No. 1

STATE OF ALASKA

WILLIAM A. EGAN, Governor

DEPARTMENT OF HEALTH AND WELFARE

OFFICE OF THE COMMISSIONER — POUCH H—JUNEAU 99801

MEMORANDUM

TO: The Honorable William Moran
Chairman, House Judiciary Committee

FROM: Frederick McGinnis, Commissioner
Department of Health and Welfare

SUBJECT: House Bill 5

DATE: February 3, 1971

Mr. F. E. Kester, Registrar of Vital Statistics, has raised a significant point in relation to the filing of death certificates should HB 5 (Alaska Probate Code) become law. His specific concerns are outlined in the attached memorandum.

It is requested that Mr. Kester be afforded the opportunity to appear before your Committee in order that he might speak to these concerns.

FM:JFM:smb
cc: Office of the Attorney General
Division of Administrative Services

MEMORANDUM

State of Alaska

RECEIVED

1971

Office of the Commissioner

TO: Frederick P. McGinnis, Commissioner
Department of Health and Welfare

Thru: V.L. Iverson, Director
Division of Administrative Services

DATE : February 1, 1971

FROM: F. E. Kester, State Registrar
of Vital Statistics

SUBJECT: HB 5, Probate Code

HB 5 revises and codifies the Alaska Probate Code. It is the same bill introduced in 1968 (HB 349) and in 1969 (HB 39). It repeals many existing statutes, among them AS 20.05.130(b), which is quite vital in determination of presumptive death after six years disappearance. We cannot find that this has been adequately replaced in the new proposed code.

The present statute says in part "If a missing person is not heard from for a period of six continuous years, he is presumed to be dead ....." This combined with AS 09.55.050 gives an authority for filing a certificate of death in these cases. Both the Bureau of Vital Statistics and the Supreme Court (Rule 5, Probate Rules) have implemented this, and the resulting death certificates have proven very useful in the settling of estates and other claims.

There are several references to such presumption of death and missing persons in the proposed code; for example:

AS 13.16.070	page 19
AS 13.16.075	20
AS 13.16.085(3)	21
AS 13.36.010	72
AS 13.36.400(b)	87
AS 13.36.410(3)	87

However, no place states specifically that the court may make a finding of presumptive death; nor does it set a standard such as the six years in the present statute.

Possibly the proposed wording is sufficient. We do not feel that this should be assumed. If it is not sufficient authority, we will again have a group of persons for whom we cannot file a death certificate.

I suggest that we call this to the attention of the House Judiciary Committee to see if they have considered this angle. I would like to discuss this rather involved matter with the Committee.

The American Assembly
Columbia University

The Ombudsman

Report of the Thirty-second American Assembly
October 26-29, 1967
Arden House
Harriman
New York

PREFACE

On October 26, 1967, the Thirty-second American Assembly —on *The Ombudsman*—opened at Arden House, on the Harriman (New York) campus of Columbia University. There were 72 participants from the worlds of business, education, communications, labor, and government, and from the clerical, legal and military professions.

For three days, in small discussion groups, they considered in depth various aspects of citizen grievance and redress vis-à-vis government (local, state, and federal); and on the fourth day in plenary session they reviewed and approved the report contained in these pages.

As background for their discussions participants read a volume entitled *Ombudsmen for American Government?* prepared under the editorial supervision of Dr. Stanley V. Anderson of the University of California at Santa Barbara, with chapters and authors as follows:

Chapter 1 —*The Spread of the Ombudsman Idea*—Donald C. Rowat, Carleton University, Ottawa, Canada.

Chapter 2 —*Transferring the Ombudsman*—William B. Gwyn, Tulane University.

Chapter 3 —*State Government and the Ombudsman*—John E. Moore, University of California (Santa Barbara).

Chapter 4 —*The Ombudsman and Local Government*—William H. Angus and Milton Kaplan, State University of New York at Buffalo.

Chapter 5 —*Proposals and Politics*—Stanley V. Anderson.

Appendix —*Annotated Model Ombudsman Statute*—Walter Gellhorn, Columbia University.

Regional Assemblies on *The Ombudsman*, making use of the above-named chapters and The American Assembly conference technique, will be held across the nation with the cooperation of other educational institutions.

The report of The Thirty-second American Assembly reflects the views of the participants in their private, not their official, capacities. The American Assembly itself, a nonpartisan educational organization, takes no position on matters it presents for public discussion, and The Ford Foundation, which generously provided support for this program, similarly takes no official position on the opinions contained herein.

CLIFFORD C. NELSON
President
The American Assembly

Ombudsmen for American Government? (ed. Stanley V. Anderson) will be published by Prentice-Hall, Inc., Englewood Cliffs, New Jersey, in January 1968.

FINAL REPORT

of the

THIRTY-SECOND AMERICAN ASSEMBLY

At the close of their discussions the participants in the Thirty-second American Assembly on *The Ombudsman* reviewed as a group the following statement. The statement represents general agreement; however no one was asked to sign it, and it should not be assumed that every participant necessarily subscribes to every recommendation.

Millions of Americans view government as distant and unresponsive, if not hostile. Though often the targets of the resentment which ensues, government officials are usually not the cause of remoteness, but sometimes its victims. Dehumanized government derives from the impersonality of modern mass society. Improving the means by which individual citizens can voice dissatisfaction with governmental action or inaction will make for a more democratically effective society.

Many devices—governmental and private, formal and informal—already serve to amplify the voice of the individual in the halls of government. Administrative agencies may provide him internal avenues of appeal. Courts may hear his case. Elected representatives may handle his complaint. Public legal aid may be available. News media or private organizations may take up his cause.

All these means of access to government are useful. We should strive further to improve them. Because these existing devices have important functions to serve other than handling citizens' complaints, there is a need in today's large and complex government for mechanisms devoted solely to receiving, examining, and channeling citizens' complaints, and securing expeditious and impartial redress. We believe that

American utilization of the Ombudsman concept will help to fill that need.

What is an Ombudsman?

The Ombudsman is an independent, high-level officer who receives complaints, who pursues inquiries into the matters involved, and who makes recommendations for suitable action. He may also investigate on his own motion. He makes periodic public reports. His remedial weapons are persuasion, criticism and publicity. He cannot as a matter of law reverse administrative action.

What Does an Ombudsman Do?

When the Ombudsman receives a complaint which seems to him to have validity, he asks the agency for an explanation. If necessary he consults further with the complainant and again with the agency. He reports his findings to those concerned. He may suggest a specific remedy to correct individual injustices and he may suggest an improvement in agency procedure.

After consideration, if he finds a complaint to be unfounded, he may discover that the agency has failed adequately to explain its action to the citizen. In this case he may urge the agency to improve its techniques of communication. In other cases he may report to the complainant why his grievance was unfounded. In addition to handling individual complaints, the Ombudsman may make studies and recommendations for the improvement of administration.

The Ombudsman proceeds without cost to the complainant. He is able to operate informally and expeditiously without formal hearing procedures.

Establishment of an Ombudsman

We recommend that Ombudsman offices be established in American local and state governments. We do not recom-

mend the establishment of a single office of Ombudsman for the entire federal government, but we do recommend that applications of the concept be undertaken at the federal level.

The Ombudsman must be selected in a manner which assures public confidence in his independence, impartiality and professional attainments. He should be given a salary which will reinforce his high status in the community.

The Ombudsman should designate his own subordinates. The Ombudsman's term of office should be sufficiently long to minimize his preoccupation with reappointment and should not be coterminous with that of the selecting authority. Provision for his removal from office for cause should be made in such manner as not to interfere with his independence while in office.

