largest and most complex city in the nation, in which unions had achieved a much higher degree of economic and political power than elsewhere in the state and where public officials had had considerable experience in collective bargaining. This report was not proposed as an alternative to the report of the Governor's Committee. Nevertheless, coming at the same time as the State report and diverging from that report's recommendations in some important respects, it was inevitable that the differences between the two would be highlighted and become important in the political maneuvering in the State legislature.

The New York City report was in the form of a memorandum signed by the Deputy Mayor and Corporation Counsel for the City and by nine leaders of employee organizations, and endorsed by the four public members. It provided:

1. A declaration of policy that the City will engage in collective bargaining and enter into written agreements with employee organizations holding certification to represent employees in designated

bargaining units.

2. A detailed exposition of the subjects coming within the scope of collective bargaining and those excluded, a management rights clause, and procedures to be followed in negotiations and implementation of agreements under various circumstances.

3. Establishment of an Office of Collective Bargaining (OCB) to be administered by a tripartite board, including a full-time impartial Chairman. The OCB was empowered to make certain that each party complies with its obligations; to oversee adherence to collective bargaining procedures; to administer procedures for resolving deadlocks; to determine bargaining units, and certify and decertify bargaining agents; and to recommend changes and improvements.

4. The Chairman of the OCB was given authority to appoint mediators and, if authorized by a majority of the Board, a disputes panel with power to mediate, hold hearings, subpoena witnesses and records, and formulate recommendations to be released to the parties and the public.

5. Unilateral changes by the City in wages, hours, or working conditions, and strikes, slowdowns, work stoppages or mass absenteeism by employees, were prohibited during negotiations and for 30 days after a Disputes Panel filed its report.

6. All agreements would contain no-strike clauses for the term of the contract and provisions for grievance procedures terminating with final and binding arbitration, to the extent permitted by law.

The four public members of the panel, in a statement accompanying the memorandum, said: "Our professional judgment and national experience, generally, with fact-finding procedures convince us that these agreed-upon procedures will result in the peaceful settlement of disputes and make strikes unnecessary." But, they added, "strikes continue to be barred by existing state laws. We are aware that changes in these laws are under consideration. The problem of strikes of public employees is a matter for legislative policy. We have sought by agreement to develop procedures designed to make strikes unnecessary and have left to other forums the problem of dealing with other contingencies." Subsequently, the public members indicated that they were evenly divided on the question of prohibiting strikes in public employment.[21]

The major differences between the recommendations of the Governor's and the Mayor's Committees were: the use of an appointed all-public board as opposed to the tripartite Office of Collective Bargaining to administer the collective bargaining procedures; the final resort in the State report, to the legislature or other appropriate governmental body if either party rejects a fact-finding report; and the prohibition of strikes and prescription of penalties on unions and employee violators in the State report. The inability of the Republican-controlled Senate and the Democratic-controlled Assembly to agree on the handling of strikes led to the failure of any law to be enacted in the 1966 session of the Legislature. New York City is expected to put the tripartite panel's recommendations into effect by Executive Order or by a local ordinance. This action had not yet been taken as of the end of July 1966.

Comparison of Public and Private Employment

The foregoing analysis of state legislation in the public employment field indicates that the developing trend follows existing laws governing labor-management relations in private industry, except for the prohibition of strikes and the provision of alternative settlement procedures. Most unions favor this approach because they see little difference between employment in the private and public sectors. They focus upon the individual employee, his economic needs, his job and his fundamental rights as a citizen in a democratic society. Since public employees do not differ from those in private industry in terms of their economic requirements and desire to have a voice in determining their conditions of employment; since almost every job in public employment has its counterpart in private industry; and since management behaves the same was vis-a vis employees, union leaders see no reason why we should have different laws, procedures and institutions governing labor-management relations in the public and private sectors of the economy. They sum it up by calling for "first class citizenship" for public employees. The more militant unions, such as the State, County and Municipal Employees and the Teachers assert the right to strike and not infrequently practice it.

Some students of industrial relations have questioned the desirability of transferring, with little or no modification, the legal framework, concepts and institutions which have become well established in private industry to the public sector.[22] They prefer an approach which would take account of the important differences between public and private employment, both with regard to the unique characteristics of the state as employer and the indigenous development of organizations representing public employees.

The proponents of this view believe that public employees are entitled to the same basic rights as private industry employees: the right to organize, to be represented by organizations of their choice, and to engage in collective bargaining (or collective negotiations as some prefer to call it) with agreements reduced to writing. But, they point out, there are certain constraints operating in the public sector which make the complete transfer of private industry laws, practices and institutions either illegal, inappropriate or undesirable in the public sector. Among these they include the following:

1. Many of the terms and conditions of employment are mandated by legislative bodies or prescribed by civil service regulations. This acts as an important limitation on the scope of negotiations.

2. There is diffusion of decision-making authority to a much greater extent than in private industry. Private employer representatives have broad discretion to negotiate and commit the organization on almost all matters. The negotiators and top management constitute a closely knit "team." This is not true in the public sector. An agency head may have authority to negotiate on some issues but not on others which are state- or city-wide. Even the chief executive does not have the final say on the distribution of funds and can only submit recommendations to the legislative body, which has responsibility for the overall budget and levying of taxes to balance income and expenditures. And if the negotiated items include matters mandated by state law or civil service

provisions, there is still an additional layer of decision-makers to go through. This has important implications for determining the appropriate unit and the appropriate scope of negotiations within a given unit of government.

3. The legal framework, procedures and institutions in private industry were developed as a response to certain characteristics, economic and social factors and historical events. To mention only a few: the strong antagonism and use of force by a large segment of private industry to prevent employees from organizing; the helplessness of the individual employee in the face of market forces and the complete and unilateral authority of the employer to hire and fire, set wages, hours and other conditions of employment; the existence of a labor movement dominated by one federation (except for the period 1935-1955) with a strong tradition of exclusive jurisdiction.

To the extent that these factors exist in the public sector and some of them are present though not to the same degree as was true in private industry before the Wagner act - transference of private industry laws and procedures may be appropriate. But we should be wary of transplating the complete system of private industrial relations into the unnatural and unreceptive environment of public employer-employee relations.

4. Cognizance must be taken of the two types of employee organizations existing in the public sector: the "association-type" and "union-type" of organizations. The former includes

not only professional associations of teachers and school administrators, nurses and other employees, but also such unions as the fire fighters and the postal employees. Associations tend to prefer broader groupings of employees rather than the narrower bargaining units favored by unions, whose limits have been set with a view to winning elections. They normally include supervisors, while unions are limited to employees below the supervisory level. The association-type organizations have been less interested (at least until recently) in formal recognition, exclusive representation and written agreements than have unions, and have rejected the strike in favor of political pressure and lobbying for favorable laws and local ordinances.

It is too early to say which of these types is the "wave of the future" in the public sector. It is more likely that they will continue to co-exist and compete with one another. Indeed, one cannot rule out the possibility of merger, amalgamation or some form of loose affiliation among the two types of organization in some fields. But the issue should not be foreclosed by legislation or adoption of arrangements which pre-ordain the outcome by favoring one or the other type of organization. A period of competition and experimentation might have salutary results if carried on within certain ground rules, and if not permitted to hold back legislation and the development of constructive employer-employee relations in public employment.

5. Finally, the strike is unlawful in public employment and should be excluded from any system of industrial relations in the public service. (This will be discussed in the next section)

In addition to these constraints, there are doubts whether certain long-standing arrangements in private industry are suitable for dealing with the wide range of complex problems and issues facing employers and unions today. For example, Professor John Dunlop questions whether the concept of exclusive representation is as well suited to dealing with pensions and health and welfare benefits, which might better be negotiated on an industry basis, as it is for handling grievances and work rules which are best determined at the plant or enterprise level. Perhaps it would be better to have different units to deal with different issues. This is only one of a number of practices in private industry which might be re-examined. It happens to have particular relevance for public employment because of the many levels of decision-making found in government. Those engaged in labor relations in government have found that the "appropriate unit" problem is one of the most difficult to resolve.

The argument between the approaches outlined above has two facets. On the one hand, there is the question whether the differences between private and public employment are so great as to warrant significant modifications in the laws, procedures and institutions which have become engrained in American labor-management relations over the past thirty years. This question lends itself to research, discussion and negotiation, as well as to experimentation at the state and local level. Another question is the extent to which practices which have worked imperfectly

in the private sector can be improved upon in public employment, and whether such improvements might serve as the basis for changes in the industrial relations system in private industry.

The idea that the states should serve as laboratories for social experimentation is one of the alleged advantages of the federal system of government. In the labor-management relations field the process has been the other way around, with the states patterning their laws on the Federal government. This has been true even in public employment where Executive Order 10988 helped to stimulate action at the state level. We doubt that Congress will follow the lead of the states in labor legislation. But this should not deter the states from rejecting those practices which have been found wanting in our Federal law and fashioning improvements to meet the peculiar problems of public employer-employee relations at the state and local level.

The Strike Issue

In private industry the strike is the ultimate weapon of employees in collective bargaining. In some cases - disputes affecting the national health and safety under the Taft-Hartley Act and those subject to the Railway Labor Act - strikes may be delayed for several months. But eventually, the union is free to use economic power, subject only to action by Congress.

Not so in the public sector. The strike is prohibited by Federal law, by a number of state statutes and court decisions. Presidents, Governors, Mayors and public officials -- liberal and conservative alike -- have generally supported the view that strikes by government employees cannot be tolerated. Calvin Coolidge, Governor of Massachusetts during

the Boston police strike of 1919, said, "there is no right to strike against the public safety by anybody, anywhere, at any time." Franklin D. Roosevelt, while recognizing the right of government employees to organize, wrote, in a letter to the President of the National Federation of Federal Employees in 1937, ". . . A strike of public employees manifests nothing less than an attempt . . . to prevent or obstruct the operations of government until their demands are satisfied. Such actions looking toward the paralysis of government by those who have sworn to support it is (sic) unthinkable and intolerable."[23] Similar statements have been made by other public officials.

But, strikes of government employees have occurred. David Ziskind decumented such strikes in his book One Thousand Strikes of Government Employees published in 1940. BLS statistics indicate that there were at least 883 strikes of public employees during the period 1942-1965.[24] Strikes in government occurred most frequently during the period 1942-1953. There followed a relatively quiescent period until 1964 when there were 41 public employee strikes followed by 42 in 1965 and at least 30 during the first six months of 1966.[25] However, even the increased strike activity of the last few years among public employees does not exceed that of the post-World War II and Korean War years. Strikes in government have been concentrated at the local level, occurring only occasionally at the state level, and very rarely in the Federal government. These stoppages are typically of short duration, rarely lasting more than a few days. However, the average duration of public employee strikes increased in 1965 and, so far in 1966, there have been several fairly long strikes.

There has been a long-term decline in the use of the strike in the

United States and in other industrialized countries.[26] In recent years, unions in the United States have found the strike increasingly costly and decreasingly effective as a method of resolving disputes. In public employment, on the other hand, unions and even associations, which in principle reject the strike weapon, have found that it often brings quick and rewarding results. Furthermore, they have learned that the risks are not great, despite the severe penalties which may be legally imposed on strikers. This, coupled with the belief that some public employers are unwilling to engage in genuine collective bargaining except under the threat or actuality of a strike, and the absence of alternative methods of resolving disputes, has undoubtedly contributed to the growing incidence of government strikes in recent years and will continue to do so as long as the situation remains unchanged.

Too often the strike in public employment has been treated as an unmitigated evil to be exorcised rather than the symptom of a malady which needs treatment. At the other extreme, some unions have utilized the strike as if it were the first rather than the last resort in collective bargaining. Mediation and fact-finding are being used increasingly in public employment and the record based on limited experience is promising. But there still remains the thorny question of what to do when these procedures have been exhausted and the impasse has not been resolved. Should the strike be permitted? And if not, why not?

The "sovereignty doctrine" which holds that a strike of public employees, whatever their occupation or the nature of their activity, is an attack upon the state and a challenge to government authority will no longer suffice. Secretary of Labor Wirtz put it succinctly when he said: "This doctrine is wrong in theory; what's more, it won't work."[27]

He was referring to the broad use of the sovereignty doctrine to deny rights of collective bargaining to government employees. But, the New York Governor's Committee also rejected the "rights of sovereignty" as a justification for barring strikes of public employees, stating that "this is scarcely an apt term to apply to a system of representative democratic government . . . which is responsive to the electorate."[28] Other countries, including Canada which is presently (July 1966) considering a bill giving Federal civil servants the right to strike, apparently do not regard strikes by government employees as a threat to the sovereignty of the state.[29]

Few would dispute, and the courts have upheld, the right of governments to prohibit strikes of public employees. Presumably a legislative body can also permit strikes, either for all public employees or for certain groups of employees. The question is whether a blanket prohibition on public employee strikes is necessary, wise or desirable in the context of present day industrial relations.

Most supporters of the view that public employee strikes should continue to be prohibited do so on one or both of the following grounds: the essentiality of many government services to the health, safety and welfare of the community and the belief that the strike is an economic weapon which is inappropriate in public employment.

The "essential services" argument is indisputable with respect to policemen, firemen and prison guards. Although isolated strikes among such employees have occurred, few would defend them and the organizations with which they are affiliated do not assert the right to strike. But one quickly runs into differences of opinion in trying to decide what

other services are "essential" to a community.

School teachers? Professor Myron Lieberman points out that "schools are closed for summer, Christmas, Easter and Thanksgiving vacations, for football games, basketball tournaments, harvesting, teachers' conventions, inclement weather, presidential visits, and for a host of other reasons without anyone getting excited over the harm done to the children."[30] Why not for strikes to protest teacher grievances or to achieve legitimate demands in collective bargaining? But how many parents would agree with Mr. Lieberman?

Transit employees? Few people would question Norman Thomas's dedication to the cause of the working man. But after the New York transit strike of January 1966 Mr. Thomas said: " . . . there are services whose continuous operation is so important to society that strikes should not be thinkable. . . . Transit in a city like New York should be so recognized." But would the transit workers agree?[31]

Similar differences of opinion would be found to exist with regard to garbage collection, water works, public utilities, hospitals and other government services. This led the New York Governor's Committee to conclude that "a differentiation between essential and non-essential governmental services would be a subject of such intense and never-ending controversy as to be administratively impossible."[32]

Perhaps the Committee was right. Still, one of the most frequent and effective arguments against a blanket prohibition on public employee strikes is that people doing the same work in private industry are free to strike. Besides, there are innumerable government services which can by no stretch of the imagination be considered so essential that they cannot be interrupted even for short periods: state-owned liquor stores, city botanical gardens, recreation centers, government cafeterias, automobile

license bureaus; the list is almost endless. The best way to put this argument to rest would be for a few states to prohibit strikes in certain specified "essential" services but not in others. Given the increasing trend towad state regulation of public employer-employee relations, we may yet have an opportunity to see how such a law would work. Of course, public employees engaged in non-essential services also have less bargaining and political power than those in essential pursuits. Given a choice between being treated like private employees in all respects, including the right to strike, and being barred from striking but with access to mediation and fact-finding procedures, most of them would probably prefer the latter alternative.

The second, and in our view the more fundamental, argument against lifting the prohibition on the strike in public employment holds that the work stoppage does not serve the same purpose in public employment that it does in private industry. It is argued that in private industry employers have countervailing rights to the strike: they may lock out their employees, try to break the strike by operating with other employees, suspend operations for months without regard to the effect on those not directly involved in the dispute; they may even choose to go out of business entirely. The threat or actual use of these economic weapons is supposed to perform a useful function by exerting reciprocal pressures upon the parties to modify their positions to the extent necessary to bring about an agreement. Throughout the dispute both parties are subject to market pressures where the consumer's power of choice is exercised (except for certain monopoly industries e.g. telephones). Jobs can and have been lost and markets seriously depleted by long strikes or settlements leading to non-competitive price increases.[33]

These considerations are not normally present in government. The countervailing right of the lockout or the possibility of going out of business do not exist. Extended suspension of operations depriving the community of needed or even desired non-essential services is not politically feasible, even when possible from an economic viewpoint. While a government can try to break a strike and may even call upon the National Guard or the Army to perform essential services during an emergency, this is hardly a permanent solution; nor does it lend itself, even on a temporary basis, to such government services as education and hospital care. Besides, such action would be political suicide in most cities.

The economic and market pressures which operate in private industry do not usually exist in the public sector. Competitors will not teach a community's children or provide checks and case work services to welfare clients; consumers will not find ready substitutes or learn to do without garbage collection or health services; too high a settlement will not price most government services out of the market, though it may affect the number of passengers on public transport in some cities.

This does not mean that there are no constraints upon the public official when he engages in negotiations with a union; nor even that he is not as influenced as his private counterpart by the cost of settlement. The difference is that the threat is political rather than economic: the public official may not be concerned over market competition and substitute products; instead, he worries over "continuance in office, political survival and future political aspirations."[34]

In this context some groups stand to gain much more than others by resorting to the strike weapon. A recent instructive example is the New York City transit strike and the resulting settlement and exemption from

prosecution under state law for transit employees, as compared with the experience of the welfare department employees in the same city. The basic question is whether the strike, which in the United States has been viewed primarily as an economic weapon, is equally appropriate when used as a political weapon.

Finally, there is a feeling on the part of some students in the industrial relations field that the strike should not be sanctioned in public employment at a time when its use is being questioned in private industry. Public opinion has become less tolerant of work stoppages, and demands for Presidential and Congressional action to force settlements of strikes which significantly affect the economy or result in great inconvenience to large numbers of people are heard with increasing frequency. The public is particularly intolerant of strikes which deprive them of government services. To sanction the strike in public employment at this time, these people argue, would take attention away from the constructive alternatives of mediation and fact-finding and focus it on the strategy and techniques of conducting or countering work stoppages.

One of the most persuasive arguments in support of permitting the strike in government is that it is the only way to get some public officials to take collective bargaining seriously. Union representatives cite case after case in which a government employer contended he could not bargain over certain issues but changed his attitude quickly when a strike was threatened or actually started. Then, insurmountable obstacles to negotiation seemed to fade away and an agreement was reached in short order. There is no question but that some public officials have used the strike prohibition to evade their responsibility to negotiate in good faith,

even in states with laws providing for collective bargaining in government employment. Union representatives have also sometimes resorted to a strike vote, strike threat, or actual stoppage before exhausting the grievance procedure or making use of mediation. Both sides are often inexperienced in collective bargaining and ignorant of the law or the most elementary knowledge of industrial relations.

Management and labor must take their responsibilities more seriously if collective bargaining in the public sector is to make progress. Government and universities too have a responsibility to make collective bargaining work. They can make an important contribution by helping the parties improve their knowledge and skill in the industrial relations field. An example is provided by the Michigan Board of Education which contracted with the School of Labor and Industrial Relations of Michigan State University to conduct courses, workshops, institutes and conferences for teachers and other school employees, school administrators and school board members. In the long run, the answer lies in building effective organizations for collective bargaining in government and unions, developing expertise, improving the amount and quality of data and information for use in negotiations, and in broadening the areas of communications. This has happened in private industry during the last 30 years. It will have to happen in the public sector before there can be real collective bargaining.

A Look to the Future

During the next decade we can look for the extension of legislation governing public employer-employee relations to more states. While existing laws will serve to show the way, there should be more variation

then is found in state laws applicable to the private sector because of the absence of a definitive Federal statute similar to the National Labor-Management Relations Act. History will probably repeat itself in the lag of the Southern states, both with regard to legislation and the ability of unions to organize public employees. In August 1965, the AFSCME reported only 6 signed agreements in the South out of a total of 302.[35] However, the existence of professional associations with substantial membership in Southern states may speed up the development of employer-employee relations in certain areas of public employment. An extensive survey of school districts by the University of Chicago found that the National Education Association had local affiliates in close to 90 percent of the districts in Southern states, and that 121, or 13 percent, were carrying on negotiations with school superintendents or boards.[36]

Employee organizations can be expected to press for agreements which will more closely resemble those found in private industry. Among their objectives will be: broadening the scope of negotiable issues, union security in the form of the union shop, and final and binding arbitration of grievances.

As employee organizations become stronger they will become less willing to accept unilateral determination of matters which presently are considered sovereign prerogatives of the state. They will whittle away at these in much the same way as unions in private industry have narrowed the range of management prerogatives. A particularly sensitive issue is the virtual exclusion of employee organizations from having any say in wage determination for classified civil service employees in the Federal Government and in the states. In 1966, Federal employee wage and salary adjustments were held within the administration's 3.2 percent guidepost.

President Johnson, in signing the Federal Salary and Fringe Benefits Act, urged labor and management to follow the example set "in our own house."[37]

In hearings on the bill, some Congressmen reminded the administration that it had "perfect control" over wages of Federal employees but not over the rest of the economy. Senator Hartke of Indiana chided the administration for violating the comparability principle established in the 1962 Federal Salary Act, providing that salaries of Federal employees were to be related to pay for the same levels of work in private industry. He charged that because of the guidepost limitation "all bargaining power and rights to negotiation have already been taken away. Now it becomes an intriguing question as to just how long these various union and Government representatives will submit to this kind of treatment."[38] Union representatives testified against the bill but were unsuccessful in getting the administration of Congress to raise the ante.

It is reasonable to assume that legislatures and government officials probably have adhered more closely to the guideposts than have private employers whose wage rates are set in collective bargaining. If the labor market remains relatively tight and inflationary pressures continue to mount, public employee organizations may be expected to press more vigorously for inclusion of pay scales as a negotiable item.

Union security in the form of the union shop is generally held to be inconflict with the civil service concept and contrary to the principle of equality of opportunity for appointment and promotion in government service. However, it has been argued, that "if collective bargaining through an exclusive representative is recognized as advancing the public interest . . . then reasonable practices that will promote a fruitful and responsible bargaining relationship should also be acceptable."[39]

In actual practice there are many union shop provisions and lesser forms of union security in agreements involving governmental units, In 1965, the AFSCME reported that it had at least 51 union shop agreements, and an additional 56 with a modified union shop or maintenance of membership.[40] Other unions have also negotiated union shop provisions. The checkoff of union dues is much more common in both the Federal service and at the state and local level. Union shop provisions and lesser forms of union security, including the agency shop, will probably become more widespread. However, they will face a major obstacle in areas where there is strong competition between unions and employee associations.

The sovereignty doctrine holds that Government must possess the right of final determination in all relations with its employees. Final and binding arbitration would appear to be ruled out by this principle. There is a long line of court decisions holding that general arbitration clauses in public employment represent an unlawful delegation of authority. However, in 1951 the Connecticut Supreme Court ruled that "arbitration may be a permissible method as to specific, arbitrable disputes."[41]

Despite the questionable legal status of general arbitration in the public service, the AFSCME has reported at least 133 agreements negotiated in 23 states providing for final and binding arbitration.[42] In 1966, the New York City Mayor's tripartite panel recommended final and binding arbitration of grievances "to the extent permitted by law,"

It would appear that the sovereignty doctrine is far from impregnable in the area of grievance arbitration. Unions at the Federal level want to replace advisory arbitration with final and binding decisions which would not be subject to veto by the agency involved. Some public officials may actually welcome the use of neutrals to free them from the touchy job of deciding disputes between lower level supervisors and employees. We expect that in time the same pragmatic approach which resulted in grievance

arbitration becoming widespread in private industry (95 percent of all agreements) will spread to public employment.

Arbitration to resolve impasses over terms of new agreements is another matter. In addition to the sovereignty obstacle, arbitration of contract terms is neither accepted in private industry nor does it have the support of unions and employers generally. Supporters of compulsory arbitration, whether in public or private employment, have yet to devise a system which will not at the same time lead to a breakdown of collective bargaining.

Conclusion

The advent of employee organizations and collective bargaining to the public sector is the most significant development in the industrial relations field of the last 30 years. In addition to the more obvious implications for employees, public officials and the art of government, it may have important effects on the labor movement and on labor-management relations in the private sector.

Trade union membership in the United States has not been keeping pace with the growth in the labor force. This has been due largely to the relative decline in employment in industries where unions have been strongest, and the failure of trade unions to appeal to the growing technical and white collar segment of the labor force. Equally important, is the tendency of young people to view the labor movement as just another pressure group out for itself, like big business, the farm lobby and other self-serving organizations.

The opening up of public employment to trade unions may change all this. As the fastest growing industry, government could provide a source of enough new recruits to reverse the decline in trade union membership.

Government employees who join unions could change the image of the labor movement to make it more acceptable to white collar employees and technicians in private industry. Finally, if the teachers of the United States join unions in large numbers, youngsters may reevaluate the role of labor in society.

If public employees show a preference for association-type organizations rather than unions, the effects may be different but nonetheless significant. Employee associations have already taken on some of the characteristics of unions; the reverse has also been true as unions try to compete for the allegiance of professional employees. This drawing together of the two types will continue. In time, some unions and associations may merge or agree not to raid one another; some associations may even affiliate with the AFL-CIO. In any event, whether employees are represented by unions or associations, the total strength of organized employees will be louder and more influential in the labor markets as well as in the legislatures of the country. The effect on students will still be great, whether their teachers are members of unions or associations which act a lot like unions.

In the collective bargaining arena, we are witnessing something that students of labor-management relations have for a long time held (and many continue to hold) could not exist, namely "no-strike bargaining." If the recent trend in state legislation continues, mediation, fact-finding and other methods of settling disputes will be used more extensively than ever before. To the extent that these approaches are successful, they may have some application to disputes in private industry. If they fail, it will provide additional ammunition to those who contend that collective bargaining without the right to strike is meaningless. Whatever the result, the experience should be instructive.

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Jackson work copy

Introduced: 3/20/70
Referred: Judiciary, Labor and Management and Finance

IN THE HOUSE

BY THE JUDICIARY COMMITTEE
BY REQUEST

HOUSE BILL NO. 796

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to a public employment labor relations Act."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 23.40 is amended by adding new sections to read:

ARTICLE 2. PUBLIC EMPLOYMENT LABOR RELATIONS ACT.

Sec. 23.40.070. DECLARATION OF POLICY. The public policy of the state regarding labor relations and collective bargaining in public employment is as follows:

(1) There are three major interests involved, namely: that of the public, the public employee and the public employer. These interests are to a considerable extent interrelated and therefore, it is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Orderly and constructive employment relations for public employees and the efficient administration of government in the state serve to promote these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employee-management relations in public employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise. It is recognized that whatever may be the rights of disputants with respect to each other in a controversy regarding public employment relations, neither party has the right to engage in acts or practices which jeopardize the public safety and interest and interfere with the effective conduct of public business.

Put in hands of an independent agency? No

(3) Where permitted by secs. 70 - 280 of this chapter, negotiations of terms and conditions of public employment should result from voluntary agreement between the public employer and its agents, as an employer, and its employees. For that purpose a public employee has the right, if he desires, to associate with others in organizing and in bargaining collectively through representation of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of this state, in order to preserve and promote the interests of the public, the public employee and the public employer, to encourage the practices and procedure of collective bargaining in public employment subject to the public employee and related laws, regulations and policies governing public employment, by establishing standards of fair conduct in public employment relations.

Sec. 23.40.080. RIGHTS OF PUBLIC EMPLOYEES. Public employees shall have, and be protected in the exercise of, the right of self-organization and the right to form, join or assist any labor or employee organization, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Sec. 23.40.090. COLLECTIVE BARGAINING UNIT. (a) The department may determine, in order to insure a clear and identifiable community of interest among employees affected, an appropriate bargaining unit and whether the employees employed in a single or several departments, divisions, institutions, crafts, professions, or occupational groupings, constitute an appropriate collective bargaining unit. No collective bargaining unit may include both professional and nonprofessional employees unless a majority of the professional employees and a majority of the nonprofessional employees vote for inclusion in the unit. No unit may include employees whose positions are in one of the classes in sec. 260 of this chapter with employees

whose positions are in another one of the classes under the same section. The department may determine a collective bargaining unit with or without providing the employees involved an opportunity to determine for themselves whether they desire to establish themselves as an appropriate collective bargaining unit.

(b) When the department permits employees to determine for themselves whether they will constitute a separate bargaining unit, the determination shall be by secret ballot, and the department shall provide, by regulation, for voting procedure to be employed in making the determination.

(c) In determining, modifying or combining collective bargaining units, the department shall consider the duties, skills and working conditions of the public employees, the history of collective bargaining by the public employees and their bargaining representatives, the extent of organization among the employees, and the desire of the public employees.

Sec. 23.40.100. REPRESENTATIVES AND ELECTIONS. (a) Representatives chosen for the purposes of collective bargaining by a majority of the public employees voting in a collective bargaining unit shall be the exclusive representative of all the employees in the unit for the purposes of collective bargaining. An individual employee, or a minority group of employees in a collective bargaining unit, may present grievances to the public employer in person, or through representatives of their own choosing, and the public employer shall confer with the employee regarding the grievances, provided that the majority representative has been afforded the opportunity to be present in the conference and that any adjustment resulting from the conference is not inconsistent with the conditions of employment established by the majority representative and the public employer.

(b) When a question arises concerning the representation of public employees in a collective bargaining unit, the department shall determine the representative of the unit by taking a secret ballot of the employees and certifying in writing the results of the election to the interested parties and to the public employer. There shall be included on a ballot for the election of representatives the names of all persons, having an interest in representing public employees, submitted by a public employee or group of public employees participating in the election, except that the department may exclude from the ballot one who, at the time of the election, stands deprived of his rights under secs. 70 - 280 of this chapter by reason of a prior adjudication of his having engaged in a prohibited practice. The ballot shall be prepared to permit a vote against representation by anyone named on the ballot. The department's certification of the results of an election shall be conclusive.

(c) When an election has been conducted under (b) of this section, in which the name of more than one proposed representative appears on the ballot and results in no conclusion, the department may if requested by any party to the proceeding within 30 days from the date of the certification of the results of the election, conduct a runoff election. In the runoff election, the department may drop from the ballot the name of the representative that received the least number of votes at the original election, or the department shall drop from the ballot the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

(d) Questions concerning the determination of collective bargaining units or representation of public employees may be raised by petition of any public employee or the public employer, or the

require 30%?

see p 3 of HB368

representative of either of them. When it appears by the petition that an emergency exists requiring prompt action, the department shall act on the petition immediately and hold the election requested within a time that will meet the requirements of the emergency presented. The fact that one election has been held within the preceding year may not prevent the holding of another election among the same group of public employees, if it appears to the department that sufficient reason exists.

Sec. 23.40.110. PROHIBITED PRACTICES. (a) It is a prohibited practice for a public employer individually or in concert with others to:

(1) interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in sec. 80 of this chapter,

(2) initiate, create, dominate or interfere with the formation or administration of a labor or employee organization or contribute financial support to it, but the public employer is not prohibited from reimbursing public employees at their prevailing wage rate for the time spent conferring with its officers or agents; it is not a prohibited practice for an officer or supervisor of the public employer to remain or become a member of the same labor or employee organization of which its employees are members, when they perform the same work or are engaged in the same profession; however, a supervisor may not participate as an active member or officer of the organization,

(3) encourage or discourage membership in a labor or employee organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment;

(4) refuse to bargain collectively on those matters provided for in sec. 250 of this chapter with the representative of a majority of its employees in an appropriate collective bargaining unit;

however, when the public employer files with the ~~board~~ department a petition requesting a determination as to majority representation, it may not be considered to have refused to bargain until an election has been held and the result has been certified to it by the department. A refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon;

(5) violate the provisions of a written agreement concerning terms and conditions of employment affecting public employees, including an agreement to arbitrate, or to accept the terms of an arbitration award, when previously the parties agreed to accept an arbitration award as final and binding upon them;

(6) deduct labor or employee organization dues or assessments from a public employee's earnings, unless the public employer has been presented with an individual order for the deduction, signed by the public employee, and terminable at the end of any year of its life by the public employee giving at least 30 days' written notice of the termination to the public employer and to the representative organization.

(b) It is an unfair labor practice for a public employee individually or in concert with others to:

(1) coerce or intimidate a public employee in the exercise of his legal rights, including those guaranteed in sec. 80 of this chapter;

(2) coerce, intimidate or induce an officer or agent of the public employer to interfere with any of its employees in the exercise of their legal rights, including those guaranteed in sec. 80 of this chapter, or to engage in a practice with regard to its employees which would be a prohibited practice if undertaken by him on his own initiative;

(3) refuse to bargain collectively on those matters provided for in sec. 250 of this chapter with the authorized officer or agent of

the public employer, provided it is the recognized or certified exclusive collective bargaining representative of employees in an appropriate collective bargaining unit; a refusal to bargain includes, but is not limited to, the refusal to execute a collective bargaining agreement previously agreed upon;

(4) violate the provisions of a written agreement concerning terms and conditions of employment affecting public employees, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties agreed to accept an arbitration award as final and binding upon them;

(5) coerce or intimidate a supervisory employee, officer or agent of the public employer, working at the same trade or profession as its employees, to induce him to become a member of or act in concert with the labor organization of which they are members.

OK amend.

(c) It is a prohibited practice for a labor or employee organization or any other person to do or cause to be done in the interest of public employers or public employees, or in connection with a controversy over employment relations, any act prohibited by (a) and (b) of this section.

Sec. 23.40.120. INVESTIGATION AND CONCILIATION OF COMPLAINTS. If a verified written complaint is filed by or for a person claiming to be aggrieved by a prohibited practice, or a written accusation that a person subject to secs. 70 - 280 of this chapter has engaged in a prohibited practice is filed with the department, the department shall investigate the complaint or accusation. If it determines after the preliminary investigation that probable cause exists in support of the complaint or accusation, it shall try to eliminate the prohibited practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during this endeavor may be used as evidence in a subsequent proceeding.

Sec. 23.40.130. ~~FORM AND SERVICE OF~~ COMPLAINT AND ACCUSATION. If the department fails to eliminate the prohibited practice by conciliation and to obtain voluntary compliance with secs. 70 - 280 of this chapter, or if, before it attempts conciliation, it considers that the circumstances warrant, it shall serve a copy of the complaint or accusation upon the respondent. The form of the complaint or accusation and the subsequent procedures shall be conducted in accordance with the Administrative Procedure Act (AS 44.62), ~~and the department shall have the powers granted therein.~~

Sec. 23.40.140. ORDERS AND DECISIONS. If the department finds that a person named in the written complaint or accusation has engaged in a prohibited practice, the department shall issue and serve on the person an order or decision requiring him to cease and desist from the prohibited practice and to take affirmative action which will carry out the policies of secs. 70 - 280 of this chapter. If the department finds that no person named in the complaint or accusation has engaged or is engaging in a prohibited practice, the department shall state its findings of fact and issue an order dismissing the complaint or accusation.

Sec. 23.40.150. ENFORCEMENT BY INJUNCTION. The department may apply to the superior court of the judicial district ~~or division~~ in which the prohibited practice occurred for an order enjoining the prohibited acts specified in the order or decision of the department. Upon a showing by the department that the person has engaged or is about to engage in the practices, an injunction, restraining order, or other order which may be appropriate shall be granted by the court without bond.

Sec. 23.40.160. POWER TO INVESTIGATE AND COMPEL TESTIMONY. (a) For the purpose of the investigations, proceedings, or hearings which

the department considers necessary for the enforcement of secs. 70 - 280 of this chapter, the department may issue subpoenas requiring the attendance and testimony of witnesses and the production of relevant evidence.

(b) The department may administer oaths, examine witnesses, and receive evidence.

(c) The attendance of witnesses and the production of evidence may be required from any place in the state at any designated place of hearing.

(d) If a person refuses to obey a subpoena issued under secs. 70 - 280 of this chapter, any superior court for the district in which the contumacious person resides or is found may, upon application by the department, issue an order requiring him to comply with the subpoena.

Sec. 23.40.170. REGULATIONS. The department may ~~from time to time~~ issue, amend, or ~~rescind~~ regulations under the Administrative Procedure Act (AS 44.62) to carry out the provisions of secs. 70 - 280 of this chapter.

Sec. 23.40.180. PENALTY FOR VIOLATION OF ORDER OR DECISION. A person who violates a provision of an order or decision of the department is guilty of a misdemeanor and is punishable by a fine of not more than $500.

Sec. 23.40.190. PENALTY FOR OBSTRUCTING ENFORCEMENT. A person who forcibly obstructs, intimidates or interferes with an authorized representative of the department while the representative performs duties under secs. 70 - 280 of this chapter or because the representative performs those duties, is punishable by a fine of not more than $500, or by imprisonment for not more than one year, or by both.

Sec. 23.40.200. ARBITRATION. (a) Parties to a labor dispute

arising from the interpretation or application of a collective bargaining agreement affecting terms and conditions of public employment may agree in writing to have the department name arbitrators in all or any part of the dispute. The department shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in arbitration shall be conducted in accordance with the Uniform Arbitration Act (AS 09.43.010 - 09.43.180) where applicable.

(b) The parties to a collective bargaining agreement may provide in the agreement a contract for arbitration to be conducted solely according to the Uniform Arbitration Act (09.43.010 - 09.43.180) if the Act is incorporated into the agreement or contract by reference.

Sec. 23.40.210. MEDIATION. The department may appoint a competent, impartial, disinterested person to act as mediator in any labor dispute either on its own initiative or on the request of one of the parties to the dispute; or the parties may select a mediator by agreement or mutual consent. It is the function of the mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the board have any power of compulsion in mediation proceedings.

Sec. 23.40.220. FACT FINDING. (a) If, after a reasonable period of negotiation over the terms of a collective bargaining agreement, a deadlock exists between a public employer and a labor or employee organization, either party or the parties jointly may request the department in writing to initate fact finding in order to make recommendations to resolve the existing deadlock.

(b) Upon receipt of a request to initiate fact finding, the department shall make an investigation, either informally or by a formal hearing, to determine whether the parties are, after a reasonable period of negotiations, deadlocked with respect to a dispute.

After its investigation the department shall certify the results of the investigation. If the certification requires that fact finding be initiated, the department shall appoint from a list established by the department a qualified disinterested person or three-member panel, when jointly requested by the parties, to function as a fact finder.

(c) The fact finder shall establish times and place of hearings and shall conduct the hearings under rules established by the department. Upon request, the department shall issue subpoenas for hearings conducted by the fact finder. The fact finder may administer oaths. Upon completion of the hearing, the fact finder shall make written findings of fact and recommendations for solution of the dispute and submit them to the parties and to the department. In making its findings and recommendations, the fact finder shall take into consideration among other pertinent factors the logical and traditional concept of public personnel and merit system administration concepts and principles vital to the public interest in efficient and economical governmental administration. Cost of fact finding proceedings shall be divded equally between the parties.

(d) Nothing in this section may be construed as prohibiting a fact finder from mediating the dispute, in which he is involved, at any time prior to the issuance of his recommendations.

(e) Within 30 days of the receipt of the fact finder's recommendations or within a time period agreed upon by the parties, both parties shall advise each other, in writing, as to their acceptance or rejection, in whole or in part, of the fact finder's recommendations and, at the same time, send a copy of the notification to the department. Failure to comply with the requirements of this section by the employer or employee representative is a violation of sec. 110(a)(4) and (b)(3) of this chapter.

Sec. 23.40.230. AGREEMENTS. Upon the completion of negotiations between a labor or employee organization representing a majority of employees in a collective bargaining unit and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. Either party to the agreement has a right of action to enforce the agreement by petition to the department.

Sec. 23.40.240. MANAGEMENT RIGHTS. (a) Nothing in secs. 70 - 280 of this chapter shall interfere with the right of the public employer, in accordance with applicable law and regulations to

(1) carry out the statutory mandate and goals assigned to the department or agency utilizing personnel, methods and means in the most appropriate and efficient manner possible;

(2) manage the employees of the department or agency; to hire, promote, transfer, assign or retain employees in positions within the department or agency and in that regard to establish reasonable work rules,

(3) suspend, demote, discharge or take other appropriate disciplinary action against an employee for cause, or to lay off employees in the event of lack of work or funds or under conditions where continuation of work would be inefficient and nonproductive.

Sec. 23.40.250. SUBJECTS OF COLLECTIVE BARGAINING. (a) Matters subject to collective bargaining are the following conditions of employment:

(1) grievance procedures;

(2) application of seniority rights as affecting the matters contained herein,

(3) work schedules relating to assigned hours and days of

does not include wages

the week and shift assignments;

(4) scheduling of vacations and other time off;

(5) use of sick leave;

(6) application and interpretation of established work rules,

(7) health and safety practices;

(8) intradepartmental transfers; and

(9) other matters consistent with this section and the statutes, rules and regulations of the public employer.

(b) Nothing in this section shall require the employer to bargain in regard to ~~statutory and regulation provided~~ prerogatives of promotion, layoff, position classification, compensation and fringe benefits, examinations, discipline, merit salary determination policy and other actions provided for by law, and regulations ~~governing civil service~~.

Sec. 23.40.260. STRIKES. (a) For purposes of this section, public employees are employed to perform services in one of the three following classes:

(1) those services which may not be given up for even the shortest period of time;

(2) those services which may be interrupted for a limited period but not for an indefinite period of time; and

(3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.

(b) Class (1) includes police and fire protection employees and jail, prison and other correctional institution employees. Strikes by employees in this class are prohibited. Upon a showing by a public employer of the department that employees in this class are engaging or about to engage in a strike, an injunction, restraining order, or other order which may be appropriate shall be granted by the superior court

of the judicial district ~~or division~~ in which the strike is occurring or is about to occur. If an impasse or deadlock is reached in collective bargaining between the public employer and employees in this class, and mediation and fact-finding have been utilized without resolving the deadlock, the parties shall submit to arbitration to be carried out under the provisions of the Uniform Arbitration Act (09.43.010 - 09.43.-180).

(c) Class (2) includes hospital, public utility, sanitation and public school and other educational institution employees. Employees in this class may engage in a strike, subject to the voting requirement of (d) of this section, for a limited time. The limit is determined by the interests of the health, safety or welfare of the public. The public employer or the department may apply to the superior court of the judicial district ~~or division~~ in which the strike is occurring for an order enjoining the strike. A strike may not be enjoined unless it can be shown that it has begun to threaten the health, safety or welfare of the public. A court, in deciding whether or not to enjoin the strike, shall consider the total equities in the particular case. Total equities includes not only the impact of a strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations.