The authority of the Ombudsman should extend to public agencies exclusive of courts, legislatures and chief executives. On the other hand, the experience of California and other states with a commission on judicial qualifications—an ombudsmanlike institution—should be given serious consideration as a means for reducing the abuse of judicial authority.

Since American local governments vary greatly in size, population, and legal structure, no uniform design need be followed and advantages are to be derived from experimentation. Such experimentation should include meaningful accessibility to the Ombudsman by all sectors of society.

How Far Does the Ombudsman Go?

An Ombudsman, concerned with mistaken or imperfect action, is a valuable resource. But an Ombudsman often can not provide all the help a citizen may need when confused by or in conflict with the officials who administer public affairs.

At times the citizen must have recourse to an active advocate who can press a demand on his behalf or plan

a defense against governmental action. This need is for adequate legal services. Then, too, citizens require information about governmental services. This need is more properly provided by easily accessible information and referral agencies.

Of course, neither an Ombudsman nor legal and information services can eliminate profound social and economic injustice, which calls for essentially political solutions.

While the Ombudsman does not make policy, his office has two important indirect effects on policy-making. First, the Ombudsman's findings provide the Legislature and the Executive with additional significant information and advice upon which to base major policy improvements. Secondly, the legislative process is enhanced to the extent that the Ombudsman's existence permits and encourages legislators to give increased attention to lawmaking.

Conclusion

We urge the prompt enactment of laws to create the special office required to handle citizens' complaints—the Ombudsman.

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ABOUT THE AMERICAN ASSEMBLY

The American Assembly was established by Dwight D. Eisenhower at Columbia University in 1950. It holds nonpartisan meetings and publisnes authoritative books to illuminate issues of United States policy.

An affiliate of Columbia, with offices in the Graduate School of Business, the Assembly is a national, educational institution incorporated in the State of New York.

The Assembly seeks to provide information, stimulate discussion, and evoke independent conclusions in matters of vital public interest.

American Assembly Sessions

At least two national programs are initiated each year. Authorities are retained to write background papers presenting essential data and defining the main issues in each subject.

About 60 men and women representing a broad range of experience, competence, and American leadership meet for several days to discuss the Assembly topic and consider alternatives for national policy.

All Assemblies follow the same procedure. The background papers are sent to participants in advance of the Assembly. The Assembly meets in small groups for four or five lengthy periods. All groups use the same agenda. At the close of these informal sessions participants adopt in plenary session a final report of findings and recommendations.

Regional, state, and local Assemblies are held following the national session at Arden House. Assemblies have also been held in England, Switzerland, Malaysia, Canada, the Caribbean, South America, Japan and the Philippines. Over ninety institutions have co-sponsored one or more Assemblies.

Arden House

Home of The American Assembly and scene of the national sessions is Arden House, which was given to Columbia University in 1950 by W. Averell Harriman. E. Roland Harriman joined his brother in contributing toward adaptation of the property for conference purposes. The buildings and surrounding land, known as the Harriman Campus of Columbia University, are 50 miles north of New York City.

Arden House is a distinguished conference center. It is self-supporting and operates throughout the year for use by organizations with educational objectives. The American Assembly is a tenant of this Columbia University facility only during Assembly sessions.

American Assembly Books

The background papers for each Assembly program are published in cloth and paperbound editions for use by individuals, libraries, businesses, public agencies, non-governmental organizations, educational institutions, discussion and service groups. In this way the deliberations of Assembly sessions are continued and extended.

The subjects of Assembly programs to date are:

1951 — United States-Western Europe Relationships
1952 — Inflation
1953 — Economic Security for Americans
1954 — The United States' Stake in the United Nations
The Federal Government Service
1955 — United States Agriculture
The Forty-Eight States
1956 — The Representation of the United States Abroad
The United States and the Far East
1957 — International Stability and Progress
Atoms for Power
1958 — The United States and Africa
United States Monetary Policy
1959 — Wages, Prices, Profits, and Productivity
The United States and Latin America
1960 — The Federal Government and Higher Education
The Secretary of State
Goals for Americans

1961 — Arms Control: Issues for the Public
— Outer Space: Prospects for Man and Society
1962 — Automation and Technological Change
— Cultural Affairs and Foreign Relations
1963 — The Population Dilemma
— The United States and the Middle East
1964 — The United States and Canada
— The Congress and America's Future
1965 — The Courts, the Public, and the Law Explosion
— The United States and Japan
1966 — State Legislatures in American Politics
— A World of Nuclear Powers?
— The United States and the Philippines
— Challenges to Collective Bargaining
1967 — The United States and Eastern Europe
— Ombudsmen for American Government?
1968 — Uses of the Seas
— Law and The Changing Society

The American Assembly

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Strong and Lundt were the sole owners of both corporations, the payments were made by one corporation and the cross-petition was filed by the other. Strong and Lundt deny personal liability herein and did not join Guardian in its cross-petition. It is their position that they signed for the corporation in a representative capacity. The contract itself would seem to indicate otherwise, but in view of our holding on the plaintiff's action and the position of Strong and Lundt, it is not necessary to discuss or meet that issue.

We affirm the judgment of the trial court dismissing both the petition and the cross-petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUDITH WAYNE GOODSEAL, APPELLANT.

— N. W. 2d —

Filed January 29, 1971. No. 37605.

1. **Criminal Law: Constitutional Law: Statutes.** The definition of crimes and the penalties for their violation are statutory in this state, and a statute which has the effect of delegating to a private person the punishment to be assessed for a crime is subject to constitutional objection.
2. **Criminal Law: Constitutional Law: Self-Defense.** The Nebraska Self-Defense Act, section 29-114, R. S. Supp., 1969, is unconstitutional and void in that it delegates to a person asserting self-defense the determination of the amount and extent of the force to be used in defending his person as a legal justification for crime.
3. **Constitutional Law: Statutes: Appeal and Error.** Where an unconstitutional statute is relied on to sustain the position of one or more of the parties, this court will, in a proper case, notice the plain error in the premise on which the case was tried and declare the unconstitutionality of the act even though that issue was not raised by the parties.
4. **Criminal Law: Self-Defense.** Killing in self-defense is grounded upon necessity. It exists only in extremity where no other practical means exists to avoid death or great bodily harm apparent to the person resorting to it.
5. ———: — ——. In order to excuse or justify a killing in self-

Re HB 40

defense, the accused must not only have entertained the belief that his life was in danger or that he was in danger of suffering great bodily harm, but the belief must have been reasonable and in good faith.

6. ———: ———. Whether or not an accused killed in fear of death or great bodily harm, or whether or not the killing was motivated by anger, punishment, or vengeance is an issue of fact to be determined by the jury.

7. ———: ———. The bad character of the accused and the fact that she was an acknowledged prostitute does not deprive her of the right of self-defense, but such facts are circumstances to be considered in determining the necessity for and the extent and reasonableness of the force used in connection with the other evidence in the case.

8. Criminal Law: Trial. It is the province of the jury to determine the circumstances surrounding the crime charged; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

9. Criminal Law: Trial: Appeal and Error. After a jury has considered the evidence in the light of the rule regarding circumstantial evidence and returned a verdict of guilty, the verdict on appeal may not, as a matter of law, be set aside for insufficiency of the evidence if the evidence sustains some rational theory of guilt.

10. Trial: Instructions. It is not error to refuse a tendered instruction where its content is covered by other instructions given by the court.

11. ———: ———. A party may not properly complain of an instruction given by the court when such instruction is more favorable to him than that to which he was entitled.