(d) Class (3) includes all other public employees who are not included in classes (1) or (2). Employees in this class may engage in a strike if a majority of the employees in a collective bargaining unit vote by secret ballot to do so.

Sec. 23.40.270. DEFINITIONS. In secs. 70 - 280 of this chapter, unless the context otherwise requires,

(1) "collective bargaining" means the negotiating by the public employer, by its officers and agents, and a majority of its

employees, by their representatives in an appropriate collective bargaining unit, concerning terms and conditions of employment of all employees in the unit in a mutual effort to reach an agreement with reference to the subject under negotiation;

(2) "department" means the Department of Labor;

(3) "election" means a proceeding conducted by the department in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in secs. 70 - 280 of this chapter;

(4) "professional employee" means

(A) an employee engaged in work:

(i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

(ii) involving the consistent exercise of discretion and judgment in its performance,

(iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time,

(iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or

(B) an employee who:

(i) has completed the courses of specialized intellectual instruction and study described in (4)(A)(iv) of this

section; and

(ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in (4)(A) of this section;

(5) "public employee" means an employee of a public employer, except a person elected by popular vote, appointed to office by the governor; or a member of a board or commission, or a person who is employed by the public employer for less than 20 hours a week;

(6) "public employer" means:

(A) the State of Alaska;

(B) an organized borough,

(C) a city of any class, whether home rule or otherwise;

(7) "supervisor" means any individual having authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances, or effectively to recommend such action, if in connection with the exercise of the foregoing the exercise of the authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Sec. 23.40.280. SHORT TITLE. Secs. 70 - 280 of this chapter may be cited as the Public Employment Labor Relations Act.

* Sec. 2. AS 23.40.010 is repealed.

* Sec. 3. AS 23.40.040 is repealed.

Original sponsor: Judiciary Committee by request

Offered: 4/23/70
Referred: Labor and Management, Judiciary and Finance

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 796

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to a Public Employment Labor Relations Act."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 23.40 is amended by adding new sections to read:

ARTICLE 2. PUBLIC EMPLOYMENT LABOR RELATIONS ACT.

Sec. 23.40.070. DECLARATION OF POLICY. The public policy of the state regarding labor relations and collective bargaining in public employment is as follows:

(1) There are three major interests involved: that of the public, the public employee and the public employer. These interests are to a considerable extent interrelated, and therefore it is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Orderly and constructive employment relations for public employees and the efficient administration of government in the state serve to promote these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employee-management relations in public employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise. It is recognized that whatever may be the rights of disputants with respect to each other in a controversy regarding public employment relations, neither party has the right to engage in acts or practices which jeopardize the public safety and interest and interfere with the effective conduct of public business.

A M E N D M E N T

Offered in the HOUSE By The Judiciary Committee

To: CS(L & M) HOUSE BILL NO. 796

_____ SENATE BILL NO. ____

AMENDMENT: Page 3 Lines 6-10

Delete all material and insert in its place: "(b) When the department determines an appropriate bargaining unit, the determination is subject to approval by secret ballot of the employees concerned, and the department shall provide, by regulation, for voting procedure to be employed."

Page 15 Lines - Between 24 & 25

Insert: "(8) 'statute' and 'statutory' include local government charters and ordinances."

Page 15 Line 28

Add: "*Sec. 3. Nothing in this Act affects collective bargaining agreements in effect on the effective date of this Act."

ALASKA has enjoyed relative peace in the labor relations of the public sector, however there is a general feeling that this will not last for the following reasons:

1. The STATE and local Governments have, in most cases, responded to the need for capital improvements with such a high percentage of the tax dollar that the wage and working conditions of the public employee has suffered and have not kept pace with the private sector.

2. The public employee, in an effort to better his wages and working conditions, has made demands to be recognized as a unit for collective bargaining. Because the Alaska law is permissive regarding collective bargaining for public employees, the demands has been rejected in many areas. Such refusal leaves the employee group no alternative but to take strike action to attain their goals as they are denied the give and take of collective bargaining.

H.B. 796 is a well thought out, progressive piece of legislation in that it provides the working man his right to organize and bargain with his employer, yet at the same time protects the public safety and interest.

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

BOX 1149 — JUNEAU 99801

April 8, 1970

The Honorable Tom Fink
House of Representatives
Alaska State Legislature
State Capitol
Juneau

Dear Tom:

I apologize for the delay in replying to your request to submit my comments on HB 796. My opinion on this bill is as follows:

On April 1, 1970, I testified before the House Judiciary Committee regarding the above bill. I stated that the bill was technically excellent, but that I did have some recommendations for improvement.

The committee clarified for me the terminology in line 9, page 4, of the bill. I had misread that section and thought that violation of one of the unfair labor practices, as included in this bill, precluded an individual from voting in an election. The committee pointed out to me that it merely precluded the placing of the name of an individual on the ballot.

Although this was the committee's opinion, it is not compatible with page 6 of the bill, (6) (b) which states that it is unfair labor practice for a public employee, individually or in concert to engage in unfair labor practices. The terminology does not include labor organizations. Thus, page 4 only precludes an individual from having his name placed on a ballot, but an individual is not a labor organization.

Next I discussed the language on page 4 and on page 5; lines 27 through 30, and 1 through 7 respectively. I stated that a time lag should be imposed between elections. I based this on my experience with the National Labor Relations Board, where there is a time lag of one year between elections. This election

bar precludes too frequent elections which, of course, are costly and time-consuming. The committee discussed a shorter time period and I agreed that a one-year bar is an arbitrary selection. I further stated that a sufficient showing of interest must be present before petitions should be entertained for a election. The NLRB uses a criteria of 30 percent of the employees in the alleged unit as a sufficient basis for the holding of elections.

If there is no criteria for showing of interest before an election is held, one employee in a unit could petition for such an election. Again, the procedure is costly and time-consuming.

I stated a personal opinion on page 5, lines 17 through 22, that I did not believe an officer or supervisor of a public employee should be permitted to remain a member of a labor organization, even though they are precluded from participating as an active member. I based my opinion on the concept that there is countervailing interest between management and labor organizations on occasion, and that this could result in a conflict of interest. Since that time it has been pointed out to me that such a bar may be appropriate in certain types of units, but in construction-oriented units rank and file members become supervisors. To preclude them from membership would also preclude them from union benefits, such as Health & Welfare or pension rights. I have no strong feelings on this particular issue and believe that preclusion from membership of supervisors could result in serious damage to the individual.

On page six, (6) (b), I thought that a labor organization should be included as one which may commit an unfair labor practice. Under the existing wording of that section, only a public employee, individually or in concert with others, may commit an unfair labor practice. A labor organization is not a public employee, but its agents may commit unfair labor practices under this act. Under the existing language, there would be no sanction.

On page eight, section 23.40.140, entitled "Orders and Decisions", there is provided an administrative procedure whereby unfair labor practice can be determined by the Department of Labor. I discussed, in general, the remedies available, such as reinstatement of, and back-pay for, discharged employees, etc. This subject is probably adequately covered in AS 23.40.150

which provides for enforcement by injunction of the Department's orders. As long as an order is reasonable and is supported by evidence, the Department can apply to the Superior Court for enforcement of said order.

I further discussed page 12, section 23.40.250, entitled "Subjects of Collective Bargaining". I pointed out that the "Subjects of Collective Bargaining" does not include wages which, I think, is a deficiency in the law.

In earlier testimony, Dwayne Carlson, lobbyist for AFL-CIO stated that he thought compulsory arbitration should be provided for Class II employees, as set forth on page 14 (c). He stated that after an injunction is obtained, the matter should be solved by compulsory arbitration. I spoke generally that I did not believe that compulsory arbitration is a good approach to labor relations. I believe that the parties have to hammer at their own agreement, and that through compulsory arbitration there is a tendency for both parties to take extreme positions and hope that the arbitrator will split the difference. I said the alternative to this was not particularly satisfactory either and that I would recommend a continuous bargaining process. In short, if an injunction is granted, it would not be retained indefinitely. The union would be allowed to strike again, and the pressure on the employer would continue. There is no truly adequate solution to this problem.

I told the committee that I had just reviewed a committee report by the Advisory Commission on Inter-government Relations, covering labor management policies for state and local government. This commission includes private citizens, members of the United States Senate, members of the U.S. House of Representatives, officers of the executive branch of the federal government, governors, mayors, members of state legislative bodies, and elected county officials. The commission had come up with some 16 recommendations, most of which were included in this piece of legislation. The commission did state that it was opposed to the striking of public employees. The commission recommended mediation and fact-finding as alternatives to the strike, and although it mentioned compulsory arbitration, it did not positively suggest this as a solution.

I went on to tell the committee that I believe there is no truly complete solution in the public sector, and that there is no magic formula that can be applied. I pointed out that although no state permits strikes by public employees, some 250 work stoppages occurred in 1968. I stated that it is the legislature's responsibility to consider all aspects of this legislation, and that one of the aspects of the legislation is timing. I stated that I did not believe that the legislature could legislate

April 8, 1970

The Honorable Tom Fink

maturity on the public employer or on the public employee group. The main problem in the public employee sector is that in the private sector there has been 35 years, or more, of collective bargaining experience, but that this is absent in the public sector. I stated that I thought that both parties had to gain a great deal of maturity and that legislation such as HB 796, may bring that maturity about.

After I concluded my testimony, Mr. Lewis Dischner, lobbyist for the Teamster's Union, stated that he disagreed with 90 percent of what I had said, and that he was in favor of the bill where I was opposed to it. He went on to say that he did not favor a "little" labor relations act, and the rest of his testimony was somewhat incomprehensible to me. After Mr. Dischner concluded his testimony, I made some additional comments.

One of my comments was that the committee should consider administration of this act by an independent agency, rather than by the executive branch of the government. I stated that since the Department of Labor is an executive agency, conflicts could result. I further pointed out that the Department of Labor could be organized and would determine the appropriate units as well as determine unfair labor practices, if any. This, to me, would not be very desirable.

I further stated that I disagree with Mr. Dischner in that HB 796 is based on the Labor Management Relations Act. I further stated that the most satisfactory thing about the National Labor Relations Board is its election procedures. I stated that these procedures are excellent and that they do afford employees the opportunity to express their free will as to selection or non-selection of their bargaining representatives.

Other people testifying at the committee hearing were Ferrell Campbell of the Operating Engineers Union, and Tom Brown, a lobbyist representing himself.

If you have any questions on the above, don't hesitate to give me a call.

Sincerely,

Bill

WILLIAM K. JERMAIN
Deputy Commissioner

WKJ:eb

An Act relating to public employment labor relations Act.

FINANCE

Committee Report

HOUSE OF REPRESENTATIVES

_____
Date

Mr. Speaker:

The Committee on _____ has had _____ under consideration. A majority of the members of the Committee

☐ recommends it do pass

☐ recommends it do not pass

☐ recommends it do pass with attached amendment(s)

☐ recommends it be replaced with CS for _____ and that CS for _____ do pass

☐ (and) recommends it be referred to the _____ committee

☐ reports it back without recommendation

☐ (other) _____

MEMBERS SIGNING THE MAJORITY REPORT:

_____ _____ _____

_____ _____ _____

_____ _____ _____

_____ _____ _____

MEMBERS NOT CONCURRING IN THE MAJORITY REPORT:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____
CHAIRMAN

File Copy

AMENDMENT

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: ~~Kxxxxx Rick~~
CSHB 796 (Lab. & Mgt.)

Page 3, Lines 6 -- 10:

Delete all material and insert in its place: "(b) When the department determines an appropriate bargaining unit, the determination is subject to approval (by secret ballot) of the employees concerned, and the department shall provide, by regulation, for voting procedure to be employed."

Page 15, Line 28:

Add: "*Sec. 3. Nothing in this Act affects collective bargaining agreements in effect on the effective date of this Act."

Page 15, Between lines 24 & 25:

Insert: "(8) 'statute' and 'statutory' include local government charters and ordinances".

CONSUMER PROTECTION

COMMERCE COMMITTEE

PUBLIC HEARING: SB 188, CSSB 352 AMENDED, HB 411, HB 444, HB 446

FEBRUARY 25, 1970

The following is an excerpt from this hearing, testimony from Mr. Randolph Aires, of Sear, Roebuck, and Co.

MR. AIRES: We do believe that the honest and legitimate merchants in your communities have a lot to gain from good and reasonable consumer legislation, and thus we do support and will continue to support good, reasonable consumer protection legislation. So, we are not fighting the consumer protections, persay. And you know, we are all consumers, I'm still young enough to remember painfully, an experiance I had as a young, newly married person, before I went to law school by the way, and a door-to-door salesman came around and very glibbly with a lot of pressure, sold us something I later didn't want. The next morning I got up and I really regretted having signed that contract and I wish at that time for example we would have had this door-to-door solicitation bill that you have before you. That's a separate matter, I'm not talking on that bill now, but I might that as an example what I think is good legislation. It would protect a lot of young married people who find themselves in that position with door-to-door salesman coming around. So, we're all consumers, and I think this is great and we should support good legislation and just another example, your door-to-door solicitation law is just one of twenty major parts of consumer protection features in the Uniform Consumer Critic Code which is before your Legislature at the present time. I understand it is not going anywhere this session, but we hope that there will be a study committee after the session is over and we get into this bill because we feel it is a good bill, it makes sense, we support it, and we hope it will really be studied seriously. Now let's get down to these three consumer protection acts, these are dealing with deceptive trade practices.

Deceptive trade practices, we're not getting into things like Federal Truth and Lending and so forth. And there are twelve enumerated deceptive trade practices in SB 352, the other two bills add a couple, and we don't agree with several of them. But the twelve that we ha ve in SB 352, we feel are practices that should be rightly attacked, with proper legislation. You'll note, the federal level, the FTC, is doing a pretty adequate job, considering. We believe that a customer who feels he's been defrauded and who cannot obtain satisfaction through the normal complaint procedure is entitled to a remedy. President Nixon's special assistant for consumer affairs, Mrs. Virginia Knauer who is receiving all sorts of publicity, has pointed out that the remedy in her words, should be, "Convenient, expeditous, and effective". Convenient, expeditous, and effective...and we submit that the consumer class action provision contained in SB 352 as amended, and HB 446, the Governor's bill, would not provide that type of remedy to the consumer. We think that indiscriminate class action legislation like this will create more evils than it will remedy. Class actions do not result in speedy and efficient determinations of claims, ask any lawyer who has ever been involved with one, he'll tell you. On the contrary, notice requirements on pre-trial procedures, required when there are numerous litigants, protracted trials, difficult damages determinations, and a heavy burden of management which is placed on the court system, all lead to excessively long and complex proceedings before benefiting and they really only benefit the lawyers when you come right down to it. These things go on for years...three, four, five years and the ones that have come up in the traditional class action arena. Up to now, the courts all over the country are reluctant to permit the traditional class actions and these come under the existing restrictive rules of civil procedure and the court rules which we have in all the states. And these allow class actions, and they are restrictive because these actions

are likely to benefit practically nobody other than the lawyers who bring them, and they create lawsuits without merit where none would have previously existed.

MR. SWEET: Mr. Chairman, he has used the word class action a couple of times could we have that defined before we go on?

MR. BRONSON: We'll pause for a moment, I think it would be a good idea, would you define class action?

MR. AIRES: Class action as I was using it, they have traditionally grown not by statute, but through our rules of civil proceedure in our court action, and it's been largely handled by the courts, by the judges making decisions by case law what the various restrictions will be in bringing a class action and the basic idea is one person can sue on behalf of a whole class of people in a somewhat similar situation. And here's where the rub comes, traditionally, the courts have been very restrictive in saying, how do you fit in this class? In other words, you must be in an almost identical position as your brethren over there in a similar situation. So that is you're, for an example, subject to one of these deceptive trade practices which are listed here, your treatment by this defendant, this given store let's say, must have been given under the same circumstances, the same type of refridgerator was sold for example, in the same store etc. etc.. I can give you an example of how some states approach this, normally the courts use very vague, broad legal terminolgy on these restrictions, just to quote you some of the traditional approaches, and then they get down to specific cases, but here is one example, they list four requirements. The class is so numerous that it is impracticable to bring all members of the class before the court, this is one condition that must exist. Well, that's not too hard to meet because you can say there are many people involved, what's many? Maybe fifteen, twenty people. Number two, another restriction would be, that the questions of law in fact come

into the class are substantially similiar and predominate over the questions effecting the individual members. There are cases upon cases on what this means, what are common questions of law in fact? And you just go on a case by case method but generally speaking, the courts have been very restrictive. They want to really be sure that Mr. A here and Mr. B really fall in the same type situations. The third requirement under this typical line of cases, would be that the claims or defenses of the representative plaintiffs are typical, another one of these broad, legal terms, are typical of the claims or defenses of th e class and fourth, the representative plaintiffs will fairly and adequately protect th e interests of the class. This is one of the chief concerns of the court, they feel somebody is going to start a lawsuit of behalf of everybody else, namely the world maybe, that by golly, they ought to be adequately representing all these other people out there, because what if he just decides in the middle of the lawsuit, "Well, I don't think we have a good case, we'll just drop it now," maybe somebody over there does have a good valid claim and he's left out hanging. The courts are very concerned with that factor, that they don't want to allow this class to get so big that somebody will be left out in the cold because the guy who brought the suit just didn't do a good job in promoting the lawsuit, and really getting adequate representation. It's a nebulous thing, what's a class action? You have a class against one defendant or in some cases if you can get defendants who are interlocked in some way maybe two companies that have interlocking boards of directors or something you could bring two defendants together, but the class is the group of plaintiffs, in other words. Traditionally, as I say, this is not by the statutes which we are now getting into, it's by the rules of civil proceedure that have been developed by the courts over the years.

MR. ORBECK: Take the pipeline for instance, it's going through quite a bit of Alaska, could people all along that pipeline, if one person

decides that this pipeline ruins his view or does damage to his property because this unsightly pipeline goes by, could VISTA or somebody file a suit for everybody along that pipeline?

MR. AIRES: I think under the traditional class action provisions we have they would have difficulty in joining together. I think for example that the clerk would say, "Well, your property is quite different from your neighbor's property, it may go through at a different angle, there's a different circumstance, you've got a mountain and he doesn't have a mountain there, lots of different things are involved." So I think in this example for example, you wouldn't have a very successful class action. I think the court would say, no...we're not going to allow that; now, that is under the traditional approach. When we get under these consumer class actions, it's a whole other ball game, and that's what I'm going to get into here. All of a sudden by statute we just say if everybody's similiarly situated, whatever that means, go at it boys! You're all together in one big class, that's what it amounts to, it's an entirely new ball game. This is a new animal which has appeared on the scene, this is a so called consumer class action. It's not just a regular class action, it' a consumer class action. It first came on the scene last year in the federal Congress with people such as Senator Tidings championing it and now this year we are seeing it at the state legislature level for the first time. We've had bills similiar to this in the past, dea ling with deceptive trade practices and they have been passed in some states. This is the first time we have had this consumer class actio" bill stuck into it; and it's not just in Alaska, it's all over. To my knowledge no state legislature has passed it yet, this year but it is difficult to keep up with this from day to day I cover nine states and it is certainly not in any of ours. But it's being

considered. One of the dangers as we see them, with the consumer class actions, this statutory creature that you are considering here, well, it's relatively simple for an enterprising lawyer, and there are many of them, to marshall an expansive list of plantiffs, through the class action notice provision you can develop hundreds of thousands of unknown clients just like that, you get your brother-in-law, o.k., you're going to bring a class action, now we're going to sue for everybody. Get the phone book out. You could check and make sure that they were customers at that store though, I think that would be a good precaution. The potential high legal fees, and this is my real concern , the potential high legal fees will cause many lawyers to bring unwerranted class actions relating to technical violations of law and against in many cases, innocent businessmen. The class actions could be brought against businessmen who would be willing to resolve on an informal basis a valid claim with a consumer. Maybe one guy would have a valid claim, and maybe it's ten dollars or twenty dollars, it could all be taken care of, the businessman would be glad to take care of this situation, but if he is faced with a situation where this one guy who has a valid claim and nine-hundred and ninety-nine who don't they were just brought in as a class without any merit, and he is dealing with a lawyer who is covering the whole class he is not going to be in the position to ever settle, or even attempt to settle with the one guy who has the valid claim, it just doesn't work. So, this is another aspect of it, when you add to that, to the fact that in your bills before you and I think we covered this in your question a while ago, that each of these so called injured persons recover at least two hundred dollars that's the floor. That's for certain on the individual actions, as I mentioned this question of interpretation as to whether that would apply in the class action part of this, but I think that would have to be cleared up, course we are against that whole feature anyway.