Appeal from the district court for Douglas County: DONALD BRODKEY, Judge. Affirmed.

Paul E. Watts and Michael N. Schirber, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

Heard before WHITE, C. J., CARTER, SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ.

CARTER, J.

The defendant, Judith Wayne Goodseal, was charged

in the district court for Douglas County with murder in the second degree for the killing of Dick Edgar Williams on July 8, 1969. The jury returned a verdict of guilty and the trial court imposed a sentence of 10 to 15 years imprisonment at hard labor in the Nebraska Reformatory for Women. The defendant has appealed.

On July 8, 1969, the body of Williams was found on the street edge of the sidewalk in front of a vacant building at 5208 South 28th Street in Omaha. It was later determined that he had been shot five or six times with .32 caliber bullets. That Williams was the victim of a homicide seemed apparent. The defendant admitted shotting the deceased and asserted that it was done in self-defense.

The deceased and Lee Dunbar were employed at a service station in Omaha. After closing the station in the evening of July 7, 1969, deceased suggested that they go out on the town. They went to several bars, purchased and drank some beer, and finally drove to the Eldorado Club at about 1 a.m. Deceased had previously inquired of a taxi driver as to where they might find some women. They parked Dunbar's car near the Eldorado Club where deceased accosted the defendant who was driving a car leased to Larry W. Pullian and after some negotiation offered $20 for her intimate association. Deceased purported to give defendant two $10 bills which she soon discovered to be two $1 bills and returned them to him. She told him to get out of the car and, according to her testimony, he proceeded to force his desires upon her.

The defendant was 24 years of age, was married, and separated from her husband. She had her two small children in her custody. She had been living with Larry W. Pullian, a single man, for about a year. She admitted that she had engaged in prostitution and admitted further that she had negotiated with deceased for such an act with him. Pullian testified that he had a .32 caliber pistol that he had taken as security for a loan. He stated

that he had placed the pistol on the floor of his car under the driver's seat, but had no knowledge as to whether or not it was loaded. Defendant testified that she did not know there was a gun in the car until immediately before the shooting.

Dunbar testified that after deceased entered defendant's car, defendant and deceased drove around the block and Dunbar followed in his car. Defendant parked her car and Dunbar parked his car about 5 to 10 feet behind it. After some delay he approached the car driven by defendant and made some inquires during the course of which deceased asked him if he had his gun. On signal from the deceased, he answered in the affirmative although he had no gun. Some time later, Dunbar heard five or six pops somewhat similar to exploding firecrackers. He saw defendant drive away and attempted to follow. He saw a man in the back seat but was unable to follow the car. He made an anonymous call to the police and informed them that there had been a shooting in the area. He gave the police the color and license number of the car. The call was verified and answered by the police, but evidence of a shooting was not discovered until the body was later found on the sidewalk in front of 5208 South 28th Street.

Defendant testified that deceased said he did not have $20. She said he tried to force her to remove her clothing which she resisted. She did not testify to making an outcry or to any attempt to open the car door or to leave the car. He finally spun her around with her legs toward him and was threatening to strike her which he did not do. He partially removed his own clothing. She said that she was afraid of deceased and fearful because she knew the man following them had a gun. As he turned her around in the seat, she said her left hand dropped down and came in contact with a gun. She got the gun in her left hand, pointed it at deceased, and squeezed it until all the bullets in the automatic pistol were fired. Deceased slumped back against the door of

the car. She drove the car back in front of the Eldorado Club, honking the horn to attract the attention of Pullian. As she came in front of the Eldorado Club, Pullian came out and, seeing the deceased in the car and the blood on defendant, signaled her to pull over to the curb. She went on, turned the corner, and stopped. He followed and when he reached the car he opened the front door on the right-hand side and the body fell out on the edge of the sidewalk where it was later found by the police. He then got in the back seat because, as he testified, the front seat was covered with blood.

Defendant and Pullian drove away and went home without reporting the incident to anyone. On arrival at their home, Pullian put the gun away and produced it in court at the trial. He washed the floor mats and upholstering to remove the blood stains. The floor mats and upholstering were still damp and the odor of vinegar was noticeable when the car was searched that afternoon by the police.

We point out that defendant admits shooting the deceased with a .32 caliber automatic pistol which she found under the seat of the car. She claims that she squeezed the trigger of the gun until all its shells were fired into the body of the deceased. She contends that she did the shooting while in fear of the deceased and Dunbar who admittedly had followed the Pullian car and had told the deceased in defendant's presence that he had a gun. The evidence is clear that defendant and Pullian had left the body of deceased on the sidewalk in front of a vacant building at 5208 South 28th Street. They left the scene immediately and did not report the killing of the deceased to anyone. On arriving home, the gun was put away and the floor mats and upholstering washed to remove the blood stains and thereby remove evidence of the killing. There is evidence that would sustain a finding of self-defense. On the other hand, there is evidence that defendant attempted to conceal her participation in the killing, an indication of guilt. It was for

the jury to determine under all the facts and circumstances whether or not defendant purposely and maliciously killed Williams without deliberation and premeditation or whether or not she killed him in self-defense as that defense is defined by the law of this state. The jury resolved these issues against the defendant and thereby found beyond a reasonable doubt that defendant did not kill Williams in self-defense and found also that the evidence shows beyond a reasonable doubt the defendant did kill Williams purposely and maliciously but without deliberation and premeditation.

The defendant contends the rule as to the weight to be given to the circumstantial evidence supports the assignment of error that the evidence was insufficient to sustain the conviction. The jury was properly instructed on the circumstantial evidence rule by instruction No. 15 and its giving is not assigned as error. The jury considered the circumstantial evidence in the light of this instruction and concluded that the facts and circumstances tend to connect the accused with the crime charged and were of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. After a verdict of guilty in part on circumstantial evidence and on appeal therefrom for insufficiency of the evidence, the verdict may not be set aside as a matter of law for insufficiency of the evidence if the evidence sustains some rational theory of guilt. State v. Reeder, 183 Neb. 425, 160 N. W. 2d 753; State v. Williams, 183 Neb. 257, 159 N. W. 2d 549; State v. Ohler, 178 Neb. 596, 134 N. W. 2d 265. The evidence is sufficient to sustain the finding of the jury.

Defendant assigns as error the trial court's refusal to give her requested instruction applicable to the law of self-defense. The requested instruction is: "Defendant contends that she acted in self-defense. Self-defense is defined as the use of such force by any means necessary to repel an attack as at the time appeared to defendant to be necessary, although she may have been

mistaken as to the extent of the actual danger, if a reasonable person would also have been so mistaken. The defendant was justified in acting upon the facts as they appeared to him and is not to be judged by the facts as they actually were.

"When a person is threatened or attacked in such a manner that it causes him to believe he is in danger of receiving bodily injury, he may use self-defense to defend himself.

"It is necessary for conviction that the state prove beyond a reasonable doubt that the defendant was not acting in self-defense, and there is no burden on the defendant to prove that she was acting in self-defense."

The foregoing requested instruction was given verbatim by the trial court as instruction No. 9, except that the court inserted a paragraph between the second and third paragraphs of the tendered instruction. The inserted paragraph stated: "However, when the person threatened or attacked uses more force than permitted by the above definition of self-defense, she is guilty of unlawful conduct and is criminally responsible therefor." It is the contention of the defendant that it was error for the trial court to give an instruction which requires the jury to weigh the type and degree of force and means used.