Even though for example, some guy may only have actual damages of say, two dollars, some very trivial thing and there are many very trivial things that come up. in our field, as you can understand. And yet this person would have two hundred dollars just like that. It doesn't take much of an imagination to see the potential for a severe harrassment in our judgement against the legitimate retailer under these conditions, you're talking about lawsuits in one millions of dollars particularly in the larger states, if you get into something like this, where they could be taken care of in a very sensible way. In class actions it's the lawyer that becomes less counsel and more the participating litigant and the real party in interest because the financial interest of the attorney as you can see, for the class may be for more substantial than the interest of any member of the class. We feel class actions could impose grave economic consequences for the defendant. A class action even if completely unwarranted necessitates substantial time and expense in the preparation of the defense, take a company like ours, we could be put to an awful lot of expense in defending one of these types of suits, whether it was warranted or not. This type of harrassment could drive some completely honest small businessman right out of business, it really could. The cost of doing business on these conditions would make it awfully difficult for any business, large or small, to keep from increasing prices of its' goods or services. It would be an added factor in the cost of doing business. Also the astute lawyer will obviously search for defendants who can be subjected to large damage recoveries rather than the judgement proof fly-by-night operator who preys upon the unsophisticated. And that, in my estimation is the tradegy of this whole approach, it's a misguided concept of this consumer class action. It's supposed to hit the guy who is abusing the consumer but he's the fly-by-night operator that the plaintiffs lawyer isn't even going to try to attack

because he knows his judgement if he'll attach the legitimate large operator for some trivial matter. There's been, in our judgement, no demonstrative need for donsumer class actions, especiaaly here in Alaska, as distinquished from your other forms of remedies presently available. And before dropping into this type of legislation we feel that at lease some experimentation in pilot programs involving other methods could be pursued. You have the small claims court here in Alaska and you can sue up to $500 in damages. The individual can go into the court without the expense and need of an attorney. One of the arguments the proponnents have always given us, well, the poor little guy...he can't go to an attorney because the attorney will say to him, well I can't take your case it's not worth it, but he can go to small claims court by himself and if he has anything on the ball he can say his case to the judge, the judges are very understanding in the small claims courts, so you have that remedy available right now. Also in this bill, CSSB 352, Section 45.50.511, which gives the Attorney General his basic powers, it provides that the court may make any order or judgement necessary to restore to the individual money or property acquired because of the deceptive trade practices. In other words, the provision is right there, for the court to take care of the individual by giving him whatever damages he is out. Now the Federal Trade Commission in the Attorney General's office should be available to the consumer who has been defrauded and there is increased emphasis being placed in this direction. The State of Washington for example, they have a consumer protection division in the Attorney General's office where they have three or four attorneys who are actively engaged only in consumer protection affairs and I know they are quite active and they do a good job, I've seen them work. We approve of this kind of strict enforcement, I think this is the proper place, the Attorney General should be serving the public interest in helping the consumer.

That's why we have no objection to the Attorney General having adequate funds and doing a proper job in this area. The whole point of this is this, we feel that much more study must be made of this whole area of how to give the consumer a fast and judicious remedy to take of his small greivances and we feel that it would be quite unwise to jump into this area right now it has just come on to the scene and from what I have indicated consumer class action is just not the fast, judicious way to go. It would hurt the consumer, it really would. We respectfully submit that if the Alaska State Legislature is prepared and determined to deal with this complex subject at this time and you are going to go ahead anyway, we feel that the best approach then would be to at least follow the Nixon Administration approach at the federal level, and that approach at the state level would be this; your Attorney General and his staff would effectively prosecute the violators of these deceptive trade practices. If he is successful then, give the individual his right, his private right under this kind of a condition. That way you at least get rid of the harrassment aspect. You won't have the plaintiffs lawyer just bringing a class actions without any merit at all. At least then you know if the Attorney General went through a case and he successfully prosecuted this guy, there it is laid right out for the individual he can go in and practically use that case and he has a legitimate reason to be there fighting the defendant. We would be willing to go along that as a compromise provision, however as I say, I don't think it is even needed, particularly here in Alaska. We have given you a suggested amendment to this effect and Dean has of course alluded to this, if this is the way you have to go in this area we feel this is a compromised version at least which we could live with. That is not our suggestion, it is just a last ditch alternative. If the Legislature felt that this was really the way to go we feel we could live with it. The

approach we submit would prevent the harrassment and at the same time the consumer would take care of his valid greivances. This is my whole emphasis with this class action thing I have six things ready to talk about but that's the big one and the rest I'll be very short about. The second thing which Dean gave to you as this matter of the proposed amendment which deals with the rule making powers of the Attorney General under a law such as this CSSB 352. Our concern in this area is that we don't feel the merchants should be subject to separate and possibly conflicting interpretations and rulings on what constitutes deceptive trade practices in any related matters. The deceptive trade practives listed in your bills, particularly CSSB 352 are keyed into the Federal Trade Commission Act dealing with deceptive trade practices. We propose that it should be made clear that it is the intent of the Alaska Legislature, if you're going with this type of legislation that the construction of your act will depend in good part upon the interpretations of the FTC and federal courts who have operated in this area for many years. Further we think it should be an absolute defense to an action brought under this act, if it can be shown conclusively that the conduct complained of was authorized by the FTC or any rules, regulations or decisions interpretating the FTC Act, this is only fair. In other words, we don't want to be subjected to going with entirely different rule making decisions on the very same area of law. There might be the very same deceptive trade practice involved and yet the Attorney General in state A will come up with an entirely different rule or interpretation of what this law is about, as opposed to the FTC and how could a businessman operate with this kind of dual regulation? So that is our concern. Four other little ones; to start with you have these twelve enumerated deceptive trade practices in CSSB 352, seven of those defined deceptive trade practices have a requirement for intent or knowledge on the part of the person or

company peretrating the practice. Just seven of the twelve, the other five don't for some reason. It's difficult to know this distinction is made, we feel that all twelve defined practices should have this knowledge or intent requirement. What if somebody innocently does something? We feel that in any good legal case you always have to show what we call the scienter, in legal terms, the intent that the guy really intented to do this. That he had a knowledge of what he was doing, I feel that is important in all twelve and it is only in seven of the twelve. Some of those definitions by the way, are so open in interpretation that you really have to have a requirement like this, to show some intent. We would suggest as another possible amendment if your legislature goes for this type of legislation, we suggest that the exception provided in Section 45.50.491 paragraph 2 of CSSB 352 as amended, should be extended to any person who merely uses some advertising matter supplied to him by his supplier That exception goes just to the newspaper, radio and television people, we feel it should apply to anyone else in the same situation. If material is supplied to him and he had nothing to do with it he should be treated the same way, it looks like it's just kind of a vested interest thing for the communications people. We feel it should be any person instead of the communication people, also as Dean has already mentioned, we feel that in fairness in this type of law there should be some statutory limitations and there are different ways you can go into this, you could say you could have a certain given time after the perpetration of the deceptive trade practices, or you can say give a certain time after the discovery of it. We feel in fairness to the consumer it should be after the discovery, in other words, what if that consumer doesn't know what happened to him until after a year and a half later. He should have should have some time and after he discovers what happened, to sue. Our suggesttion is one year after the discovery, we feel that is

plenty of time for a consumer to act. After one year his records get stale and it can become very difficult for a defendant to have to answer and get involved with a lawsuit of that nature. We feel that is a lot fairer than just the one year after it happened. We would suggest that as an amendment, one year statue of limitation after the discovery. And the last thing I would like to respectively submit as an amendment would be this liability for actions for employees under Section 45.50.550 of the CSSB 352. This is very broad, I can see the intent, this was an amendment by the way, that was slipped in at the last minute in the Senate side, it wasn't in the original bill, somebody put it in at the very end. It's on the liability for actions of employees, what I am suggesting is that we add a clause like this: after the word deceptive trade practices, in the course of; in the scope of employment with said person. The way this reads now your employee could go out and on his own in a moonlighting situation for example, or in his own business if he wanted, and maybe do something along this line the way this reads, the employer would be subject to liability. Maybe when he wasn't working for his employer or maybe he did something without the authority of his employer, he was doing something completely outside the scope of his duties for his employer intentionally wanting to screw up the operation. We feel if you put in this: in the course of; in the scope of employment, which is good law, then it would cover the situation. Corporations should be responsible for what their employees do but in the course of; in the scope of their employment, that's the point. WEll, I think I've said enough, maybe too much but this is a general summary we think with these six amendments particularly the two major ones which we have given to you we could support CSSB 352, with some modifications we could support HB 444 we think that probably the original version is the best of the three in our judgement. HB 446, the Governor's bill, would

have to be drastically changed before we could support it. And you are considering two other bills tonight and I would just like to throw that in that we are in favor of HB 411 and SB 188, one sets up the consumer protection division in the Governor's office and again we are in favor of supporting the consumer and helping him out. This door-to-door solicitation bill I think is a good piece of legislation, we are not fighting good consumer legislation, that's our story. But we think it should be reasonable and that it should not harrass the reasonable businessman.

February 3, 1970

The Honorable Lester Bronson
Chairman, House Commerce Committee
Alaska State Legislature
Juneau, Alaska 99801

Dear Mr. Bronson:

It has come to the attention of this office that several clerical errors appear in HB 446, the governor's bill relating to consumer protection. These errors should be corrected to avoid confusion in reading the bill.

Page 1, line 21; "of" should be "or"

In several places throughout the bill section 10 and section 30 appear and have no apparent cross reference in the bill. These section numbers were used in an earlier draft of the proposal and were inadvertently retained in a number of places. Section 10 corresponds to section 470 in the bill and section 30 refers to the present section 500. Thus on

Page 3, line 11; "sec. 10" should be "sec. 470"
Page 4, line 5; "sec. 30" should be "sec. 500"
Page 4, line 10; "sec. 10" should be "sec. 470"
Page 5, line 9; "sec. 10" should be "sec. 470"
Page 6, line 3; "sec. 30" should be "sec. 500"
Page 6, line 5; "sec. 10" should be "sec. 470"
Page 7 line 8; "sec. 10" should be "sec. 470"

Please accept the apologies of this office for this oversight. It is hoped that its correction will not cause undue inconvenience.

Sincerely,

G. KENT EDWARDS
ATTORNEY GENERAL

By: William Edward Spear
Assistant Attorney General

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STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

February 9, 1970

The Honorable Tom Fink, Chairman
Subcommittee on Consumer Fraud
House Commerce Committee
Sixth State Legislature
Juneau, Alaska 99801

Dear Representative Fink:

This is in response to your request for a comparison of HB 444, the proposed consumer fraud bill of the Legislative Council, and HB 446, the Governor's bill on the same subject.

For your information, also included in the analysis is SB 352, the only other comprehensive consumer fraud bill now pending before the legislature, and which was introduced by Senator Terry Miller.

For convenience, the bills have been broken down into several particular areas so that the parallel features of the bills may be scrutinized separately.

I. Prohibited Acts.

(HB 446, pages 1 and 2 to line 22, page 6, lines 7-26)
(HB 444, pages 1, 2 and 3 to line 19)
(SB 352, pages 1 and 2 to line 28)

All of the bills in question are quite similar in their coverage of consumer fraud down to the ninth and tenth subsections, though there are a few minor changes. Subsection (1) of HB 446 contains language which was felt to be more specific than the term "pass off" used in the other bills, though all the subsections (1) contain language which specifically outlaws the age-old fraud of passing off consumer goods. Subsection (3) of the Governor's bill is essentially a combination of subsections (2) and (3) of the other two bills. [Note: The "of" in line 21 is a typographical error and should have been "or". This subsection must be amended accordingly in order to make sense.] Subsections 2, 4, 5, 6, 7, 8,

9 and 10 of HB 446 are all included in HB 444 and SB 352. The latter two bills contain a subsection (11) which is not included in the Governor's bill. This section sets out a specific fraud which, though not covered specifically in HB 446 would be actionable under its subsections (11) and (12).

Subsections (11) and (12) of HB 446 are not included in either of the other bills nor are there similar provisions in the other proposals. Subsection (11) requires that one be damaged by the fraud but does not require intent while subsection (12) states that the deception would be actionable "whether or not" damage has occurred but requires intent. Combined with the power to make regulations (see below) these sections are potentially very valuable and would enable the enforcement official (the Attorney General in all bills) to reach all forms of practice which are unfair or deceptive consumers. As such, it is felt these subsections provide more complete and comprehensive protection to the public against all of the various trade practices which unfairly injure or are calculated to injure consumers.

An important difference between the prohibitions in the Governor's bill and those in the other bills is the lack in most sections, of an intent, or knowledge requirement to constitute a violation. It would appear that a few of the prohibitive acts in the other two bills do not require the element of intent either. For an instance, subsection of both HB 444 and SB 352 does not refer to intent or knowledge. Likewise, subsection (12) of both bills appears not to require the element of scienter. The position that the element of intent not be required to constitute a violation in the Governor's bill is similar to that taken by several states (for instance Texas) and recognizes the essential nature of the activity sought to be prohibited as a fact accomplished, i.e. that someone has been damaged. This is especially true in a civil action where intent or knowledge has no part in such litigation for the salient point here is whether or not a person has been damaged. It is the position of this office therefore, that the element of intent should not be included in the prohibited acts but if it is so included in the final bill intent should not be required in any civil action and that in a criminal action there should be an evidentiary presumption, rebuttable by the defendant, that the act was done with intent.

HB 444 contains several subsections which are not in either the Governor's bill or the Senate bill. To-wit, subsections (13), (14) and (15) are unique to the council proposal. In inverse order, (15) would appear to be covered at least by (6) of the same section, (6) of SB 352 and (5), (11) and (12) of the Governor's bill. Likewise, the prohibition against 'bait and switch' advertising in (14) of HB 444 would probably be covered by (9) of the same section, (9) of the Senate bill and (8), (11) and (12) of the Governor's bill. This section includes the advantage of clear, specific prohibitions but may prove to contain loopholes or allow their creation by the imaginative and ever alert mind of the swindler. Subsection (13) of HB 444 again sets out a specific prohibition which is not included in either of the other bills. It is not precisely clear on the face of the subsection as to what transactions it might cover but may prove to be a useful addition to the prohibited acts section.

Both HB 444 and SB 352 contain identical subsections (b) and (c) which are not included in HB 446. It is not apparent what the specific purpose of subsection (b) is. It is probable that this subsection is aimed at giving an evidentiary advantage where there has been consumer fraud, to one either prosecuting or seeking damages in an anti-trust action, as it refers to injuring competition and competitors. Since, at the time the bill was drafted Alaska had no anti-trust provisions or proposed bills, it was not included in HB 446. However, the intent of the subsection may have been to aid in litigation begun under the several federal anti-trust laws, and may have value as such in the final bill. Subsection (c) was not considered necessary in HB 446 in light of AS 01.10.010 which makes the common law applicable in Alaska where it is not contrary to the State or Federal Constitutions.

A major provision which appears in the Governor's bill, but which does not appear in either of the other proposed bills, is the section on the non-negotiability of certain consumer paper found on page 6, line 7 of HB 446. A similar provision is still pending before the legislature in HB 362, though the technical statutory approach is somewhat different because that bill actually amends the Uniform Commercial Code. The Uniform Commercial Code presently permits a waiver of defense clauses in commercial transactions and the execution of a negotiable instrument is made equivalent thereto, but, in

effect, cedes to each state the power to set its own policies with respect to their use. Thus, in AS 45.05.726(a) the code permits the waiver of defenses "Subject to a statute or decision. . . . " The section of HB 446 presently under discussion would constitute the statute to which this section would refer. This section is intended to reach only paper which is described as negotiable for the purposes of AS 45.05.726(a) for it is this section that automatically forces a waiver of defenses agreement on a buyer signing a negotiable instrument. Thus, it is clear that many types of paper transactions in the consumer market would not be covered by this provision.

Present Alaskan law works a genuine hardship and great injustice on consumers in the state when it permits the transferee of consumer paper to cut off the consumer's defenses. When one buys goods it is his reasonable expectation that if the vendor does not live up to his end of the bargain, he, the consumer, may refuse to pay. In actual fact, however, he very often finds that the note has been assigned away to a third party with whom he has not dealt and of whom he may have never heard, and he is left only with a cause of action against the seller which, assuming the presence and solvency of the seller, means an expensive and time consuming law suit.

There is a considerable and increasing use of the holder of the due-course-doctrine in Alaska for fraudulent purposes. Very often a group moves in, makes a fantastic offer to consumers which is never intended to be fulfilled, takes a note for the products or services, negotiates it, and skips the jurisdiction before anyone even realizes they have been taken. As a practical matter, the consumer has no recourse, least of all against the holder of his note to whom he is legally liable. Very often it is impossible for law enforcement officers to stop the dishonest or sharp dealer before the damage is done. However, an essential part of any such scheme is the sale of the paper taken. If the institutions who close their eyes to the people with whom they are dealing realize that it is they, not the consumer, who will be left holding the bag, the incidence of consumer fraud of this nature will decrease markedly.

It may be noted that the Uniform Consumer Credit Code (U3C) also takes a dim view of negotiable consumer paper, and offers the legislature another alternative in accomplishing the objective sought in the present section, as the U3C has been introduced as SB 211. One of the stated aims of the

U3C in deciding what credit or practices to prohibit or limit, was to insure that there were very real and corresponding benefits to the consumer because of the recognition that restrictions on rights of creditors could lead to higher credit costs and interest rates (see N. Butler, Summary of the Uniform Consumer Credit Code 3, 1968). One of the very first practices outlawed by the U3C was the use of negotiable promissory notes and consumer sales (see 4.850 UCC4, in SB 211, page 46, line 29). The code also contains two alternative proposals as to the question of defenses and their waiver by the buyer as to an assignee of a consumer contract.

Obviously, the thrust of all these proposals is to curtail the abuse of the holder-in-due-course doctrine presently provided under the UCC, as noted above. The purpose of this doctrine is, of course, to insure, as far as it can, the free flow of commercial paper and to encourage investment. The supposition of the typical holder-in-due-course incident is that there are two innocent parties: the obligor who has been wronged by the obligee, and the assignee who took the note from the obligee without notice of the defense. The law, by favoring the holder of the note, seeks to keep the paper moving and relieve the anxieties of prospective transferors. However, the code, as noted, recognizes the difference between consumer paper and other loans, though it allows the local law to determine what the consequences of the distinction, if any, shall be. (It is interesting to note that the UCC originally sought to deny third party freedom from defenses in the case of consumer goods [Uniform Commercial Code § 9-2061 (1952 version)] which version was originally adopted in Pennsylvania.)

One question to be asked and answered, therefore, is whether the holder-in-due-course doctrine, as applied to consumer paper, is really having this classic effect on the money market. It is submitted that it does not. Consumer paper passes from dealer to financer as readily in states that subject the assignee to defenses as in states that do not. The possibility of consumer defenses is merely one of several risks taken by the assignee and the price he pays for the paper and the recourse or reserve arrangement he makes with the dealer are considered at the time the paper is negotiated. Consumer paper is not typically sold between financial institutions (saving perhaps some bulk transfers in which the

second assignee is probably indifferent to the defenses of individual consumers) but if bought directly from the dealers, and it is here that the crux of the situation may be seen most clearly.

Without question the financial institution who is in the consistent practice of buying paper from particular dealers is in the best position to police his retail activities; presently, however, he has no reason to do so. By making the financial institution subject to the defenses of buyers, however, the effect will be to make those institutions put pressure on retailers to improve shoddy or dishonest dealings and force them to examine more carefully the paper sought to be sold by fly-by-night businesses. Moreover, what is the social or economic policy of allowing a financial institution to deal with a disreputable dealer and then stand free of liability while the consumer bears the loss?

There is the possibility that the increased protection afforded by requiring buyers of paper to be a bit more selective in their purchases and by making them subject to the defenses of consumer notes will result in some increased credit costs. However, the small increase, if any, is justified by the amount of lost consumer dollars in personal financial difficulties that may be avoided by this legislation. Moreover, there are aspects of this section which may actually decrease the cost of credit which cannot be ignored; notably the reduction in personal bankruptcies and increased percentages of collections from satisfied customers.

II. Exemptions and Exceptions.

(HB 446, page 2, line 24 to page 3, line 5)
(HB 444, page 3, line 20 to page 4, line 6)
(SB 352, page 2, line 29 to page 3, line 12)

All three bills contain common exceptions and exemptions in subsections (1) and (2), HB 446 and SB 352 being almost identical. These two exceptions are almost always provided in the similar state laws regarding consumer fraud and are considered necessary to protect the parties concerned. It must be noted that HB 444 does not repeal, as do the other two bills, the present sections on false or misleading advertising which contain a provision (AS 45.50.490(b)) similar to all the subsections (2). The retention of this exception in HB 444 presumably is to insure that it will apply to both the civil actions it provides and the criminal actions in the present law.

HB 444 also contains a third exception dealing with a pending action and appeals, and a fourth dealing with trademarks and tradenames used prior to the effective date of the statute.

III. Investigatory, Regulatory, and Subpoena Powers of the Attorney General.

(HB 446, page 3, lines 6 and 7)
(HB 444, page 4, lines 7 to page 5, line 24)
(SB 352, page 3, line 13 to page 5, line 1)

One of the most marked differences between the Governor's bill and the other bills is the inclusion in the latter of very broad powers of investigation centering in the office of the Attorney General. Most of the states enacting this type of legislation have included these powers and they have apparently proven to be a useful enforcement aid primarily in states where court calendars are very crowded and immediate judicial action is difficult or impossible to obtain. It was felt, at the time 446 was drafted, that these extraordinary powers were not necessary to the enforcement of the act for several reasons. At this time, court calendars are not generally so overcrowded in Alaska as to make it difficult to hear motions for restraining orders or injunctions nor are the offices of the Attorney General so far distant from the court rooms that it would be impossible or inconvenient to act quickly in the necessary case. In addition, the relative isolation of the state combined with the relatively small population tends to discourage the fly-by-night or fast moving operator for whom most of these extraordinary powers are required from using Alaskans as his 'dupes'.