The defendant relies upon the defense of self-defense as defined by section 29-114, R. S. Supp., 1969, referred to herein as the Nebraska Self-Defense Act. The requested instruction tendered by the defendant is based upon the Nebraska Self-Defense Act which became effective on June 5, 1969. The State relies solely upon an interpretation of the act. It is readily apparent that the constitutionality of the act is not raised by either the State or the defendant.

The pertinent part of the act provides: "No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, by any means necessary, himself, his family, or his real or personal property, or

when coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime." § 29-114, R. S. Supp., 1969. The State argues that the language of the statute preserves the concept of the use of reasonable force only in defending one's person or property. On the other hand, the defendant argues that the act provides that a person may use unlimited force in repelling an aggressor and that the common law rule that one may use only reasonable force has been abrogated by the act. It is shown that amendments by the Legislature were twice offered and defeated to change the words "any means necessary" to "any reasonable means necessary." It was clearly the intention of the Legislature to eliminate the word "reasonable" from the common law rule and it would be an act of legislation for this court under such circumstances to place it back in the act by judicial pronouncement. On the other hand, we do not subscribe to defendant's view that the words "by any means necessary" were an opening of the door for the use of extreme and brutal force by an aggressor in every case to protect against minor infringements of personal and property rights. Necessary force does not mean unnecessary force. Nor does "any means necessary" mean "any reasonable means necessary" under the legislative history here shown.

Killing in self-defense is grounded upon necessity. The right exists only in extremity where no other practicable means to avoid the threatened harm is apparent to the person resorting to it. If there is no real or apparent necessity for the killing, the defense fails. In order to be entitled to assert self-defense as an excuse or justification for the killing, the defendant must have been in imminent danger of death or great bodily harm at the time of the commission of the act. In order to justify or excuse a killing in self-defense, the accused must not only have entertained the belief that his life was

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HB-7 and HB-17

March 19, 1971

The Honorable William J. Moran,
Chairman
Judiciary Committee
House of Representatives
Pouch V
Juneau, Alaska 99801

SUBJECT: Ombudsman

Dear Bill:

As state chairman of the American Bar Association Committee on the Ombudsman I am enclosing for your information a copy of the report of the 32nd American Assembly on the Ombudsman and a brief outline on the Ombudsman prepared by the Ombudsman Committee of the American Bar Association.

As you are a member of the Judiciary Committee I am also enclosing a copy of an article, "The Ombudsman and Human Rights", by Bernard Frank, a reprint from the Administrative Law Review of April, 1970.

Although I understand that at least one key committee chairman is opposed to the enactment of any Ombudsman legislation by this legislature, I hope that our furnishing you with this material may induce legislative leaders to permit both committee and floor action on the Ombudsman bills now before the legislature.

Although Alaska is a small state and aggrieved citizens have much more than the usual opportunity to obtain informal relief through the political process, I still believe that Alaska needs and should have an Ombudsman. Hawaii, a state which also has a small population, has reported outstanding success with their new Ombudsman.

I believe that Alaska should place its Ombudsman, for administrative purposes, under the Legislative Council or, if the Legislative Audit Committee is upgraded, under the aegis of that committee. Indeed, historically, the Ombudsman function developed out of the Legislative Audit role of the Swedish Parliament.

Even though this session is drawing to a close, I hope that you will be able to act on the Ombudsman bills and, if floor action cannot be completed, that the bills could be assigned to the Legislative Council or to other committees for interim studies.

Sincerely,

Barry W. Jackson

Barry W. Jackson

BWJ:pb

Encl. (3)

HB-7 and
HB-17

AMERICAN BAR ASSOCIATION
ADMINISTRATIVE LAW SECTION
OMBUDSMAN COMMITTEE

THE OMBUDSMAN

1. **Definition**

   The Ombudsman is an independent governmental official who receives complaints against government agencies and officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints.

2. **Basic Concept**

   The Ombudsman system is one of the institutions essential to a society under the Rule of Law, a society in which fundamental rights and human dignities are respected. Human rights are not protected simply by constitutions or legislation, by guarantees or speeches, by proclamations or declarations, but primarily by the availability of remedies. The Ombudsman system is one of the remedies which seeks to preserve human rights.

3. **Reasons for Ombudsman**

   (a) The post-World War II growth of the welfare state. Government grew in size and extensive powers were given to agencies. Protection is needed against executive and administrative mistake and abuse of power.

   (b) The activities of public administration have become so comprehensive and the power of the bureaucracy so great that the legal status of the individual needs additional protection.

   (c) Existing mechanism — courts, legislatures, the executive, administrative courts, and administrative agencies — are not sufficient to cope with the grievances of the aggrieved and there is a need for a supplementary institution.

   (d) The presence of the Ombudsman has psychological value. His office gives the citizen confidence that there exists a watchdog for the people who will hold government accountable.

   (e) The legislature traditionally concerned with the observance of laws and rulings by public officials has at the same time extensively delegated powers to the administrative authorities. The Ombudsman can serve to aid the legislature in its function of supervising the executive and administrator.

   (f) The Ombudsman gives the citizen an expert and impartial agent without personal cost to the complainant, without time delay, without the tension of adversary litigation, and without requirement of counsel or the intervention of those highly placed.

4. **Types of Action or Inaction Which Give Rise to Complaints**

(a) The Ombudsman investigates complaints arising from administrative action or inaction as a result of which any person has been aggrieved. Such types of action or inaction are:

(1) Injustice.
(2) Failure to carry out legislative intent.
(3) Unreasonable delay.
(4) Administrative error.
(5) Abuse of discretion.
(6) Lack of courtesy.
(7) Simple clerical error.
(8) Oppression.
(9) Oversight.
(10) Negligence.
(11) Inadequate investigation.
(12) Unfair policy.
(13) Partiality.
(14) Failure to communicate.
(15) Rudeness.
(16) Maladministration.
(17) Unfairness.
(18) Unreasonableness.
(19) Arbitrariness.
(20) Arrogance.
(21) Inefficiency.
(22) Violation of law or regulations.
(23) Abuse of authority.
(24) Discrimination.
(25) Disability to act.
(26) Errors, mistakes, carelessness.
(27) Disagreement with discretionary decisions.
(28) Inconsistent with general course of an agency's function.
(29) Mistakes in law or arbitrary in ascertainment of facts.
(30) Based on irrelevant consideration.
(31) Unclear or inadequately explained when reason should have been revealed.
(32) Inefficiently performed.
(33) All other acts of injustice that frequently the governors inflict upon the governed, intentionally or unintentionally.

(b) The Ombudsman may also recommend clarification, amendment, or initiation of legislation and administrative rules and regulations.

5. American Bar Association Resolution

The following Resolution dealing with the establishment of an Ombudsman was adopted by the American Bar Association at the Midyear Meeting of the House of Delegates in 1969:

Be it Resolved, That the American Bar Association recommends:

1. That state and local governments of the United States should give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an ombudsman should contain the following twelve essentials: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act of failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the ombudsman idea within the federal government, the Administrative Conference should (a) experiment by constituting itself an ombudsman for limited areas of federal activity, and (b) encourage and study experimentation by particular agencies with the ombudsman idea.

4. That establishment of a federal government-wide ombudsman system, whether or not designed to assist congressmen in handling constituents' complaints about administration, should await findings based upon the experimentation recommended.

Be it Further Resolved, That the Section of Administrative Law is authorized to present the views of the Association and to encourage the establishment of ombudsmen in accordance with the provisions of this Resolution, by all necessary and appropriate means.

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Attention is called to the following Bibliographies:

1. Bibliography on the Ombudsman by Randy Hamilton, School of Public Administration, University of Southern California, University Park, Los Angeles, California, 90007.

2. Ombudsman-Citizen Defender, Bibliography prepared by Charles L. Smith for the Friends Committee on Legislation of California, 2160 Lake Street, San Francisco, California.

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Washington, D. C.

Ombudsman Committee
Chairman, Bernard Frank
832 Hamilton Street
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Co-Chairman, Benny L. Kass
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For further information with respect to the Ombudsman, write to Chairman, Bernard Frank.

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HB-7 & HB-17

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An effort is made to survey the current status of the ombudsman throughout the world. The author is deputy chairman of the Federal Bar Association's Committee on the Ombudsman.—The Editors.

THE OMBUDSMAN AND HUMAN RIGHTS

By
BERNARD FRANK*

The Geneva Conference on World Peace Through Law in 1967 recommended that the World Peace Through Law Center "disseminate widely information about the role which an ombudsman can perform in protecting citizens against violation of their rights by administrative authorities; and seek to assist financially or otherwise projects designed to encourage research on the establishment of ombudsmen."[1] It is, therefore, appropriate to discuss at this Bangkok World Conference on World Peace Through Law the subject, "Man, Rights and Law (Ombudsman)."

WHAT IS AN OMBUDSMAN?

The "Ombudsman" is an independent governmental official who receives complaints against government agencies and officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints. To this definition must be added the basic concept that the Ombudsman system is one of the institutions essential to a society under the Rule of Law, a society in which fundamental rights and human dignities are respected. Therefore, our frame of reference when we discuss the Ombudsman is concern with the preservation of human rights.

EXISTING NATIONAL OMBUDSMAN INSTITUTIONS

Today there are national Ombudsman officials in Sweden, Finland, Denmark, Norway, New Zealand, Guyana, Tanzania, Great Britain, and Northern Ireland. Space limitations will permit only a mini-analysis of the institution in each country.[2] This work paper has excluded consideration of Military Ombudsmen in Norway and West Germany.

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*Deputy Chairman, Federal Bar Association Committee on Ombudsman; Member, American Bar Association Committee on Ombudsman.

[1]World Peace Through Law Center, Programs for Progress Toward Peace Through Law, Future Work Program, Topic II, Human Rights, 28-29.

[2]Publications of particular relevance are GELLHORN, OMBUDSMEN AND OTHERS (1966); ROWAT, ed., THE OMBUDSMAN, (2d ed. 1968); THE OMBUDSMAN OR CITIZEN'S DEFENDER:

A. Sweden.[3]

In 1968, the offices of the Justitieombudsman (created in 1809) and the Militieombudsman (concerned with military affairs since 1915) were combined into one institution with three seperate Ombudsmen each known as Justitieombudsman: Alfred Bexelius, handling social and institutional welfare; Hugo Henkow, who is in charge of military and taxation matters, shares the task of controlling the courts, the prosecutors, and the police, with Ulf Lundvik, who also supervises sheriffs, local government, and the rest of civil administration.[4] The Ombudsmen with a common staff do not operate as a committee, each working separately and deciding his own cases.[5] The following selected characteristics of the office are noted: *Principal duties*-to supervise observance of laws by courts, public officials, and military officers; *Jurisdiction*-includes all officials (except members of the Cabinet, and the Chancellor of Justice), judges (with some limitations where members of the Supreme Court of Justice and the Supreme Administrative Court are concerned), municipal boards and officials (except elected members of municipal councils), clergymen of the State Lutheran Church, and military officers and officials; *Complaints*-may be made by anyone in writing or investigation may be initiated by Ombudsman, who also has discretion to decide which complaints shall be investigated; *Investigations*- has power to investigate with access to files and minutes of courts and agencies, and call upon officials for assistance; *Remedies*-may prosecute or commence disciplinary proceeding but the most frequent device used is a letter of admonition or reminder; has no power to change a decision of a court or an administrative agency; *Defects in laws*-may call attention to defects in laws and suggest amendments or

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A MODERN INSTITUTION, Annals, Vol. 377 (May 1968); ANDERSON, ed., OMBUDSMEN FOR AMERICAN GOVERNMENT; Remedies Against the Abuse of Administrative Authority—Selected Studies, United Nations, 1964, ST/TAO/HR/19; Ombudsman, Hearing Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 89th Cong., 2d Sess., pursuant to Senate Resolution 190 (1966).

[3]Effective Realization of Civil and Political Rights at the National Level—Selected Studies, United Nations, 1968, BEXELIUS, The Ombudsman, 27; Bexelius, The Swedish Ombudsman, 17 U. Toronto L.J. 170 (1967); Jagerskiold, The Swedish Ombudsman, 109 U. PA. L. REV. 1077 (1961); The Swedish Parliamentary Ombudsmen, Annual Report for 1968, Summary in English; GELLHORN, supra note 2, 194; WENNERGREN, The Rise and Growth of Swedish Institutions for Defending the Citizen Against Official Wrongs, Annals, supra note 2, 1; Bexelius, The Origin, Nature, and Functions of the Civil and Military Ombudsmen in Sweden, Annals, supra note 2, 10.

[4]Ombudsman Annual Report for 1968, supra note 3, 1-2.

[5]Letter from Alfred Bexelius to Bernard Frank, April 8, 1969.

ask an administrative agency to change a practice; *Inspection*-may make inspections of courts, police, prosecutors, agencies, and institutions; *Discretionary decisions*-may review but does so only in exceptional cases; *Exhaustion of other remedies*-not required; *Parliament*-annual reports are made to Parliament; each year administration is examined by a committee of Parliament; *Election*-elected by 48 electors of the Riksdag for a term of four years or term of Parliament and may be reelected; *Case load*-in 1968, received 2120 complaints and originated 494 on their own initiative; about 80% of the cases are unfounded or without evidence.

B. Finland.[6]

Risto Leskinen, the Finnish Parliamentary Commissioner (an office created in 1919) has functions which are to a great extent comparable with the Chancellor of Justice appointed by the President. Most of the selected characteristics of the Swedish Ombudsman are applicable and separate comment need be made only with respect to the following: *Principal duties*-to see that "laws, decrees and official regulations are observed by judges and other officials."; *Jurisdiction*-public administration, including judges, members of the Cabinet, local officials, military officers, and ecclesiastical organizations or organs functioning with the responsibility of public officials;[7] *Discretionary decision*-may be reviewed if the official exceeds his discretionary power, raising a question of legality; *Reopening cases*-can request the Supreme Court or the Supreme Administrative Court to annul prior decisions and reconsider a case if there "has been a fault in the procedure, if the evidence was based on perjury or false documents," if there is "new relevant evidence or if the application of the law has been evidently erroneous";[8] *Election*-elected by Parliament for a term of four years and may be reappointed; *Case load*-in 1967, received 1294 complaints, took up 136 on his own initiative, and the Chancellor of Justice referred 136.[9]

C. Denmark.[10]

The Parliamentary Commissioner for Civil and Military Government

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[6] LESKINEN, THE POSITION AND FUNCTIONS OF THE FINNISH PARLIAMENTARY OMBUDSMAN (1965); GELLHORN, supra note 2, 48; KASTARI, The Chancellor of Justice and the Ombudsman, ROWAT, supra note 2, 58; HIDEN, Finland's Defenders of the Law, Annals, supra note 2, 31.

[7] Letter from Mikael Hiden, Secretary, Eduskunnan oikeusasiamies, to Bernard Frank, April 1, 1969.

[8] Hiden, supra note 7.

[9] Hiden, supra note 7.