It must be noted that the powers granted by these two bills are both exceptional and substantial. The Attorney General, if these provisions are understood correctly, may upon his belief that some deceptive practice is or has taken place, (1) make the person in question file a detailed report in writing and under oath, (2) examine and cross-examine the person, (3) examine the property, records, books, and documents, (4) make copies of any of the above. The only investigation over which a court has any authority apparently is where the Attorney General wants to impound a sample of the property. In addition to these powers the Attorney General may issue subpoenas on his own power. These powers are reinforced by remedies against those refusing to cooperate in the investigation.

Should the legislature decide to include these powers in the final bill, the following general comments are offered for your consideration. SB 352 has identical powers to HB 444. However, it does not contain the safeguards against their abuse as does the latter bill (see HB 444, page 7, lines 5 to line 28). HB 444 recognizes the constitutional problems of self-incrimination which would be inherent in using material directly or indirectly uncovered as a result of an investigation conducted with these powers in any criminal action. (Though it must be noted that HB 444 provides for no criminal sanction.) The powers would, of course, be invaluable in opening up a violator to civil damages or injunction but their aid in convicting a person of a crime is doubtful. This distinction should be made where the broad investigatory powers are provided.

Likewise, HB 444 recognizes the possible abuse of the powers in question by requiring discovered material to be kept confidential. This protection will prevent persons from being pilloried in newspapers, stigmatized, or otherwise attacked unless the Attorney General, in his investigation has found evidence substantial enough to justify litigation. In this line of thought, some consideration might be given to the protection of trade secrets, secret trade information, or other privileged matter. Some states (Massachusetts notably) require that the demand for information shall not contain any requirements which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court. Further court control could be obtained by providing for a motion by the person of whom the information is requested to extend the period of time or even satisfy the demand for good cause. In addition, some consideration should be given to the time and place that such information could be demanded (regular business hours, regular place of business, etc.).

It should be noted here that all three bills allow for regulatory power in the office of the Attorney General. This provision will enable the Attorney General to pinpoint specific schemes and rackets by regulation so that there can be no mistake as to what acts are prohibited. It is an important and useful tool in insuring that comprehensive and effective protection is afforded the public in consumer matters and the provision which will allow in the long run greater fairness to the business man by outlining prescribed conduct with precision.

IV. Restraining Orders, Injunctions, Voluntary Compliance.

(HB 446, page 3, line 8 to page 5, line 3)
(HB 444, page 5, line 25 to page 7, line 28)
(SB 352, page 5, line 2 to page 6, line 12)

Any law seeking to regulate such a sensitive area as consumer fraud requires that a broad spectrum of ways to deal with violators, whose activities may range from borderline to flagrant, be available to the authority charged with enforcement. Though the development of a body of effective regulations as to what specific acts are prohibited will go a long way toward putting the business man on notice as to what activity is prohibited, the use of assurances of discontinuance or voluntary compliances are particularly useful in cases where an honest business man unwittingly may have used a practice that could be considered deceptive. As a practical matter, long standing usages by businesses or industry which would be illegal under a new law may continue unnoticed and such cases should not necessarily be brought into court though something beyond a specific warning may be needed. Also, the use of this device will aid the enforcement officers and courts by giving an alternative to actual litigation for every use of deception. The provisions for voluntary compliance in HB 444 and SB 352 are substantially the same except that the latter adds a subsection (c) (page 6, line 8) which would seek to make a violation of the assurance prima facie (rebuttable) evidence of the violation of the law in civil actions by the Attorney General. This provision attempts to overcome the shortcoming of the voluntary assurance that if it is violated the Attorney General must proceed as if it had never been made.

The Governor's bill does not include it, as do the other bills, the provision for the voluntary payment by the alleged violator of investigative costs or damages on a stipulation to the assurance. This section does not appear to add a great deal to the bill because unless such an agreement were specifically prohibited by statute it could always be entered into regardless of its mention in the consumer fraud bill. Moreover, the Governor's bill does contain substantial provisions for private recourse, and in no way would prohibit this payment which is stated to be voluntary.

The power of the Attorney General to seek injunctions, whether permanent or temporary is common to all three bills and

is a valuable and traditional tool of enforcement and one which we believe is essential to effective enforcement of a deceptive trade practice act.

V. Penalties.

(HB 446, page 6, line 27 to page 7, line 20)
(HB 444, page 7, line 29 to page 8, line 13)
(SB 352, page 6, line 13 to page 7, line 9)

SB 352 and the Governor's bill both provide for criminal sanctions for a violation of the act. HB 444 in marked contrast does not provide for any criminal sanctions. It is submitted that criminal sanctions are often the only way to deal with the purveyors of consumer fraud and that any bill without them would be of little help in actually curbing the incidents of consumer fraud in Alaska. A bill providing only civil penalties seems to assume that the victims of fraud are intelligent middle class individuals who are all aware of their rights, are familiar with and at ease in the courts, and are willing to bring actions to enforce their rights. Many times the persons hardest hit by these frauds are the poor, the illiterate, the feeble, the old, immigrants, the unaware, the unintelligent, and others who need to be protected from the unscrupulous. We are rarely concerned in these laws with the brilliant confidence artist who executes a multi-million dollar stock swindle against the financial wizards of Wall Street; we are talking here about individuals who take advantage of people who are already disadvantaged and prey upon the weakest members of our society. This is criminal activity and should be treated as such.

It is the apparent theory of HB 444 that the present criminal law is sufficient to protect the general public. The only additional public protection afforded by this proposal is the ability of the Attorney General to seek an injunction, which, if broken, could result in a civil penalty of up to $10,000. In other words, the purveyor of fraud has nothing to lose by engaging in fraudulent acts. Even if the Attorney General identifies him, seeks and obtains an injunction, (or assurance of discontinuance) the defrauder has lost nothing. He is free then to find another racket in which to engage so long as the court's order is not violated. The only fear under HB 444 would be from civil suits of those who are aware of the fraud, can prove damage, and are willing to prosecute

their cases. However, as noted below, these civil claimants are given no evidentiary advantage and no specific provision for punitive or treble damages. Moreover, it is difficult to imagine a defrauder entering into an assurance of discontinuance with the Attorney General if the most than can be done is to get an injunction against him. The lack of criminal sanctions negates the use of this manpower saving tool. In short, the bill contains no real deterrent to fraudulent practices and next to no way to punish those who do engage in fraud. HB 444, despite its extensive and carefully drawn provisions prohibiting acts, providing for investigations, etc., will, in fact, change very little the present law which is inadequate to deal with the mounting incidence of consumer fraud in Alaska.

In comparing HB 446 and SB 352, it is notable that upper limit of the fine in the latter is $1,000, while in the former it is $10,000. Both provide for one year imprisonment. It is submitted that the fine will be used much more extensively by the courts than the jail sentence and that a $1,000 fine is an insufficient deterrent to the crimes set out in these bills. Consumer fraud is big business and $1,000 to many of these organizations would be a mere slap on the wrist, and easily written off as a 'business expense'. In addition the civil penalty limit for violation of a court order in SB 352 is only $10,000 as compared with $25,000 in the Governor's bill. Obviously these upper limits are not aimed at small operators but at the large, nation-wide organizations who may be well heeled and may retain 'house counsel' or other advantages.

All of the bills provide for private civil actions but again HB 444 is considerably less helpful than the other two bills. It provides only for actual damages where, in the proper case, the other bills would allow punitive damages (SB 352) or treble damages (HB 446). It does not specifically provide for class actions; nor does it give the evidentiary edge (prima facie) to private litigants where there has been a permanent injunction or final judgment as does the Governor's bill in subsection (e) of 45.50.540 (page 6, line 2). This point is not a minor one for in consumer fraud cases the main difficulty in getting a judgment is the investigation and accumulation of evidence which can be prohibitively expensive. Neither HB 444 or SB 352 provide for this feature. The deletion of this evidentiary advantage is particularly damaging to HB 444 which relies only on the Attorney General's ability to get an injunction and the possibility of private civil recovery for sanctions.

Allowing for private civil actions in a consumer fraud law is extremely helpful to the enforcement agent because it has the effect of making the law 'self-enforcing' to a degree, and especially with regard to the smaller or occasional claims. As a general rule, every such case which is brought by a private party means one less that must be prosecuted by the state. The enforcement officer is thus freer to investigate the professional or organized operations which are of important public concern and which may be prevented before they begin. In addition, it must be noted that the civil action gives the injured party a chance to recover his damages.

In our opinion the Governor's bill and, to the extent applicable, SB 352 are more sensitive than HB 444 to the need for a wide range of alternatives for enforcement. It includes higher limits for violation of orders or injunctions; it provides for a civil action by the state and class actions by injured groups; it provides for revocation of a corporate franchise as a proper case; it provides for a receivership where the court deems such extreme action necessary; and it recognizes the ability of private actions to aid in enforcement.

VI. Definitions.

(HB 446, page 7, line 21 to end)
(HB 444, page 8, line 15 to end)
(SB 352, page 7, line 10 to end)

In HB 444 "person" seems unnecessary in light of AS 01.10.060(7). ✓

I hope these observations have been of help to you in your study of this important legislation. If you have questions concerning it, please do not hesitate to contact this office.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By William Edward Spear
William Edward Spear
Assistant Attorney General

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STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

February 17, 1970

The Honorable Tom Fink
Alaska House of Representatives
Juneau, Alaska 99801

Dear Mr. Fink:

On February 9, 1970 you were sent a letter in which the three consumer fraud bills now pending before the legislature were compared in some detail. Since that time one of the bills, SB 352, has been altered in several important points and this letter is to insure that you understand that the previous letter from this office was concerned with the original bill and not the substitute CSSB 352.

Though the substitute bill incorporates some of the features of the governor's bill (HB 446) it now appears to bear more relation to the Legislative Council proposal (HB 444) than to the former bill. Like HB 446, the substantial investigatory powers of the Attorney General are deleted. However, CSSB 352 goes even further in that it also has removed the power of the Attorney General to make regulations. The importance of this feature was expressed in our previous letter and its absence in a final law would be detrimental to the enforcement branch and the legitimate businessman as well.

The signal change in the substitute bill is the removal of any criminal sanctions from the bill which places it in the same category with HB 444 and leaves the governor's proposal the only bill providing for criminal actions. It is felt that the effectiveness of a consumer fraud law not containing provisions for criminal proceedings would be drastically reduced and would be far out of line with other state provisions and practices. In addition to removal of criminal penalties, it must be noted that the substitute reduces the civil sanctions and no longer provides for punitive damages. In short the substituted bill has had its teeth almost entirely drawn.

CSSB 352, you will note, has added the sections with which your subcommittee was most interested, dealing with consumer paper. This addition, identical to the governor's bill, seems to be a recognition of the importance of taking consumer paper out of the holder-in-due-course doctrine presently provided by the UCC.

Thank you for your patience in this matter. I hope that these supplemental comments will be of help to you.

Sincerely,

G. KENT EDWARDS
ATTORNEY GENERAL

By: William Edward Spear
Assistant Attorney General

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STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K, STATE CAPITOL — JUNEAU 99801

March 10, 1970

The Honorable Barry W. Jackson
Chairman, House Judiciary Committee
House of Representatives
Juneau, Alaska 99801

Dear Representative Jackson:

This is in response to the request of the Vice-Chairman of your committee, Mr. Fink, for clarification of certain issues raised with regard to the sections of HB 446 and CSSB 352 which would have the effect of suspending the holder-in-due-course doctrine, now provided for in the Uniform Commercial Code, where consumer paper is sought to be negotiated.

Section 45.50.550 of proposed House Bill 446 makes any instrument entered into between a retail buyer and seller a non-negotiable instrument within the meaning of the UCC (AS 45.05). Paragraph (b) provides that an assignee of the seller is subject to all claims and defenses of the buyer and the buyer may not agree to limit his rights.

This section is intended to modify AS 45.05.726 which provides:

> Subject to a statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee a claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith, and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under §§ 246 - 402 of this chapter. A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

Under the current practice, when a negotiable instrument and a security agreement are executed by a retail buyer, under the provisions of AS 45.05.726, the buyer by executing the negotiable instrument agrees not to assert any defenses against an assignee of the paper except defenses which could be asserted against a holder in due course. In effect, the assignee becomes a holder in due course and the buyer may not assert against the assignee defenses which he would have available in an action by the seller. Proposed AS 45.50.550 removes the holder in due course protection of the assignee thus allowing the buyer to assert any defenses against an assignee which he could assert against the seller of the merchandise.

Under trade practices an assignee among others could consist of finance companies, small loan companies and state and national banks. There is no statutory conflict under state law which proposed AS 45.50.550 would affect as to any of the various types of assignees. Nor is there any statutory conflict under Federal Law, which would adversely affect national banks in the event proposed House Bill 446 was adopted.

National banks are authorized to purchase installment consumer paper. 12 U.S.C.A. § 84 sets forth the limits of liability of any person to a national bank. Paragraph 13 provides that as to full recourse negotiable or non-negotiable installment consumer paper the bank is subject to a limitation of 25% of its capital and surplus. However, this section goes on to provide if the bank certifies it has evaluated the responsibility of the purchaser of merchandise and is relying primarily on him for payment the 25% limitation is transferred from the seller of the paper to the maker.

For example, if a bank were purchasing negotiable or non-negotiable recourse consumer paper from an automobile dealer it would be limited in the amount that it could purchase to 25% of its capital and surplus. However, if the bank evaluates the responsibility of the buyer of the automobile and certifies that it is relying primarily upon him for payment that paper is not considered in the 25% limitation applicable to the dealer.

The section refers to both negotiable and non-negotiable consumer paper. The provision for certification is not limited to negotiable paper but also includes non-negotiable paper. Therefore, a statute which made all such paper non-negotiable would not change the authorization or the practice which national banks have been following.

It does, of course, because it removes a bank from the protection of a holder in due course, requires it to be a little more circumspect in purchasing paper because of the requirement of evaluating the responsibility of the buyer and certifying that the bank is relying primarily on him for payment. Or in the words of the comptroller of national banks: "What is required essentially is the responsible exercise of prudent banking judgment supported by a reasonably adequate record." (Comptroller's Manual for National Banks, May 1968, Sec. 1620(e).

Several states including California and Massachusetts have adopted legislation such as HB 446 without any noticeable effect on banks. Congress in 1959 when considering 12 U.S.C.A. § 84(13) acknowledged the necessity of including non-negotiable paper in paragraph (13) because various state laws had been enacted limiting the negotiability of consumer paper. Thus it was stated in Senate Report (No. 731) on the amendment:

> Furthermore, there has been a trend in recent years for the varous States to protect consumers by adopting retail installment sales acts which specify the form which obligations covering consumer installment purchases shall take. The form prescribed is almost always nonnegotiable, and in at least some of these States the law prevents the seller of goods from taking a negotiable note in addition to the form of obligation prescribed by statute. In these States banks engaged in this type of financing must take nonnegotiable paper. (U.S. Code Congressional and Administrative News, Vol. 2, 86 Congress, First Session, page 2305.)

For the foregoing reasons, it is the opinion of this office that enactment of the sections on non-negotiability of consumer paper will not have any noticeable effect upon legitimate and good faith commercial transactions. On the other hand, passage of the measure will accomplish a substantial benefit to Alaska's consumers as was explained in our previous memorandum, (See letter to Hon. Tom Fink, Feb. 9, 1970 pp. 3-6) by requiring the purchasers of consumer paper to be more selective in choosing businesses from whom they purchase paper and in policing the activities of the businesses with whom they do choose to deal.

It may be appropriate here to discuss one further point concerning the various approaches to the provision in question. The language of the provisions in HB 446 and CSSB 352 are quite similar to the draft developed by the Committee on State Legislation. (See Suggested State Legislation 1970, The Council of State Governments.) In drafting the provisions both alternatives of the UCCC (SB 211) on the subject were considered but found to be less acceptable than the language of the present bills. SB 211 chose alternative "A" of the UCCC which provides that the rights of the consumer can only be asserted as a matter of defense to or set-off against a claim by the holder of the paper. Under that provision then the consumer has no rights unless the holder sues the consumer. In the commentary on the language here it was stated:

> This would allow continuation of threats to, and impairment of, a consumer's credit rating which result from harassing collection tactics sometimes used without any actual litigation being undertaken against the consumer. (p. 5 of Reprint)

Thus it is felt that though the effect of either approach is aimed at the same problem the legislation under consideration here is superior to that of the UCCC.

I hope these remarks have been of help to you in your study of this provision.

Very truly yours,

G. KENT EDWARDS
ATTORNEY GENERAL

By
Donald J. Beighle
Assistant Attorney General

GKE:DJB:agm

Standard oil Co of Cal

MEMORANDUM

February 20, 1970

1970 Alaska Legislation
S.B. 352, H.B. 444 and
H.B. 446

Each of these similar bills would prohibit numerous "deceptive" or "unfair" trade practices in the name of "consumer protection." In brief summary, they would seek to prevent various defined deceptive or unfair trade practices, principally by providing injunctive and damage sanctions. For reasons detailed below, legislation of this kind would be unsound in any state and is unnecessary in Alaska. S.B. 352[1] will be used for illustrative purposes, with appropriate references to variations in the other two bills.

Section 471.[2] This section forbids any trade practice "defined in this chapter as, or determined under this chapter to be, a deceptive trade practice." Section 461 then sets out twelve categories of deceptive trade practices varying in specificity from the relatively clear "(6) represents that a property is original or new if he knows or should know that it is deteriorated, altered, reconditioned, reclaimed, used or secondhand"; to such amorphous standards as "(8) disparages the property, services or business of another by false or misleading representation of fact," and "(12) makes false or misleading statements of fact concerning the price of property or services, or the reasons for, existence of,

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1. Considered herein is "CSSB 352 am." which is an amended version of original S.B. 352 and which was passed by the Senate on February 11, 1970 and thereupon assigned to the House ~~Consumer~~ COMMERCE and Judiciary committees.
2. The provisions of the bill would constitute Article 4 of Title 45, Chapter 50.

or the amounts of price reductions" (emphasis added).[3] It is then provided that the foregoing deceptive trade practices "are in addition to and do not limit the various types of unfair trade practices actionable at common law or under the laws of this state."[4] This last provision really subverts the ostensible purpose of this kind of legislation, i.e., to notify businessmen of definite wrongs, because in effect it says that if we have forgotten anything it nonetheless may be redressed under

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3. In addition to its generally similar definitions of "unlawful acts and practices" H.B. 446 prohibits engaging "in any other conduct creating a likelihood of confusion or misunderstanding and which misleads, deceives, or damages any person in connection with the sale or advertisement of any goods or services," and using or employing "any deception, fraud, false pretense, false promise, misrepresentation, or knowingly conceal, suppress or omit any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any goods or services whether or not any person has in fact been misled, deceived or damaged."

   H.B. 444's "deceptive trade practices" add to those of CSSB 352am certain restrictions on installment sales, "bait and switch" advertising and the sale of flood or water damaged goods.

4. H.B. 446 does not contain a comparable provision. H.B. 444 contains the same provision and also provides that "Evidence that a person has engaged in a deceptive trade practice is prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition." Apparently this provision is intended to help sellers prove that any loss of profits coincidently sustained by them resulted from the "deceptive" practice, which would be redressable in damages as provided in other provisions of the bill.

the common law or under other statutes.[5]

These categories of deceptive practices would seem to add nothing of importance to Alaska's existing legislation. Present section 45.50.40 forbids all "false, deceptive or misleading advertising with actual knowledge of the facts which make the advertising false, deceptive or misleading, for a business, trade or commercial purpose or for the purpose of inducing, or which is likely to induce, directly or indirectly, the public to purchase, consume, lease, dispose of, utilize or sell a property or service, or to enter into an obligation or transaction relating to a property or service." Related provisions authorize injunctive relief and make violations of the statute a misdemeanor punishable by ninety days imprisonment or a $5000 fine, or both (Alaska Statutes, Title 45, Ch. 50, §§ 470-510).[6]

Indeed, the superfluity of this bill is indicated by the speech of Mr. Gale P. Gotschall, FTC Counsel for Federal-State Cooperation, given on September 26, 1969 to an Arkansas legislative committee. On page 5 of the transcript of that speech Mr. Gotschall includes Alaska as one of 23 states now having laws "which achieve approximately the same results" for consumer protection as the Federal Trade Commission Act.

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5. Indeed, H.B. 444 provides that the Attorney General may "promulgate the rules necessary to administer the provisions of this chapter" (§ 45.90.040), and under H.B. 446 he may "make regulations interpreting" what is and what is not an unlawful act or practice under the statute (§ 45.50.090). Considering the breadth and vagueness of many of the descriptions in the bill, this power is legislative in nature. Such comparable legislation as the FTC may enact is limited to a case-by-case development and is based on the Commission's assumed expertise supported by an extensive staff of lawyers, accountants and economists able to make the detailed economic studies necessary for any intelligent regulation of interstate business. There is no basis for delegating like legislative powers to a state attorney general, and this effort to do so would raise a serious constitutional question.