[10] HURWITZ, The Ombudsman, The Danish Institute for Information (1968);

has been held by its only incumbent, Professor Stephan Hurwitz, since 1955. The office differs appreciably from Sweden's, as is apparent from the following selected characteristics: *Principal duties*-to keep "himself informed as to whether any person within his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties";[11] *Jurisdiction*-all Ministers, civil servants, and all other persons acting in central government service (except judges) including military administration, local government (with some limitation), and civil servants of the Lutheran Church (except in matters which involve tenets or preachings); *Complaints*-as far as possible in writing with name and address and with a one year statute of limitations; has discretion to decide which complaints he shall investigate; *Investigation*-can investigate with all government (state and local) officials required to give information and supply documents and records (subject to limitations regarding state secrets and rules in the Administration of Justice Act); *Remedies*-cannot prosecute but does give his views, has no power to change an administrative decision; *Defects in laws*-may call attention to defects in existing legislation or administrative regulations; *Inspections*-may inspect any state agency (subject to limitations set forth in Administration of Justice Act) and may inspect premises of local government in connection with a case involving local government; *Discretionary decisions*-criticizes such decisions when supported by experts and "when as far as can be ascertained, there exists reliable documentary evidence of an arbitrary or unreasonable decision;"[12] *Exhaustion of other remedies*-except in cases where the Ombudsman has acted on own initiative, complaints against decisions which may be set aside by a higher administrative authority may not be brought before him until the higher authority has given its decision; the Ombudsman has pointed out that this restriction applies only to "decisions" and not to mistakes made in the treatment of cases by subordinate authorities or the conduct of the officials concerned;[13] *Civil servants*-a civil servant has the right when complained against to have his case removed to disciplinary investigation by the agency concerned; *Election*-elected after every general Parliamentary election for term of Parliament and may be

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CHRISTENSEN, The Danish Ombudsman, 109 U. PA. L. REV. 1100 (1961); GELLHORN, supra note 2, 5; ABRAHAM, The Danish Ombudsman, Annals, supra note 2, 55; PEDERSEN, Denmark's Ombudsmand, ROWAT, supra note 2, 75.

[11] Article 3, Directives for the Parliamentary Commissioner for Civil and Military Administration, HURWITZ, supra note 10, 45.

[12] HURWITZ, supra note 10, 9.

[13] HURWITZ, supra note 10, 13.

re-elected; *Parliament*-annual reports and special communications to Parliament are made through a Parliamentary Committee; *Case load*-about 1000 cases a year with only 10% to 15% found justified.

D. Norway.[14]

In 1962, the Ombudsman for Public Administration was established, an office held by Andreas Schei. Norway was influenced by both the Swedish and the Danish systems but more particularly by Denmark, as is indicated by the following selected characteristics: *Principal duties*-to "endeavour to ensure that the public administration does not commit any injustice against any citizen and that civil servants and others in the service of the administration do not commit errors or neglect their duties";[15] *Jurisdiction*-covers government administrative organs, Cabinet Ministers as heads of ministries, civil servants, and others in the service of the government, as well as local government (since January 1, 1969), but excludes Cabinet decisions, the courts, the Auditor of Public Accounts, and matters which come within the province of the Military Ombudsman; *Complaints*-must be in writing and signed (but with a one year statute of limitations) from someone personally wronged; has discretion to dismiss a complaint obviously unfounded; since the Ombudsman can investigate on own initiative, can take up cases which lack the necessary personal interest or which are stale;[16] *Investigation*-has power to investigate, with the right to obtain information from all officials and with access to documents and records (but not internal work papers); *Remedies*-only sanction is to express an opinion with no power to compel compliance or to change or make an administrative decision; *Defects in laws*-may call attention to defects in acts, administrative regulations, or administrative practices; *Inspections*-no general inspection duties but may visit or inspect agencies in course of an investigation; *Discretionary decisions*-can review and give opinion concerning discretionary decisions which are "manifestly unreasonable or otherwise contrary to proper administrative practices"; *Exhaustion of remedies*-administrative remedies must be exhausted unless there is a particular reason for the Ombudsman to handle without delay; *Election*-selected by Parliament after each general election for four years or until the next general election; *Parliament*-barred from dealing with a

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[14] THUNE, The Norwegian Ombudsmen for Civil and Military Affairs, Annals, supra note 2, 41; OS, The Ombudsman for Civil Affairs, ROWAT, supra note 2, 95; WALNUN, The Norwegian Ombudsman, article, No. 21, published by the Royal Ministry of Foreign Affairs, Oslo, Norway (1967); GELLHORN, supra note 2, 154.

[15] Rules for the Storting's Ombudsman for the Administration, issued 1968, Sec. 1.

[16] Walnun, supra note 14, 1.

complaint if subject is one under consideration by Parliament or the Standing Committee on Parliamentary Control, Ombudsman makes annual and special reports; can be referred cases from Parliament; *Case load*-about 1000 complaints annually; about 15% are justified.

E. New Zealand.[17]

Sir Guy Powles is the Parliamentary Commissioner, an office created in 1962. New Zealand was influenced by the Danish system but the first country outside of Scandinavia to transplant the Ombudsman did so with striking variations, again illustrated by selected characteristics: *Principal function*-"to investigate any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any person of the Departments or organizations named in Parts I and II of the Schedule to this Act, or by any officer, employee, or member thereof in the exercise of any power or function conferred on him by any enactment";[18] *Jurisdiction*—limited to government departments and other organizations enumerated in a Schedule to the Act; has no direct power over Ministers but can investigate a recommendation to a Minister and may apply to the Supreme Court for a declaratory order where a question arises as to jurisdiction; noteworthy among omissions are the local government, administrative tribunals, and the courts; in 1968, the Ombudsman obtained jurisdiction over Education and Hospital boards; jurisdiction is limited with respect to members of the Armed Forces; the powers conferred on the Commissioner may be exercised notwithstanding any provision in any enactment as to finality of an administrative act or that there shall be no right of appeal or that no proceeding or decision shall be challenged, reviewed, quashed or questioned; *Complaints*-must be written; requires payment of two dollars (which can be waived); has discretion not to investigate including where complainant had knowledge of matter for more than twelve months before complaint received by Commissioner or does not have sufficient personal interest in the subject matter; can investigate on his own motion; *Investigation*-has the power to investigate (must be in private) and to obtain information from such

[17] NORTHEY, New Zealand's Parliamentary Commissioner, ROWAT, supra note 2, 127; SAWER, The Ombudsman and Related Institutions in Australia and New Zealand, Annals, supra note 2, 62; GELLHORN, supra note 2, 91; Powles, Address, Canadian Bar Association (1964), reprinted in U.S. Senate Document, supra note 2, 207.