6. CSSB 352am and H.B. 446 would repeal this legislation.

Section 501. Whenever the Attorney General has "cause" to believe that section 481 is being violated he may sue for temporary and permanent injunctive relief.[7] In contrast, the Federal Trade Commission's repeated requests for a preliminary injunctive remedy have always been denied by Congress, and soundly so. To the extent that the FTC may particularize the broad wording of section 5 of the Federal Trade Commission Act on a case-by-case basis, it is acting essentially like a legislature. To a significant degree the same would be true of courts entertaining cases under section 481 of this bill. No legislature has the power to obtain injunctions pending consideration of proposed laws, and neither the FTC nor a court should have it in similar circumstances.

This section also provides that the court may make any further order "necessary to restore to any other person money or property which may have been acquired by means of a deceptive trade practice." Apparently this contemplates broadening state injunctive proceedings to include damage claims in behalf of the general public. Wholly apart from the unnecessary administrative burdens this would impose on the Attorney General, a damage remedy is inappropriate to enforce a statute of such breadth that proceedings under it would often perforce be announcing new rules which would be applied ex post facto in awarding damages.[8] This point is noted further below.

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7. H.B. 444 adds provisions making the Attorney General a one-man grand jury with power to issue subpoenae and t require written reports and oral testimony under oath, as well as the production of documents. Disobedience may be redressed by court orders not only requiring compliance but restraining the "sale or advertisement of property by a person," which, so far as appears, could be done without notice to and an opportunity to be heard by the respondent (see §§ 45.90.030-45.90.050, incl.).

8. H.B. 444 and H.B. 446 have comparable provisions, those of the latter bill contemplating even the appointment of a receiver and the dissolution of the company and the forfeiture of its right to do business in the state. Such drastic relief is plainly disproportionate to the offenses involved, and even if it were not there are no criteria to guide the court in dispensing such punishment.

Section 511 contemplates the negotiation of "an assurance of discontinuance of a deceptive trade practice" in lieu of litigation. Such a stipulation may provide, among other things, for the payment of "any amount necessary to restore to a person the money or property which may have been acquired by the alleged violator by means of the deceptive trade practice." This provision also would create substantial administrative burden for the Attorney General and would in effect provide for a damage remedy to enforce a statute that, unless made far more specific, would be in many instances too vague to support such relief.[9]

Section 520. Anyone who violates a court order or injunction obtained under this bill is subject to a "penalty" of up to $10,000. This seems excessive in view of the $5000 maximum penalty imposed for violations of cease and desist orders issued by the Federal Trade Commission.[10]

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9. The other bills have comparable provisions. Section 530(d) of CSSB 352am states that a final judgment in state proceedings shall be "prima facie evidence that the person engaged in a deceptive trade practice" as defined in section 461, but there is nothing to indicate whether the subsequent action must involve the same conduct. H.B. 444 states that any violation of such an assurance is "prima facie evidence of a deceptive trade practice for the purposes of civil action or proceeding thereafter by the attorney general, whether a new action or a subsequent motion or petition in a pending action or proceeding" (45.90.000(b)). This sort of once-guilty-always-guilty approach is untenable and presumably unconstitutional since the first conduct may have no sufficient probative connection with the later conduct.

10. H.B. 446 would impose up to $25,000 for each violation of an injunction obtained under the bill (45.50.500).

    H.B. 446 would also impose a "civil penalty" of up to $5000 for each unlawful act or practice and a fine of up to $10,000 and imprisonment for up to one year for "a course of conduct declared unlawful" by the bill (ibid.). There are no civil or criminal penalties for violations of section 5 of the Federal Trade Commission Act, and presumably criminal sanctions could not lawfully be imposed for "crimes" so vaguely defined as many of these "unlawful" or "deceptive" practices.

Section 530. "Any person" may sue for himself and for "numerous persons similarly situated" to recover damages. An individual suing solely for himself may recover his actual damages or $200, whichever is greater. But apparently in class actions each member of the class may recover only his "actual" damages. In each type of action, however, the court in its discretion may award "additional" damages.[11]

There is no private right to damages for a violation of section 5 of the Federal Trade Commission Act, and there should be none for substantive state provisions of comparable vagueness. This is because prohibitions of acts described so vaguely as those that may "mislead" are so broad that it is inappropriate and unfair to impose damages, ex post facto, for a violation which would not be established with certainty until the end of a trial. "Additional damages" in such cases would be even more unfair, especially in the absence of any criteria to govern when they would be awarded. Moreover, the bill would improperly provide what in the usual case would be an unreasonable escalation of actual damages to a minimum of $200. Large and prosperous companies could possibly withstand the financial exposure created by this provision, which would typically result in punitive damages multiplied by the total number of consumers who sue or join in suits brought by others. But the statute is not so limited and it therefore threatens smaller companies with bankruptcy for relatively trivial offenses that may even be inadvertent. In sum, the damage provisions are unnecessary and repressive in the context of legislation this vague, especially when considered with the other remedies provided by the bill.

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11. HB. 446 gives the court discretionary power to award up to threefold the actual damages sustained. H.B. 444 contemplates only actual damages, and does not provide for class actions. All three bills would permit the court to award costs and reasonable attorney's fees.

    Section 45.50.550 states that notes and evidence of indebtedness given for the purchase of consumer goods and services shall be nonnegotiable. This seems unnecessary and will serve to make it more difficult to obtain credit for such purchases. CSSB 352am has the same provisions.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

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BARRY W. JACKSON
THOMAS E. FENTON

November 7, 1969

Mr. Arthur H. Peterson
Revisor of Statutes
Legislative Affairs Agency
Pouch Y
Juneau, Alaska 99801

Re: Consumer Protection Act

Dear Art:

Enclosed is some material on Colorado's new consumer protection act. Senator Terry Miller and I are agreed on your reviewing this proposed legislation in light of our present statutes, and preparing an appropriate bill for prefiling in both houses. Can you go to work on this.

Sincerely,

Barry W. Jackson

BWJ:nb

Encl.

cc: Senator Terry Miller

Received
SEP 12 1969
Offices of
Jackson and Fenton
Attorneys

The State of Colorado

DEPARTMENT OF LAW

DUKE W. DUNBAR
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
104 STATE CAPITOL BUILDING
DENVER, COLORADO 80203

JOHN P. MOORE
DEPUTY ATTORNEY GENERAL

August 26, 1969

JACKSON (1)
FENTON (2)
BROWN
HILARY
OTHER
FILE (3)

Mr. Millard F. Ingraham
Attorney at Law
Suite C, Nerland Building
Fairbanks, Alaska 99701

Mr. Ingraham:

Thank you for your inquiry about Colorado's new Consumer Protection Act.

I enclose a copy of the Act, which became effective July 1, 1969; a copy of a brochure explaining the Act's more important features; an overview of such state legislation in the form of a review by the FTC; and an FTC news release issued recently describing newer developments.

If we can be of further assistance, please call on us.

Cordially,

OFFICE OF CONSUMER AFFAIRS

C. Patrick Carrico

C. Patrick Carrico
Assistant Attorney General

CPC:pmb
Enclosures



(House Bill No. 1030. By Representatives Fuhr, Bain, Bastien, Mullen, Black, Grace, Koster, Cox, Dameron, Braden, Sack, Johnson, Arnold, Baer, Bryant, Burns, Byerly, Calabrese, Colorose, Cooper, DeMoulin, Dittemore, Edmonds, Fentress, Friedman, Grant, Grimshaw, Gustafson, Hamilton, Hinman, Horst, Jackson, Klein, Knox, Lamm, Massari, Ed McCormick, H. McCormick, Moore, Munson, Ed Newman, J. E. Newman, Quinlan, Rose, Safran, Sanchez, Schmidt, Schubert, Showalter, Singer, Sonnenberg, Strahle, and Woodard; also Senators Stockton, Strickland, MacManus, Kemp, Vollack, L. Fowler, Anderson, Cisneros, Decker, MacFarlane, and Taylor.)

CONCERNING CONSUMER PROTECTION; DEFINING DECEPTIVE TRADE PRACTICES; AND PROVIDING ENFORCEMENT BY THE ATTORNEY GENERAL.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. Definitions.—(1) As used in this act, unless the context otherwise requires:

(2) "Article" means a product as distinguished from a trademark, label, or distinctive dress in packaging.

(3) "Certification mark" means a mark used in connection with the goods or services of a person other than the certifier to indicate geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of the goods or services or to indicate that the work or labor on the goods or services was performed by members of a union or other organization.

(4) "Collective mark" means a mark used by members of a cooperative, association, or other collective group or organization to identify goods or services and distinguish them from those of others, or to indicate membership in the collective group or organization.

(5) "Mark" means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

(7) "Service mark" means a mark used by a person to identify services and to distinguish them from the services of others.

(8) "Trademark" means a mark used by a person to identify goods and to distinguish them from the goods of others.

TRADE

(9) "Trade name" means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement used by a person to identify his business, vocation, or occupation, and to distinguish it from the business, vocation, or occupation of others.

(10) "Advertisement" includes the attempt by publication, dissemination, solicitation, or circulation, visual, oral, or written, to induce directly or indirectly any person to enter into any obligation or to acquire any title or interest in any property.

(11) "Property" means any real or personal property, or both real and personal property, intangible property, or services.

(12) "Sale" means any sale, offer for sale, or attempt to sell any property for any consideration.

Section 2. Deceptive trade practices.—(1) (a) A person engages in a deceptive trade practice when in the course of his business, vocation, or occupation, he:

(b) Knowingly passes off goods or services as those of another;

(c) Knowingly makes a false representation as to the source, sponsorship, approval, or certification of goods or services;

(d) Knowingly makes a false representation as to affiliation, connection, association with, or certification by another;

(e) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(f) Knowingly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods or services or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;

(g) Represents that goods are original or new if he knows or should know that they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(h) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if he knows or should know that they are of another;

(i) Disparages the goods, services, or business of another by false or misleading representation of fact;

(j) Advertises goods or services with intent not to sell them as advertised;

(k) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(l) Advertises under the guise of obtaining sales personnel when in fact the purpose is to first sell a product or service to the sales personnel applicant;

(m) Makes false or misleading statements of fact concerning the price of goods or services, or the reasons for, existence of, or amounts of price reductions;

(n) Fails to deliver to the customer at the time of an installment sale of goods or services, a written order, contract, or receipt setting forth the

name and address of the seller and the name and address of the organization which he represents, and all of the terms and conditions of the sale, including a description of the goods or services, which shall be stated in readable, clear, and unambiguous language;

(n) (i) Employs "bait and switch" advertising, which consists of an attractive but insincere offer to sell a product or service which the seller in truth does not intend or desire to sell, which advertising is accompanied by one or more of the following practices:

(ii) Refusal to show the product advertised;

(iii) Disparagement in any respect of the advertised product or the terms of sale;

(iv) Requires tie-in sales or other undisclosed conditions to be met prior to selling the advertised product or service;

(v) Refusal to take orders for the product advertised for delivery within a reasonable time;

(vi) Showing or demonstrating a defective product which is unusable or impractical for the purposes set forth in the advertisement;

(vii) Accepting a deposit for the product and subsequently switching the purchase order to a higher priced item; or

(viii) Failure to make deliveries of the product within a reasonable time or to make a refund therefor.

(p) Knowingly fails to identify flood damaged or water damaged goods as to such damages.

(2) Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

(3) The deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.

Section 3. Exclusions.—(1) (a) This act does not apply to:

(b) Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency;

(c) Publishers, including outdoor advertising media, advertising agencies, broadcasters, or printers engaged in the dissemination of information or reproduction of printed or pictorial matter who publish, broadcast, or reproduce material without knowledge of its deceptive character; or

(d) Actions or appeals pending on the date that this act becomes effective.

(2) This act shall not be interpreted to apply to the use by a person of any service mark, trademark, certification mark, collective mark, trade name, or other trade identification which was used and not abandoned prior to the effective date of this act, if the use was in good faith and is otherwise lawful except for the provisions of this act.

Section 4. Powers of attorney general.—(1) (a) When the attorney general has cause to believe that any person has engaged in or is engaging in any deceptive trade practice listed in section 2 of this act, he may:

(b) Request such person to file a statement or report in writing under oath or otherwise, on such forms as shall be prescribed by him, as to all facts and circumstances concerning the sale or advertisement of property by such person, and such other data and information as he may deem necessary;

(c) Examine under oath any person in connection with the sale or advertisement of any property;

(d) Examine any property or sample thereof, record, book, document, account, or paper as he may deem necessary;

(e) Make true copies, at the expense of the attorney general, of any record, book, document, account, or paper examined pursuant to paragraph (d) of this subsection (1), which copies may be offered into evidence in lieu of the originals thereof in actions brought pursuant to sections 6 and 7 of this act; and

(f) Pursuant to any order of any district court, impound any sample of property which is material to such practice and retain the same in his possession until completion of all proceedings undertaken under this act. An order shall not be issued pursuant to this paragraph (f) without full opportunity given to the accused to be heard and unless the attorney general has proved by clear and convincing evidence that the business activities of the person or persons to whom such order will be directed will not be impaired thereby.

Section 5. Subpoenas—hearings—rules.—(1) The attorney general, in addition to other powers conferred upon him by this act, may issue subpoenas to require the attendance of witnesses or the production of documents, administer oaths, conduct hearings in aid of any investigation or inquiry, and prescribe such forms and promulgate such rules as may be necessary to administer the provisions of this act.

(2) Service of any notice or subpoena may be made in the manner prescribed by law or the Colorado rules of civil procedure.

Section 6. Remedies.—(1) (a) If any person shall fail to cooperate with any investigation pursuant to section 4 hereof or if any person shall fail to obey any subpoena pursuant to section 5 hereof, the attorney general may apply to any district court for an appropriate order to effect the purposes of this act. Such application shall state that there are reasonable grounds to believe that the order applied for is necessary to terminate or prevent a deceptive trade practice as defined in this act. If the court shall be satisfied of such reasonable grounds the court, in its order, may:

(b) Grant injunctive relief restraining the sale or advertisement of any property by such person;

(c) Require the attendance of or the production of documents by such person, or both;

(d) Grant such other or further relief as may be necessary to obtain compliance by such person.

Section 7. Restraining orders—injunctions—assurances of discontinuance.—(1) Whenever the attorney general has cause to believe that a person has engaged in or is engaging in any deceptive trade practice listed in section 2 of this act, he may apply for and obtain, in an action in any district court of this state, a temporary restraining order, or injunction, or both, pursuant to the Colorado rules of civil procedure, prohibiting such

person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice, or which may be necessary to restore to any other person any moneys, or real or personal property which may have been acquired by means of any such practice.

(2) Where the attorney general has authority to institute a civil action or other proceeding pursuant to the provisions of this act, in lieu thereof or as a part thereof, he may accept an assurance of discontinuance of any deceptive trade practice listed in section 2 of this act. Such assurance may include a stipulation for the voluntary payment by the alleged violator of the costs of investigation and any such action or proceeding by the attorney general, and any amount or amounts necessary to restore to any person any money or property which may have been acquired by such alleged violator by means of any such practice. Any such assurance of discontinuance accepted by the attorney general and any such stipulation filed w i the court as a part of any such action or proceeding shall be confidential to the parties to such action or proceeding and to the court and its employees, but upon final judgment by the court that (a) a temporary restraining order or injunction obtained pursuant to subsection (1) of this section has been violated, or (b) an assurance of discontinuance accepted pursuant to this subsection has been violated, or (c) a person has engaged in the same deceptive trade practice as had theretofore been enjoined pursuant to a final permanent injunction obtained pursuant to subsection (1) of this section, or (d) a person has engaged in the same deceptive trade practice which he theretofore had agreed to discontinue by acceptance of an assurance of discontinuance under this subsection, said assurance of discontinuance or stipulation shall thereupon be deemed a public record and open to inspection by any person. Proof by a preponderance of evidence of a violation of such an assurance shall constitute prima facie evidence of a deceptive trade practice for the purposes of any civil action or proceeding brought thereafter by the attorney general, whether a new action or a subsequent motion or petition in any pending action or proceeding.

Section 8. Information and evidence confidential and non-admissible—when.—(1) The attorney general shall not release any information or evidence, obtained by him pursuant to the provisions of this act, to any district attorney or his investigator or to any law enforcement officer for use in any criminal prosecution. Any such information or evidence produced by the attorney general under this act shall not be admissible in evidence in any such prosecution. The provisions of this subsection (1) shall not be construed to prevent the attorney general from disclosing to any district attorney or law enforcement officer the fact of the commission of a crime by any person, nor shall the same be construed to prevent any district attorney or his investigator or any law enforcement officer from independently producing or obtaining the same or similar facts, information, or evidence for use in any criminal prosecution.

(2) Subject to the provisions of section 7 (2) of this act, the attorney general shall not make public the name of any person alleged to have committed a deceptive trade practice during any investigation conducted by him under this act, nor shall the records of investigations or intelligence information of the attorney general obtained under this act be deemed public records available for inspection by the general public; but this shall not be construed to prevent the attorney general from issuing public statements describing or warning of any course of conduct or any conspiracy which constitutes or will constitute a deceptive trade practice, whether on a local, state-wide, regional, or nation-wide basis.

Section 9. Civil penalties.—Any person who violates any court order or injunction issued pursuant to this act shall forfeit and pay to the general fund of this state a civil penalty of not more than ten thousand dollars. For the purposes of this section, the court issuing any such order or injunction shall retain jurisdiction and the cause shall be continued. In any such case of violation, the attorney general may petition the court for the recovery of such civil penalty. Such civil penalties shall be in addition to any other penalty or remedy available for the enforcement of the provisions of this act and of any such court order or injunction.

Section 10. District attorneys to receive and transmit complaints.—(1) The district attorneys of the several judicial districts of this state, their assistants and deputies, are hereby appointed agents of the attorney general, to serve without additional compensation, for the limited purposes described in subsection (2) of this section.

(2) (a) The agents appointed in subsection (1) of this section shall have the following duties:

(b) To receive, on forms provided by the attorney general, complaints from persons concerning deceptive trade practices listed in section 2 of this act; and

(c) To transmit such complaints to the attorney general.

Section 11. Enforcement.—In order to promote the uniform administration of this act in this state, the attorney general shall be responsible for its enforcement, but he may direct any district attorney in this state to enforce the provisions of this act, in which case the district attorney shall have the powers of the attorney general prescribed in this act.

Section 12. Damages.—The provisions of this act shall be available to any person in a civil action for any claim against any person who has acquired any moneys or real or personal property by means of any deceptive trade practice listed in section 2 of this act. Costs shall be allowed to the prevailing party unless the court otherwise directs. The court may award attorneys' fees to the prevailing party.

Section 13. Citation.—This act may be cited as the "Colorado Consumer Protection Act".

Section 14. Severability clause.—If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section 15. Effective date.—This act shall take effect July 1, 1969.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

NEWS RELEASE

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

OFFICE OF INFORMATION 393-6800 Ext. 197

For RELEASE: IMMEDIATE, Wednesday, August 13, 1969

FTC URGES STATES TO ENACT "UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW"

The Federal Trade Commission has renewed its recommendation, originally made in 1966, that the states enact laws to protect the public from deceptive and unfair trade practices. The FTC-recommended legislation would enable the attorney general or other designated state official to investigate and obtain court injunctions with respect to "unfair methods of competition and unfair or deceptive acts or practices in trade or commerce." This is similar to language contained in Section 5 of the Federal Trade Commission Act (Title 15, Section 45, U. S. Code). The Commission also included in its draft alternative language which would prohibit practices which are misleading or deceptive to the public.

Chairman Paul Rand Dixon in discussing the current proposal stated that co-operation between the Commission and state and local agencies is needed if the public is to be afforded adequate protection against practices which cheat consumers and unfairly injure honest businessmen. Chairman Dixon said, "To the extent that the states correct such practices occurring locally, the Commission will be enabled to giv quicker and more effective attention to problems of national significance."

The FTC-recommended legislation is designated "Unfair Trade Practices and Consumer Protection Law." It embodies language not only from the Federal Trade Commission Act but from existing laws of several states, including Washington, Hawaii, North Carolina, Vermont and Massachusetts, as well as Arizona, California, Connecticut Delaware, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, Texas and Wisconsin.

This year's draft contains a provision authorizing the court to decree restituti of money or property to anyone who suffers damage from unlawful acts or practices, to appoint a receiver, or revoke a license or certificate for doing business. Provision is also made for injured parties to initiate suits for the recovery of their own damages as well as losses sustained by others who have been similarly damaged, and for payment of attorney's fees and court costs. Ordinarily the amount involved in a consu transaction is not sufficient to warrant bringing private suit, with the result that thousands of consumers suffer small losses without any remedy being available, Chairma Dixon explained. Minimum relief of $200 is authorized, and the court may, in its discretion, award up to three times the actual damages.

Another new section added to the model law this year provides that a consumer's promissory note or other evidence of debt is different from ordinary commercial paper and, if it is transferred to a finance company or other third party, the consumer may assert all the defenses against the note holder that he could have asserted against

the original seller or lessor of the goods or services. Under the laws of most states, such transferees are treated as "holders-in-due-course" and are not subject to these defenses with the result that if the seller fails to perform the services or to deliver the merchandise as ordered, the buyer may nonetheless be required to pay his note. The Commission feels that eliminating the holder-in-due course doctrine for consumer installment transactions will help to eliminate consumer deception and the hardships which consumers suffer as a result of high-pressure selling methods. Retailers will no longer be able to secure what amounts to virtual immunity from their illegal practices by assigning the installment contracts to third parties. At the same time, more finance companies will be encouraged to investigate the business practices of concerns from whom they buy consumer paper, which may dry up the sources of financing of those fly-by-night operators which engage in deceptive and fraudulent sales practices.

Another new section of the model law recommended by the Commission would authorize assessment of civil penalties of up to $2,000 per violation for initial violations when the violator acted willfully, that is, when he knew or should have known that his conduct violated the law. Criminal penalties of up to $5,000 fine and one year's imprisonment are authorized to be imposed, in the discretion of the court, to deal with violations which entail fraudulent conduct. The Commission felt that these additions were necessary to eradicate the hard-core frauds and predators who victimize aged and low-income consumers, especially in the inner cities.

Participation in enforcement actions by county and city attorneys within the state, subject to approval of the state attorney general, is also authorized under the proposed law. This, it was felt, would promote the development of coordinated enforcement action at state, county and city levels.

In addition to the specific legislative proposal contained in the recommended "Unfair Trade Practices and Consumer Protection Law," the Commission urged that agencies of state and local government take action designed to stimulate competition in low-income areas of their inner cities. The Commission believes that the restoration of competition among merchants who serve these areas is an effective means of assuring that the customer has the opportunity to purchase quality goods and services at fair prices.

The proposals were unanimously adopted by the Commission except that Commissioner MacIntyre did not concur in the recommendation regarding limitation of the holder-in-due-course doctrine. He reserved judgment on this subject pending completion of his analysis and study of the National Consumer Protection Hearing held by the Commission in November-December 1968.

The Council of State Governments has endorsed the draft recommended by the Commission with three changes:

(1) in the prefatory explanation regarding the limitation of the holder-in-due-course doctrine, the Council added a footnote reminding state legislatures to consider this change in conjunction with the Uniform Consumer Credit Code;

(2) in the civil damage section, the Council changed treble damages to punitive damages; and

(3) the Council deleted the section which would have provided criminal penalties. This was done on the motion of a member who expressed the view that their inclusion would unduly complicate and delay investigation under the law, and that state criminal fraud laws are already more or less adequate, the great need being for a law which provides civil procedure and remedies.

The Commission's proposal regarding improvement of competition was consolidated for consideration with related proposals received from the Small Business Administration and the Department of Housing and Urban Development which the Council is also considering.

The official report of the Council's action will be published about September 1, 1969 in Suggested State Legislation for 1970.

The full text of the Commission's proposals may be obtained from Office of the General Counsel, Division of Legislation and Federal-State Corporation, Federal Trade Commission, Washington, D. C. 20580.

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OK → 1) See Law Reviews cited in note #1, 2) then fill in blanks "proposed legislation"

Proposed Legislation

FROM
ASSISTANT GENERAL COUNSEL
FOR FEDERAL-STATE COOPERATION
FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

PAUL RAND DIXON
CHAIRMAN

April 23, 1969

RECEIVED
MAY 19 1969
OFFICE OF THE
ATTORNEY GENERAL

Honorable Phillip S. Hughes
Deputy Director
Bureau of the Budget
Executive Office of the President
Washington, D. C. 20503

Re: Proposals for State Legislation

Dear Mr. Hughes:

This is in response to your letter of December 20, 1968, conveying invitation from the Council of State Governments and the National Governors' Conference for submittal of legislative proposals to be considered by the Committee of State Officials on Suggested State Legislation.

The enclosed proposal No. 1 is a revision and bringing up to date of the model "Unfair Trade Practices and Consumer Protection Law" which was initially recommended by the Federal Trade Commission in 1966 and published by the Council of State Governments in Suggested State Legislation for 1967. This proposal incorporates changes which were published in Suggested State Legislation for 1969 and additional changes which are discussed in the prefatory statement.

The enclosed proposal No. 2 is designed to stimulate competition by encouraging new entry and improving efficiency of business concerns in low-income areas of America's inner cities, for the purpose of providing residents of those areas with better quality merchandise at lower prices.

The Commission is pleased to note that its proposal to license hearing aid fitters and dealers, as adopted by the Council of State Governments in Suggested State Legislation for 1967, has been followed in Indiana, Tennessee, Florida, Kansas, South Dakota, Louisiana, and Arkansas. They, along with Oregon and Michigan, which were first to act, now comprise nine States having such laws.

The Commission is still interested in seeing that model legislation be developed to provide for better regulation of correspondence and vocational schools and their salesmen, as mentioned in our proposals of 1966-68.

3.

The cooperation of the Council of State Governments and the National Governors' Conference in making this opportunity available to us is appreciated.

By direction of the Commission, with Commissioner MacIntyre reserving judgment as to the proposal involving holder-in-due-course doctrine. His separate statement in that regard is attached.

Paul R. Dixon

Paul Rand Dixon
Chairman

Enclosures

UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (Revised for 1970)

This is a revision and bringing up to date of the model Unfair Trade Practices and Consumer Protection Act as initially published in Suggested State Legislation for 1967. This draft incorporates the changes which were published in Suggested State Legislation for 1969, and additional changes discussed below.

The 1967 proposal has been highly successful, in that ten States subsequently adopted such legislation. They are Arizona, Kansas, Maryland, Massachusetts, Missouri, New Mexico, Pennsylvania, Rhode Island, Texas, and Vermont.

To meet differing requirements in the several States, slightly different language has been adopted for Section 2 which declares what acts and practices are unlawful. Three alternative forms of language have evolved for this section. Alternative Form No. 1 prohibits use of those "unfair methods of competition and unfair or deceptive acts or practices" which if used in interstate commerce are prohibited by Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)). This form has been adopted in Washington, Hawaii, Vermont and Massachusetts, and is the form preferred by the Federal Trade Commission. It enables the enforcement official to reach not only deceptive practices which prey upon consumers, but also unfair methods which injure competition. This form will reach price-fixing arrangements, boycotts by suppliers, coercion of retailers, and other trade restraints which tend to create monopoly and enhance prices. However, in some States such anticompetitive practices are already covered by other legislation. For those States, Alternative Form No. 2 is suggested.

Alternative Form No. 2 enables the enforcement official to enjoin all types of deceptive trade practice. In this draft the language used is that proposed by Howard H. Bell, President of the American Advertising Federation, before the Federal Trade Commission at its National Consumer Protection Hearing on November 13, 1968. Mr. Bell suggested that the model act declare unlawful "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce." This language is acceptable to, and recommended by, the Federal Trade Commission. Similar language is used in the laws of Arizona, Delaware, Illinois, Iowa, Kansas, Maryland, Missouri, New Jersey, and North Dakota.

Alternative Form No. 3 would, like the 1967 draft, prohibit the twelve specific types of deceptive practice enumerated in the Uniform Deceptive Trade Practices Act as promulgated by the National Conference of Commissioners on Uniform Laws in 1964. The latter Act provides a remedy only for a private person injured by a deceptive practice. In the draft set forth below, there has been added a subsection (13) to prohibit "any other act or practice which is unfair or deceptive to the consumer." This language was adopted by Council of State Governments in Suggested State Legislation for 1969, and is acceptable to the Federal Trade Commission. It is somewhat narrower in scope than the language of either Alternative No. 1 or Alternative No. 2.

The common feature of these laws is that they enable an enforcement official, usually the attorney general, to investigate alleged or suspected deceptive and unfair trade practices, and to obtain court injunction when violation exists. The enforcement official is given power to accept an assurance of voluntary compliance, when he considers that method of disposition appropriate. This along with the authority to proceed when "in the public interest" protects him from contentious complainants and from the necessity of pursuing every matter, regardless of its relative importance, to formal litigation.

Broad prohibition of unfair and deceptive practices is essential to cope with the novel practices and variations on old practices that sharp operators constantly are inventing to deceive the public and divert trade from honest competitors.

The provision in Section 3(a) that the administering official shall give due consideration and great weight to interpretations rendered by the Federal Trade Commission and the courts, in their administration of similar language of the Federal Trade Commission Act, was adopted by the Council of State Governments in Suggested State Legislation for 1969. This language is from the Rhode Island Consumer Protection Law.

The provision in Section 3(b) for the administering official to issue rules and regulations interpreting the Act is taken from the law of Massachusetts. This provision will reduce costs of administration by allowing the administering official to carry on an educational program among businessmen and consumers, to acquaint them with the requirements and protections of the act, and will encourage self-regulatory effort among the businessmen to attain a high level of compliance at minimum cost.

Section 4(a) continues the exemption for acts done pursuant to other laws of the State or the United States, as in the 1967 draft.

To this draft has been added, in Section 4(b), an exemption for acts done by newspaper and magazine publishers and radio and television broadcasters, and their agents and employees, in the publication or dissemination of advertising, when they do not have knowledge of the false, misleading or deceptive character of the advertisement. The language used is similar to that found in the New York False Advertising Law, and the Consumer Protection Laws of Delaware, Illinois, Iowa, Kansas, Maryland, Missouri, New Jersey, Pennsylvania, Vermont, and Washington. It is also similar to Section 145 of the Consumer Credit Protection Act (the Federal Truth in Lending Law)(P.L. 90-321) which provides that there is no liability under the chapter relating to credit advertising on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated. Such exemption is appropriate because media generally would not have the expertise or facilities needed to determine the truth or falsity of advertisements presented to them for publication. However, in this draft they would be held responsible if they prepared the advertisement, or had a financial interest in the sale or distribution of the product being advertised. Thus the exemption will extend only to acts done in their capacity as publishers and broadcasters on behalf of other advertisers, and will not permit them to misrepresent their own goods or services, or goods or services in which they have a direct financial interest, or to prepare false advertisements for others.

Section 5 has been amended by adding the words "has used" in the phrase which authorizes the attorney general to proceed when he has reason to believe that any person "is using, has used, or is about to use" any method, etc., which is unlawful. This corrects an oversight which occurred in drafting the 1967 model. Addition of these words will obviate the problem which might occur if a defendant contends that he discontinued the alleged practice some days before trial, and that the prosecutor has failed to show continuance of the unlawful practice up to and through the day of trial. This deficiency in the model law was pointed out by Robert L. Meade, Assistant Attorney General of Massachusetts.

Sections 6 and 7 provide additional relief, by authorizing the court to decree restitution of money or property to anyone who suffered damage from the unlawful acts or practices, and to appoint a receiver or revoke a license or certificate for doing business. This is similar to the laws of Arizona, Delaware, Illinois, Iowa, and several other States.

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Section 8 provides for private and class actions, and for payment of attorney's fees and costs, in order that the private bar may be brought into the consumer protection picture. Ordinarily the amount involved in a consumer transaction is not sufficient to interest a private practitioner, with the result that thousands of consumers suffer small losses, without remedy or relief being available. This section incorporates language and ideas suggested by David A. Rice, Assistant Professor of Law, Boston University, in an article entitled "Consumer Transaction Problems" (Boston Univ. Law Review, Fall 1968, p. 560).

Section 9 limiting the holder-in-due-course doctrine in the case of consumer paper is proposed on the basis of information and experience as reflected in F.T.C. Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers (March 1968), the F.T.C. Report on District of Columbia Consumer Protection Program (June 1968), and the Record of F.T.C. National Consumer Protection Hearing (November-December 1968). The Commission is aware of the importance and desirability of providing for the negotiability of commercial paper to the fullest extent practicable. But very often the finance company which purchases consumer paper knows, or should reasonably have known, of the existing defenses, such as non-performance of the seller or defect in the merchandise, and it places an unreasonable burden on the consumer to prove that the finance company had knowledge. The Commission believes that the consumer should be given the benefit of doubt in such cases, by enabling him to assert all defenses against the finance company that he could have asserted against the original vendor or lessor of the goods or services. This provision will, it is believed, go a long way toward eliminating consumer deception, and the hardships which consumers suffer as a result of high-pressure selling methods. A main advantage of the proposal is the built-in self-regulatory feature by which finance companies will be encouraged to investigate more carefully the business practices of retailers with whom they deal. It should dry up the sources of financing which enable fly-by-night operators to fleece aged, low-income and other unsuspecting consumers.

In selecting the language of Section 9, the Commission considered "Alternative A" and "Alternative B" in Section 2.404 of the Uniform Consumer Credit Code promulgated in August 1968 by the National Conference of Commissioners on Uniform State Laws. Alternative A is considered less acceptable than the language of Section 9 recommended herein because Alternative A provides that rights of the buyer or lessee (the consumer) can only be asserted as a matter of defense to or

set-off against a claim by the assignee (holder of the paper). Thus unless the consumer is sued by the holder, he has no rights against the holder. This would allow continuation of threats to and impairment of a consumer's credit rating which result from harassing collection tactics sometimes used without any actual litigation being undertaken against the consumer. Alternative B which requires 90 days' notice to the holder by a debtor to preserve defenses is deemed clearly unacceptable, because it is unrealistic to expect low-income consumers or others not versed in the law to be apprised of their rights under the law and to defend themselves against the holder-in-due-course doctrine. The Commission accordingly has selected for inclusion in Section 9 what it considers to be the most desirable features of Alternative A of the Uniform Consumer Credit Code, coupled with the existing laws of Vermont and Massachusetts which abolish the holder-in-due-course doctrine for consumer paper (Section 2455 of the Vermont Consumer Fraud Act, approved April 17, 1967; and Section 12C, Chapter 255, General Laws of Massachusetts, approved May 31, 1961).

Section 10, providing for Assurances of Voluntary Compliance, is not changed from the 1967 version.

Sections 11 through 14 provide authority for the attorney general to require the filing of reports, to issue subpoenas, to interrogate persons under oath, to examine merchandise and to obtain relevant documentary material, in investigations to determine whether violation of the statute has occurred, similar to authority contained in the Consumer Protection Laws of Arizona, Delaware, Illinois, Iowa, and other States. Woven into these Sections are pertinent provisions adapted from the Federal law applicable to issuance of civil investigative demands, similar to the 1967 draft.

Under Section 15 civil penalties of up to $2,000 per violation may be assessed by the court for initial violations of the Act when the violator acted willfully, that is, when he knew or should have known that his conduct violated the Act. Criminal penalties of up to $5,000 fine and one year's imprisonment are also provided for use in the discretion of the court to deal with violations which entail fraudulent conduct. These additions are needed to eradicate the hard-core frauds and predators who victimize aged and low-income consumers, especially in the inner cities.

For violation of an injunction issued under the Act, civil penalties of up to $25,000 are provided, along with revocation of corporate charter, as in the 1967 draft.

Section 17 is new, to authorize participation in enforcement actions by County and City attorneys within the State, subject to approval of the attorney general. This should promote the development of coordinated enforcement action at State, County and City level.

Additional information regarding this proposal, examples of existing consumer protection laws in the several States, and drafting assistance, may be obtained from

Assistant General Counsel
for Federal-State Cooperation
Federal Trade Commission
Washington, D. C. 20580

Suggested Legislation

(Title should conform to state requirements. The following are some suggestions: "An Act to prohibit unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"; "Unfair Trade Practices and Consumer Protection Law"; or "Buyer Protection Act".)

(Be it enacted, etc.)

Section 1. Definitions.

As used in this Act,

(a) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(c) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(d) "Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material or copy thereof.

Section 2. Unlawful acts or practices.

Alternative Form No. 1:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 2:

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

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Alternative Form No. 3:

The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

(1) passing off goods or services as those of another;

(2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of fact;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or

(13) engaging in any act or practice which is unfair or deceptive to the consumer.

Section 3. Interpretation.

(a) It is the intent of the legislature that in construing Section 2 of this Act due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the

Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended; and

(b) The attorney general may make rules and regulations interpreting the provisions of Section 2 of this Act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C., 45(a)(1)), as from time to time amended.

Section 4. Exemptions.

Nothing in this Act shall apply to:

(a) Actions or transactions permitted under laws administered by the state public service commission or other regulatory body or officer acting under statutory authority of this State or the United States (or the state fair trade law).

(b) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement, and did not have a direct financial interest in the sale or distribution of the advertised product or service.

Section 5. Restraining prohibited acts.

Whenever the attorney general has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by Section 2 of this Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary or permanent injunction the use of such method, act or practice, upon the giving of appropriate notice to that person. The notice must state generally the relief sought and be served in accordance with Section 13 of this Act and at least three (3) days before the hearing of the action. The action may be brought in the (trial court of general jurisdiction of the county or judicial district) in which such person resides or has his principal place of business, or, with consent of the parties, may be brought in the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this Act, and such injunctions shall be issued without bond.

Section 6. Additional public relief.

The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practice in this Act declared to be unlawful, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

Section 7. Powers of receiver.

When a receiver is appointed by the court pursuant to this Act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice declared to be illegal and prohibited by this Act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

Section 8. Private and class actions.

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 2 of this Act, may bring an action under rules of civil procedure in the (trial court of general jurisdiction of the county or judicial district) in which the seller or lessor resides or has his principal place of business or is doing business, to recover actual damages or $200 whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this Section may, if the unlawful method, act or practice has caused similar injury to numerous other persons similarly situated and if they adequately represent such similarly situated persons, bring an action on behalf of themselves and other similarly injured and situated persons to recover damages as provided for in subsection (a) of this Section. In any action brought under this Section, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

(c) Upon commencement of any action brought under subsection (a) of this Section the clerk of court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(d) In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs.

(e) Any permanent injunction, judgment or order of the court made under Section five of this Act shall be prima facie evidence in an action brought under Section eight of this Act that the respondent used or employed a method, act or practice declared unlawful by Section two of this Act.

Section 9. Non-negotiability of consumer paper.

(a) If any contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, such note, instrument or evidence of indebtedness shall have printed on the face thereof the

words "consumer paper," and such note, instrument or evidence of indebtedness with the words "consumer paper" printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code -- Commercial Paper.

(b) Notwithstanding the absence of such notice on a note, instrument or evidence of indebtedness arising out of a consumer credit sale or consumer lease as described in this Section, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease. Any agreement to the contrary shall be of no force or effect in limiting the rights of a consumer under this Section. The assignee's liability under this Section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. Failure to imprint the words "consumer paper" on such note, instrument or evidence of indebtedness shall subject the seller or other responsible person to appropriate civil and criminal sanctions as provided in this Act.

Section 10. Assurances of voluntary compliance.

In the administration of this Act, the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the Act from any person who has engaged or was about to engage in such method, act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of (trial court of general jurisdiction of the county or judicial district) in which the alleged violator resides or

has his principal place of business, or the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest, pursuant to Section 5.

Section 11. Investigation.

(a) When it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this Act, or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any act or practice declared to be unlawful by this Act, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(b) At any time before the return date specified in an investigative demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the (trial court of general jurisdiction of the county or judicial district) where the person served with the demand resides or has his principal place of business or in the (trial court of general jurisdiction of the county or judicial district) where the State Capitol is located.

Section 12. Subpoenas, hearings, rules and regulations.

To accomplish the objectives and to carry out the duties prescribed by this Act, the attorney general, in addition to other powers conferred upon him by this Act, may issue subpoenas to any person, administer an oath or affirmation to

any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms and promulgate such rules and regulations as may be necessary, which rules and regulations shall have the force of law; provided that none of the powers conferred by this Act shall be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture; and provided further that information obtained pursuant to the powers conferred by this Act shall not be made public or disclosed by the attorney general or his employees beyond the extent necessary for law enforcement purposes in the public interest.

Section 13. Service of notice, demand or subpoena.

Service of any notice, demand or subpoena under this Act shall be made personally within this State, but if such cannot be obtained, substituted service therefor may be made in the following manner:

(a) Personal service thereof without this State; or

(b) The mailing thereof by registered or certified mail to the last known place of business, residence or abode within or without this State of such person for whom the same is intended; or

(c) As to any person other than a natural person, in the manner provided in the (rules of civil procedure) as if a (complaint or other pleading which institutes a civil proceeding) had been filed; or

(d) Such service as a (trial court of general jurisdiction of the county or judicial district) may direct in lieu of personal service within this State.

Section 14. Enforcement of investigative demands.

If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the attorney general, the attorney general may, after notice, apply to a (trial court of general jurisdiction of the county or judicial district) and, after hearing thereon, request an order:

(a) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(b) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this State or revoking or suspending the certificate of authority to do business in this State of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

(c) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand.

Any disobedience of any final order entered under this Section by any court shall be punished as a contempt thereof.

Section 15. Civil and criminal penalties.

(a) Any person who violates the terms of an injunction issued under Section 5 of this Act shall forfeit and pay to the State a civil penalty of not more than twenty-five thousand dollars ($25,000.00) per violation. For the purposes of this Section, the (trial court of general jurisdiction of a county or judicial district) issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the State may petition for recovery of civil penalties.

(b) In any action brought under Section 5 of this Act, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by Section 2 of this Act, the attorney general, upon petition to the court, may recover, on behalf of the State, a civil penalty of not exceeding two thousand dollars ($2,000.00) per violation.