[18] Parliamentary Commissioner (Ombudsman) Act 1962, Section 11 (1). A 1968 Amendment 11 (2) relates to Part III of the Schedule adding Specified Local Organizations.

persons as he thinks fit; has the power to require production of documents or papers and to compel attendance of officials and complainants to be examined on oath, subject to the right of the Attorney General to certify that certain limited matters should not be disclosed; *Remedies*-limited to reporting his opinion and recommendations to the department and the Minister concerned and if no action is taken which he considers adequate may report to the Prime Minister and Parliament; the grounds on which he may make a report and recommendation are broad: contrary to law; unreasonable, unjust, oppressive, or improperly discriminatory in accordance with a rule of law, statute, or practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; based wholly or partially on mistake of law or fact; or was wrong; *Defects in laws*-in any case, can call attention to altering of practices or reconsideration of law; *Inspections*-during investigations can make on site inspection; *Discretionary decisions*-can investigate where discretionary power has been exercised for an improper purpose or on irrelevant grounds or with irrelevant considerations or where reason should have been given for decision; *Exhaustion of remedies*-cannot investigate an administrative act which could be appealed on its merits to any court or administrative tribunal; *Parliament*-makes annual and interim reports to Parliament; any Committee of the House of Representatives may refer to him for investigation and report petitions; *Election*-appointed on recommendation of House of Representatives by Governor General for three or four year term (depending on session at which recommendation is made) and may be reappointed; *Case load* in the year ending March 31, 1968, received 631 complaints, handled a total of 555 cases, found 56 justified, and issued formal recommendations in six cases.[19]

F. Guyana.[20]

The 1966 Constitution of Guyana established the office of Ombudsman, a position held by Gordon S. Gillette. The Guyana Ombudsman is generally based on the New Zealand system, but again in the process of transplantation variations were made, as indicated in the following selected characteristics: *Principal Function*-to investigate any administrative action taken on or after May 26, 1966, by any department of government, other authorities, or by Ministers, officers or

[19]Report of the New Zealand Ombudsman, 31 March 1968, 5-6.

[20]Report of the British Guiana Commission of Inquiry, Racial Problems in the Public Service, International Commission of Jurists (1965); The Constitution of Guiana and Related Constitutional Instruments (May 1966); Guyana Act No. 17 of 1967, Ombudsman Act, 1967; 1968 Report of the Guyana Ombudsman.

members of such a department or authority (but excluding courts); *Jurisdiction*-a First Schedule to the Constitution sets forth action and matters not subject to investigation; *Complaints*-must be in writing and allege that the complainant has sustained injustice in consequence of a fault in administration; has discretion not to investigate including where complainant had knowledge of action for more than twelve months before complaint received by Ombudsman; may investigate on own initiative; a Minister or a member of the National Assembly may request an investigation by the Ombudsman; *Investigation*-must be in private; may obtain information from such persons as he thinks fit; can require the production of documents or papers and to compel attendance of witnesses to be examined under oath; *Remedies*-recommendations only and if, within a reasonable time, no satisfactory action has been taken, may report the matter to the National Assembly; *Inspection*-for purposes of investigation, has power to inspect after prior notice, subject to certain limitations; *Exhaustion of Remedies*-cannot investigate any action if there is remedy in court or right of appeal to a tribunal but has discretion to investigate if satisfied that in the particular circumstances not reasonable to expect the complainant to take or to have taken such proceedings and is not precluded from investigation because the complainant may apply to the High Court for redress under the Constitution for contravention of provisions for the protection of fundamental rights and freedoms; *National Assembly*-annual report to National Assembly; *Election*-appointed for a four year term by the Governor General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition; *Case load*-in 1968, received 192 cases and handled four from the previous year. Seventeen cases were found to be justified.[31]

G. The United Republic of Tanzania.[32]

The Interim Constitution and Act 25 of 1966 provides for a Permanent Commission of Enquiry in the one party state of Tanzania. The present Commissioners are E.A.M. Mang'enya, Chairman, Sheikh Mohamed Ramiya, and K.M. Kikwete. There are many variations from

[31] 1968 Report of the Guyana Ombudsman, supra note 20, 3-5; letter from Gordon S. Gillette to Bernard Frank, April 14, 1969.

[32] Annual Report of the Permanent Commission of Enquiry, June 1966–June 1967, Dar Es Salaam (1968); Account of the Origin, Practice and Procedure of the Permanent Commission of Enquiry in Tanzania, The Tanzania Standard, Dar Es Salaam, May 15, 1968, p. 4, and May 16, 1968, p. 4 and 7; Mang'enya, 'Watch-Dog' Guards the Rights of All Tanzanians, The Tanzania Standard, Dec. 6, 1968, p. XII; and The Nationalist, Dar Es Salaam, July 17, 1969 and July 18, 1969.

the other Ombudsman systems as indicated in the following selected characteristics: *Principal Functions*-"to enquire into the conduct of any person to whom this section applies in the exercise of his office or authority, or in abuse thereof".[33] The Commission deals with "arbitrary decisions or arrests, omissions, improper use of discretionary powers, decisions made with bad or malicious motive, a decision that has been influenced by irrelevant considerations, unnecessary and unexplained delays, obviously wrong decisions, misapplications and misinterpretations of laws, by laws, and regulations";[34] *Jurisdiction*-central and local government officials, party office holders, local government authorities, and, in addition, commissions, corporate bodies, public authorities or boards listed in a First Schedule to the Act 25 of 1966; excluded are decisions made by the courts or tribunals in exercise of their judicial functions; included are administrative decisions made by members of the judiciary, the administration (including Ministers and the Second Vice President but excluding the President and the First Vice President), party officials and scheduled organization officials; *Complaints*-may be made orally or in writing or the Commission may investigate on its own initiative; in all instances, the President can direct that there be no investigation; the President may also request investigation; the Commission has discretion not to investigate including if case is too old; *Investigation*-conducted in private; the Commission has the power to examine anybody who can give testimony or produce documents, subject to the right of the President to limit the production of information or documents which might prejudice security, defense, or Cabinet deliberations; *Remedies*-the Commission can express an opinion only and, make a report to the President; *Exhaustion of remedies*-the Commission will decline a case if under the law or existing administrative practice there is an adequate remedy or right of appeal which has not been exhausted; *Defects in laws*-not within the jurisdiction of the Commission; *Commission action*-when a Commissioner does not agree with his fellow Commissioners on any report to the President, the report contains a statement of the disagreement; *Finality*-except on ground of lack of jurisdiction, no action of the Commission can be challenged, quashed, or questioned; *Election*-members are appointed by the President to serve for two years with a right of reappointment for another two years; *Reports*-annual reports are made to the President who places them before the National Assembly; *Case Load*-in the year ending June 30, 1968, the Commission dealt with 443 left over from the

[33] Interim Constitution of Tanzania, Sec. 67 (1).

[34] Mang'enya, supra note 22, XIII.

previous year, received 783 cases, completed 585, and found 114 justified.

H. Great Britain.[25]

The British Parliamentary Commissioner Act 1967 created the office of Parliamentary Commissioner for Administration which is held by Sir Edmund Compton. The Act is a blend of the Scandinavian Ombudsman, New Zealand Ombudsman, and the British Comptroller and Auditor-General systems, with the following selected characteristics: *Principal function*-to receive complaints through members of the House of Commons from persons who claim to have sustained injustice in consequence of maladministration as the result of action by a government department or other authority; *Jurisdiction*-limited to departments and authorities listed in a Schedule Two and covering roughly the central government excluding local government, nationalized industries and independent boards. A Schedule Three sets forth types of action by the central government which are excluded; *Complaints*-must be in writing and must come only through a M.P.; has discretion not to investigate; unless special circumstances exist will not investigate a complaint which was made later than twelve months from day on which complainant first had notice of the matters alleged in complaint; has no power to initiate investigation on own motion; *Investigation*-may obtain information from such persons and in such manner and make such inquiries as he thinks fit; can compel furnishing of information and production of documents; has access to all departmental documents including internal papers and records (except proceedings of the Cabinet); *Remedies*-reports results of investigation only with no power to prosecute or invoke sanctions; *Discretionary decisions*-cannot question discretionary decision taken without maladministration but in 1968 accepted a recommendation of the Select Committee on the Parliamentary Commissioner for Administration that if he found a decision which judged by its effect on an aggrieved person appeared to him to be thoroughly bad in quality, he might infer there had been an element of maladministration in the decision;[26] *Exhaustion of Remedies*-

[25] Frank, The British Parliamentary Commissioner for Administration—The Ombudsman, 28 FED. B.J. 1 (1968); Friedmann, Commons, Complaints, and the Ombudsman, 21 Parliamentary Affairs 38, 1967-68; Friedmann, The British Ombudsman: Evaluation of the Institution After Its First Year of Operation, a paper read at the Canadian Political Science Ass'n (1968); Garner, The British Ombudsman, 18 U. TORONTO L.J. 158 (1968); Wade, The British Ombudsman, 20 AD. L. REV. 409 (April 1968).