(c) Any person who engages in a fraudulent course of conduct declared unlawful by Section 2 of this Act shall, upon conviction, be fined not more than five thousand dollars ($5,000.00), imprisoned for not more than one year, or both, in the discretion of the court; provided that nothing in this subsection shall limit any other provision of this Act.

(d) For purposes of this Section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 2 of this Act.

Section 16. Forfeiture of corporate franchise.

Upon petition by the attorney general, the (trial court of general jurisdiction of a county or judicial district) may, in its discretion, order the dissolution or suspension or forfeiture of franchise of any corporation which violates the terms of any injunction issued under Section 5 of this Act.

Section 17. Duties of County and City attorneys.

It shall be the duty of the County and City attorneys to lend to the attorney general such assistance as the attorney general may request in the commencement and prosecution of actions pursuant to this Act, or, the County or City attorney with prior approval of the attorney general may institute and prosecute actions hereunder in the same manner as provided for the attorney general; provided that if an action is prosecuted by a County or City attorney alone, he shall make a full report thereon to the attorney general, including the final disposition of the matter.

Section 18. Severability.

If any provision of this Act is declared unconstitutional, or the application thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

Section 19. Effective date.

(Insert effective date.)

Alaska Retail Association

Section 45.50.550 - PRIVATE AND CLASS ACTIONS

When any person in any action brought by the attorney general under section 45.50.520 of this title, has been enjoined from committing any act or practice, whether after final adjudication or by consent decree; any person claiming to have been adversely affected by the act or practice giving rise to such injunction may bring suit and recover actual damages, and the costs of suit, including reasonable attorneys' fees, and when appropriate additional damages, restitution, reformation, rescission and other equitable relief.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

ALASKA RETAIL ASSOCIATION, INC.

Testimony on

ALASKA CONSUMER PROTECTION ACT

The retail industry favors having a consumer protection bill which defines and prohibits deceptive trade practices. We know this helps the legitimate businessman, as well as the consumer. In fact, we have made this statement both before the Senate Judiciary Committee and, more recently, before the House Commerce Committee. Most of our previous testimony has been in regard to SB 352 which has passed the Senate and is being considered by you today, along with HB 444 and HB 446.

We have had only two major suggested amendments to the Senate Judiciary Committee substitute of SB 352; those were the elimination or modification of the "class action provisions" contained in Section 45.50.530 and an amendment to Section 45.50.501 which would bring this measure into line with existing Federal laws and regulations. Copies of those suggested amendments have been supplied to each member of this Committee.

I am certain that many of you wonder why our industry is so opposed to the "class action" method of enforcing this type of law. We have, we think, valid ground for our opposition.

First of all, let's define "class action." This is an action where one or more members of a class sue, either for themselves or for themselves and other members of a class. Any judgment entered for the plaintiffs in such an action would, of course, be conclusive for all members of the class represented. It is true that class actions are presently permitted under Alaskan Law; however, inclusion of a statutory provision in a law such as SB 352 would, in all probability, make entry of this type of suit much easier than is presently the case.

On the surface, it might seem that the inclusion of class action provisions in a consumer protection law might help to make it "self enforcing." However, if we explore the possibilities, we will see that the wide use, by consumer, of class action in cases of an alleged deceptive trade practice might create more problems than they would solve.

The possible amounts of recovery against a defendant under a class action are enormous and, on the surface, it would seem to be a fine way to rid ourselves of dishonest businessmen. It is an unfortunate fact, however, that attorneys initiating such an action would not be unduly interested in filing against the "fly-by-night" operator or against marginal businesses skirting the fringes of legality; these businesses would be judgment proof -- or unable to pay large amounts in damages. A class action lawyer and his multiple clients would, instead, be encouraged to bring actions against reputable, financially-sound enterprises who may have been trapped through an inadvertent violation.

A business could be nearly ruined in a situation where a responsible public official would only require an assurance of more care in the future, or, at most, a minor penalty.

Consumers, in cases where they have been victimized by a deceptive trade practice, are entitled to fast and equitable relief. The "class action" theory would not accomplish this purpose because of the intricate and complicated pre-trial procedures required in determining, first of all, the actual "make-up" of the class. There would also be the requirement of notices to all parties (or members of the class); complicated pre-trial procedures and extensive hearings. All of this would serve to cause delay to the consumer in receiving the relief he seeks. Another point to consider is the fact that, if class action suits become the usual method by which this law is enforced, it could place a fantastically heavy burden on our Court System which is already over-loaded.

The retail industry sincerely feels that the consumer, the State, and the businessman would not benefit under a class action suit. We feel that the inclusion of such provisions in a law of this nature would encourage the filing of frivolous actions by attorneys interested only in the large contingent fees possible or by persons solely interested in "harassment" of reputable businessmen.

We would suggest that the consumer, the State and the honest businessman would be much better served if, instead of class actions, a consumer protection law included provisions to give the

Attorney General's Office broad and realistic powers to enforce the Alaska Consumer Protection Act, along with providing for reasonable penalties. In this manner, the honest victim of a deceptive trade practice would be protected. Additionally, the legitimate businessman would not be subjected to unfair private actions that, even though unfounded, could still cost a lot of money to defend.

If this Committee and the legislature still feel that class actions would be a necessary part of this law, we would suggest the inclusion of language which would allow private and class actions after a vendor has been enjoined from committing any act or practice prohibited by this measure either through final adjudication or by consent decree, through an action brought by the Attorney General. A provision of this nature would help to discourage the filing of frivolous, harassment type actions. I have previously distributed copies of a suggested amendment that would accomplish this.

Our other principal suggested change is the inclusion of language in Section 45.50.501 which would bring this law in line with Federal laws and regulations presently in existence. This suggestion is only to preclude the possibility that a business might find itself in the position of having to comply with two separate laws on the same general subject. Copies of our suggested amendment have been made available.

We have several other suggested changes that are minor, copies of which have been also supplied to you. I'll review a few

of these briefly. Sec. 45.50.481 - Deceptive trade practices defined: We suggest that it should be made clear that a person must have knowingly engaged in a deceptive trade practice (INTENT); Section 45.50.491 - Exceptions to the prohibited trade practices - Language should be added to insure that when a person uses, for example, advertising furnished by a supplier which turns out to be false or misleading and he has no knowledge of its misleading character, he will not be penalized; Section 45.50.550 - Liability for actions of employee - The addition of language specifying that the employer shall be liable for an employee's action only in the course and scope of his employment; A new section establishing a statute of limitations, which we suggest, should be one year after the discovery of a deceptive trade practice.

We have mainly discussed SB 352 and have not touched greatly on the other two similar bills. However, I would like to make brief comments on two sections in HB 446 which contain provisions not covered in either HB 444 or SB 352, or in our suggested amendments. First of all, under Section 45.50.560 - Penalties - We feel that a penalty of $25,000 is excessive, particularly when a violation could be through inadvertence. Secondly - in Section 45.50.570 - Forfeiture of Corporate Franchise - This section is extremely harsh. The loss of one's business, which apparently is possible under this section for one violation, seems unduly drastic; we would suggest the complete elimination of this provision.

To sum up -- we favor the passage of SB 352 if our suggested amendments are included. We think a law along these liner would be beneficial to all concerned. HB 446 seems to be, in general, an extremely harsh measure, particularly in view of the fact that there appears to be no pressing problem in Alaska at this time in reference to deceptive trade practices. HB 444, in its original form appears to be the most fair and realistic law and could be supported by the retail industry, subject to a few very minor technical changes or classification of certain portions.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

ALASKA RETAIL ASSOCIATION, INC.

Testimony on SB 352

Alaska Consumer Protection Act

I am Dean Ehrich, Executive Director of the Alaska Retail Association. With me is Mr. Randolph Aires, an attorney from Sears Roebuck & Co. in Los Angeles, who will gladly answer any questions regarding the legal aspects of SB 352, which is being considered at this hearing.

We have examined the Committee Substitute for SB 352, relating to consumer protection in some detail and find that its intended purpose is substantially in accordance with our own views regarding the need to protect consumers and legitimate merchants from unfair and deceptive trade practices. There are, however, at least two major areas in the bill before us which need complete revision. First, and most important, we feel, is elimination of the class action provisions. Second, would be the addition of language in Section 45.50.501 to bring the measure in compliance with existing Federal laws. We also feel, incidently, that a reasonable statute of limitations should be included. We suggest that one year would be a reasonable length of time for a consumer to determine whether or not he had been a victim of a deceptive trade practice.

We would now like to relate our reasons for our suggested changes in more detail. CLASS ACTIONS: On the surface, the provisions in this measure allowing the right of private or class action suits in matters of deceptive trade practices might appear to be reasonable and justified. However, if we explore all the ramifications possible in this type of provision, we soon find that we have indeed opened up a "fine can of worms"; a can of worms that negatively affects not only the retail industry but also our

court system and the consumer its designed to protect.

Let's first define "Class Actions". This is an action in which one or more members of a class sue, either for themselves or for themselves and other members of a class. Where members of a class sue on behalf of other membems, judgement is conclusive for those memb rs of the class thus represented. As you will note, the class action provision in SB 352 would allow for a multiplicity of plaintiffs, all bringing action against a defendant. The possible amounts of recovery against a defendant under a class action are enormous and, on the surface, it would seem a fine way to rid ourselves of dishonest businessmen. However, it is an unfortunate fact that class action lawyers would not be unduly interested in filing an action against the "fly-by-night" operator or marginal businesses skirting the fringes of legality. Such businesses would generally be judgement proof or, at best, incapable of paying substantial damages. Accordingly, class action suits would be least effective in reference to the very type of business against whom they are allegedly designed to protect the consumer. The class action lawyer, with a view toward garnering large fees, would, quite naturally, initiate actions against reputable, financially sound enterprises who would be capable of paying large judgements. He would have little or no interest in "righting a wrong". We can see from this that a legitimate operator could easily become a victim, through honest ignorance or employee neglect, of an action that could quite possible ruin him. He could be ruined, under a class action suit, in circumstances that a responsible public official would only require an assurance from the businessman of greater care in the future or, at most, a minor penalty.

We feel that the consumer is entitled to fast, equitable redress in cases where he has been the victim, either through design or through inadvertance, of a deceptive trade practice. The class action provisions of SB 352 would not accomplish this worthwhile goal. In fact, because of the time consuming, cumbersome procedures involved in such an action, the consumer may never receive the relief deserved. Litigation in a class action would involve questions including the actual "make-up" of the class; would require intricate notices to all members of the class; and would require complicated pre-trial procedures and extensive hearings.

This leads us to our third point against the class action theory. Should this type of action become the usual vehicle for redress of consumer wrongs, a fantastically heavy burden will be placed on or already over-loaded Alaskan Court system. This is inefficient, both from the stand-point of the State and that of the consumer.

We believe that the proper, most efficient method to accomplish the purpose of rapid remedy of consumer abuses is to give the Attorney General's office broad and realistic powers to enforce the provisions of the Alaska Consumer Protection Act. Class actions would only serve to cause confusion and delay to the consumer, burden our courts and perform an injustice to the honest businessman. Class action would be more a form of mob rule rather than rule by law and justice.

If, after due consideration, the committee still feels that class action should be retained in this law, we would suggest the inclusion of a provision which would provide, in brief, that private and class actions would be allowed after a vendor or supplier has been enjoined from committing any act or practice prohibited by this measure, either through final

adjudication or by consent decree, through an action brought by the Attorney General. This would, to a large degree, help to prevent the filing of frivolous, harassment type actions.

Our second major suggested change would be the addition of language in Section 45.50.501 which would serve to bring this measure in line with existing Federal laws and regulations. To accomplish this, we suggest the following: "This act is to be construed uniformly with Federal law and regulations. In any action instituted under this act, it shall be an absolute defense to show that challanged parties are subject to and comply with statutes administered by the Federal Trade Commission, or any rules, regulations, or decisions interpreting such statutes." We feel the inclusion of such language would serve to prevent possible confusion and mis-interpretations from developing in the State's administration of this law.

Mr. Chairman, we wish to thank you and the members of your committee for hearing our views on SB 352. We would be happy to answer any questions you might have of Mr. Aires or myself at this time.

STATEMENT OF RANDOLF H. AIRES BEFORE
ALASKA HOUSE COMMERCE COMMITTEE
CONCERNING S.B. 352 AND RELATED BILLS

I am Randolf H. Aires, an attorney in the Pacific Coast Legal Department of Sears, Roebuck and Co. I appreciate the opportunity to appear before your Committee, both on behalf of my company and on behalf of the Alaska Retail Association, to express the retailing industry's concerns with all three consumer protection bills before your Committee and with CSSB 352 in particular.

The retail industry, which acts as the purchasing agent for the consumer, believes that the interests of its customers are paramount. The words "consumer protection" are magic words these days, and we believe that the honest and legitimate merchants in your communities have a lot to gain from good consumer legislation. Thus we support and will continue to support good and reasonable consumer legislation.

You know, we are all consumers, and I am still young enough to remember painfully how I was taken advantage of as a young newly married person, before going to law school, by a door-to-door salesman with a glib line and plenty of high pressure. The misrepresentations he made really hit me the morning after we signed the contract, and I wish that a law such as your door-to-door solicitation bill being considered here tonight would have been available to me then, so that I could have rescinded that sale.

Your proposed door-to-door solicitation law is just one of twenty significant consumer protection features contained in the Uniform Consumer Credit Code, presently before the Alaska Legislature. We support the UCCC and we hope that it will be studied seriously some time later in the year.

Now, in these three consumer protection acts before you, we're dealing with deceptive trade practices. The twelve enumerated practices in CSSB 352 are practices which we feel should be dealt with in proper legislation.

We believe that a customer who feels he has been defrauded, and who cannot obtain satisfaction through the normal complaint procedure is entitled to a remedy. President Nixon's Special Assistant for Consumer Affairs, Mrs. Virginia Knauer, who has received so much publicity recently, has pointed out that the remedy should be "convenient, expeditious, and effective."

We submit that the consumer class action provision contained in CSSB 352 and H.B. 446 would not provide that type of remedy to the consumer. We believe that indiscriminate class action legislation will create more evils than it will remedy.

Class actions do not result in a speedy and efficient determination of claims. Ask any attorney who has been involved with one. On the contrary, notice requirements, unwieldly pre-trial procedures required when there are numerous litigants, protracted trials, difficult damages determinations, and a heavy burden of management which is placed on the courts, all lead to excessively long and complex proceedings benefitting only the lawyers. I know that you are attempting to deal with the problem of overburdened courts in Alaska this year.

Up to now, courts all over the country have been reluctant to permit traditional class actions, under the existing restrictive rules of civil procedure and court rules allowing class actions, because these actions are likely to benefit practically nobody other than the lawyers who bring them and because they often create lawsuits without merit

where none would have previously existed.

Now we have this new approach which has appeared on the scene - the proposed statutory consumer class action. It first came on the scene last year in the Federal Congress with people such as Senator Tidings championing it. This year we are seeing it at the state legislative level. To my knowledge no state has passed a consumer class action law so far this session.

What are the dangers as we see them with the consumer class action? It is relatively simple for an enterprising attorney (there are many) to marshall an expansive list of plaintiffs through the class action notice provision. You can develop hundreds and thousands of unknown clients just like that. The potential of high legal fees will cause many attorneys to bring unwarranted class actions relating to technical violations of law and against innocent businessmen. The class action might be brought against a businessman who would be willing to resolve, on an informal basis, a valid claim of a consumer. But when maybe only one out of the hundreds or thousands who might be in the so called "class" has a valid claim and the others don't, how could you possibly settle with the lawyer representing the amorphous class?

Add to this the fact that in your bills before you, each so called "injured person" will recover at least two hundred dollars. There is no certainty concerning this provision, but there is the possible interpretation that the two hundred dollar minimum for each person applies to the consumer class action as well as to the private individual action. If this is true, even the people with valid claims may be damaged only in the amount of several dollars, and yet each person in the class would be asking for two hundred dollars or more, whether they have a valid claim or not. It doesn't

take much imagination to see the potential for severe harassment against the legitimate retailer under these conditions.

In class actions such as these, the lawyer becomes less counsel and more the participating litigant and real party in interest, because the financial interest of the attorney for the class may be far more substantial than the interest of any member of the class.

We believe that consumer class actions could impose great economic consequences for the defendant. A class action, even if completely unwarranted, necessitates substantial time and expense in the preparation of a defense. This type of harassment could drive some completely honest small businessmen right out of business.

The astute lawyer will obviously search for defendants who can be subjected to large damage recoveries rather than the judgment proof "fly-by-night" operators who prey upon the unsophisticated. Thats the tradgedy of this whole misguided concept of consumer class actions in bills such as are before you.

Here are some examples of technical violations which could be used against a legitimate enterprise in a consumer class action: an unintentional omission of an address in a guaranty form; a mistake in using the term "regular price" when an article was actually "originally" rather than "regularly" offered at such price; the designation of a product as "imported" but with the omission of the specific country of origin, even though such country produces goods of desirability to the consumers; the advertising of a television picture tube as "23 inch" without referring to it as a "diagonal measurement."

There has been no demonstrated need for a consumer class

action statute, especially here in Alaska, as distinguished from other forms of remedies presently available. Before jumping into this type of legislation, we believe that experimentation and pilot programs involving other methods could be pursued.

Section 45.50.511 of CSSB 352, which gives the Attorney General basic powers, provides that the court may make any order or judgment necessary to restore to the individual money or property acquired because of a deceptive trade practice. So the court would be equipped to take care of the individual without the necessity of the individual bringing his own lawsuit.

Furthermore, small claims courts are available in Alaska for amounts up to $500.00 in damages, where the individual can go into court without the expense and need of an attorney.

The Federal Trade Commission and the Attorney General's office should be available to a consumer who has been defrauded. There is increased emphasis being placed in this direction. In the State of Washington, there are presently three or four attorneys in the Consumer Protection Division of the Attorney General's office, doing their thing for the consumers, and they are quite active. We have no objection to this kind of strick enforcement at the governmental level.

The whole point of all of this is that much more study should be made of this whole area of how to give the consumer a fast and judicious remedy to take care of his small grievances, and it would be quite unwise, in our judgment, to pass this kind of legislation at this time.

We respectfully submit that if the Alaska Legislature is prepared and determined, however, to deal with this complex

subject at this time, the best approach is that being followed by the Nixon Administration at the Federal level. That approach, put into effect at the state level, would involve your Attorney General and his staff, who would effectively prosecute violators of these deceptive trade practices, and if successful, the individual could bring his lawsuit based on the violation and get all the relief necessary from the court. We have given you a suggested amendment to this effect. This approach, we submit, would prevent the harassment from unwarranted private and class actions, and at the same time give the consumer who has a valid grievance his day in court.

Another proposed amendment which we have given to you deals with the rule making powers of the Attorney General under such a law as CSSB 352. Our concern in this area is that we don't feel that merchants should be subject to separate and possibly conflicting interpretations and rulings on what constitutes a deceptive trade practice and on any related matters. Deceptive trade practices listed in your bills, particularly in CSSB 352, are keyed into the Federal Trade Commission Act dealing with deceptive trade practices. We propose that it should be made clear that it is the intent of the Alaska Legislature that the construction of your act will depend in large part upon the interpretation of the Federal Trade Commission and the federal courts who have operated in this area for many years.

Further, we think it should be an absolute defense to an action brought under this act if it can be shown conclusively that the conduct complained of was authorized by the Federal Trade Commission or any rules, regulations or decisions interpreting the Federal Trade Commission Act. This is only fair.

We suggest that four other amendments be considered for

CSSB 352.

Seven of the twelve defined deceptive trade practices have a requirement for intent or knowledge on the part of the person or company perpetrating the practice. It is difficult to know why this distinction has been made. We feel that all twelve defined practices should have this knowledge or intent requirement. The requirement is particularly necessary because some of those definitions are so broad and open to interpretation.

We suggest that the exception provided in Section 45.50.491 (2) should be extended to <u>any person</u> who merely uses some advertising matter which is supplied to him by his supplier, and not just to the newspaper, radio and television people.

We feel that it is only reasonable that a statute of limitations be placed in this bill or any other bill of this nature, granting a one year statute of limitations after the discovery of the unlawful conduct involved.

We recommend that Section 45.50.550 of CSSB 352, dealing with the liability for actions of employees, be clarified to state that the deceptive trade practice perpetrated by the employee would have to arise in the course of and in the scope of his employment with the employer. Otherwise, broadly read, this could apply to something the employee did when he wasn't working for his employer, such as on a moonlighting situation, or it could apply to something which the employee did without any authority, or in connection with some type of activity not in the scope of his assigned duties.

With the adoption of the amendments which we have recommended and given to you, we could support CSSB 352. If H.B. 444 and H.B. 446 are considered by the House, our comments concerning CSSB 352 will apply with equal force to

those bills. Further, we would want some other minor modifications to H.B. 444, and we feel that H.B. 446 would have to be drastically changed before we could support it. In particular, I refer to the sections in H.B. 446 dealing with the Attorney General's regulations, the powers of receivership, the forfeiture of the corporate franchise, and the civil and criminal penalties provided therein.

Since you are also considering tonight H.B. 411 and S.B. 188, I would like to state that we are in favor of both of these consumer bills.

Thank you. I will be glad to try to answer any questions you may have.

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A UNIT IN THE ORIGINAL FILE.