[26] Second Report from the Select Committee on the British Parliamentary Commissioner for Administration, Session 1967-68, VI-VIII.

will normally not investigate a case where the complainant has or had a remedy by way of appeal to a tribunal or by way of proceeding in a court of law but has discretion to act if satisfied there are special circumstances which prevent or prevented the complainant from seeking such a remedy; *Reports*-special interim and annual reports to Parliament which are received and acted upon by the Select Committee on the Parliamentary Commissioner for Administration; *Election*-appointed by the Crown and holds office during good behavior or until year of service in which he attains age 65; *Case load*-from April 1, 1967, to December 31, 1967, received 1069 complaints of which he completed 849 and found maladministration in 19 cases;[27] during the calendar year of 1968 he received 1120 complaints and had a carryover of 220 from 1967, making a total of 1340 cases of which he completed 1181, finding maladministration in 38 cases.[28]

l. Northern Ireland.

The Parliamentary Commissioner Act (Northern Ireland) 1969, virtually identical with the British Parliamentary Commissioner Act 1967, came into operation on July 1, 1969 by an Order in Council of the Governor. The designation of Sir Edmund Compton, British Parliamentary Commissioner for Administration, to serve as Northern Ireland Parliamentary Commissioner for Administration, had earlier been announced by the then Prime Minister, Captain O'Neill. Sir Edmund Compton assumed office on July 1, 1969, and presented his first report to the Parliament of Northern Ireland on September 30, 1969. He revealed that for the three-month period he had received eight complaints from six of the 56 members of the House of Commons, which he noted was in recess. He promised not to be an absentee Ombudsman.[28.1]

THE OMBUDSMAN SYSTEM—ITS PRINCIPAL ELEMENTS

Since the Ombudsman is easily adaptable to the differing needs of various countries, each nation has made its Ombudsman to its own fashion. However, an analysis reveals a number of principal elements common to the institution. The Ombudsman:

1. Is an arm of the legislature, except in Tanzania.

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[27] Fourth Report of the British Parliamentary Commissioner for Administration, Session 1967-1968, Annual Report for 1967, 3-5.

[28] Second Report of the British Parliamentary Commissioner for Administration, Session 1968-1969, Annual Report for 1968, 3-5.

[28.1] First Report of the Northern Ireland Parliamentary Commissioner for Administration, p. 3-4 (1969).

2. Is generally independent even of the legislature although there may be controls over finances and staff and examination by a legislative committee.
3. Is a figure of prestige and influence based upon his independence, objectivity, competence, and fairness.
4. Receives complaints of abuse by government departments or agencies from the public or acts on his own initiative, except in Great Britain where complaints are channeled through the M.P.
5. Conducts an impartial investigation, calls upon all persons for information, requires the production off documents, and has access to governmental records, subject in some countries to specific limitations.
6. Uses fast, inexpensive, and informal procedures.
7. Has no power to give orders or impose sanctions, except in Sweden and Finland. The Ombudsman has no right to quash or reverse a decision or order of any official and can only report or recommend or suggest. But, even in Sweden and Finland, the most potent weapon of the Ombudsman is an expression of his opinion.
8. Issues annual and in some countries more frequent reports of the results of his investigations.
9. Gives reasons for dismissal of a complaint if a complaint is unfounded or beyond his jurisdiction.
10. Has the power to inspect agencies, institutions or departments either as a general power or as a power in connection with investigation of a complaint.
11. Is easily accessible: The complaint procedures are without cost to the complainant, do not require counsel, and once filed the Ombudsman is the moving party.
12. Generally may suggest changes or improvements in administrative procedures or changes in legislation.

WHY THE OMBUDSMAN?

The roll call of grievances against abuses of government grows larger each day. Complaints arise out of acts or the failure to act of officials and range from simple clerical errors to oppression and include oversight, negligence, inadequate investigation, unfair policy, delay, partiality, failure to communicate, rudeness, maladministration, unfairness, unreasonableness, arbitrariness, arrogance, inefficiency, improper motivation, violation of laws or regulations, abuse of authority, discrimination, disability to act, errors, mistakes, carelessness, and all of the other acts of injustice that frequently the governors inflict upon the governed, intentionally or unintentionally.

Why was it determined that a political institution founded in 1809 in

Sweden, not adopted next until 1919 in Finland, and today existing in seven other countries, three Canadian provinces and two states in the United States would help to adjust complaints of citizens? There are many reasons and the most pertinent are summarized below:

1. The post World War II growth of the Welfare State resulted in the proliferation of administrative agencies. As the State assumed a multitude of functions in welfare, education, medical care, social security and housing, government grew in size and extensive powers were given to agencies. The growth of the Welfare State made necessary new protection against executive and administrative mistake and abuse of power.

2. The traditional concern for the guaranty of the legal rights of the individual has become even greater in modern society. The activities of public administration have become so comprehensive and the power of the bureaucracy so great that the legal status of the individual needs additional protection.

3. The legislature traditionally concerned with the observance of laws and rulings by public officials has at the same time extensively delegated powers to the administrative authorities. The Ombudsman can serve to aid the legislature in its function of supervising the executive and administrator.

4. The presence of the Ombudsman has psychological value. His office gives the citizen confidence that there exists a watchdog for the people who will hold government accountable.

5. The Ombudsman can best be engrafted upon the political and legal systems of a country.[29]

6. Existing mechanisms for adjusting grievances are inadequate.

(a) The legislator (if he investigates complaints) is taken away from his main function of studying and passing legislation. His role in adjusting complaints is frequently limited because of lack of sufficient funds and staff and inability to have direct access to files and information. He must of necessity rely in most cases upon a reply from the agency or department he is investigating. Party consideration may affect his role in handling grievances.

(b) The courts everywhere play a major role in the correction of abuses by government. But litigation is expensive, tension creating, protracted and slow moving and, in many cases, the citizen bears with injustice because he cannot afford or does not wish litigation. Courts may be precluded from hearing appeals either by law or by technicalities

[29]Seminar on the Effective Realization of Civil and Political Rights at the National Level, Kingston, Jamaica, April 25-May 8, 1967, p. 55, paragraph 258, United Nations, 1967, ST/TAO/HR/29.

of form, time, standing, jurisdiction, nature and extent of interest, the character of the administrative act, and the wording of statutes. Review of administrative acts may be limited by such questions as to whether the agency acted within its powers, was the ruling supported by substantial evidence or was the action reasonable and not arbitrary. Courts cannot conduct informal investigations and are limited by rules for the production of evidence. Courts are limited to basically adversary party proceedings.

(c) Administrative courts even using procedures as informal as possible still follow court-like adversary procedure. Legal representation is the normal rule. Such courts frequently move slowly and there is great delay in ensuring the execution of the judgment when delivered. Grievances must concern an administrative decision and must be brought before local courts or regional courts initially, even in France, except in certain cases.

(d) The executive may frequently handle grievances but is in essence investigating himself and in great part relying on the reply from the agency or official against whom the complaint was made. Party affiliation of the person making the complaint may be important. Executive complaint agencies lack the essential characteristic of independence from the executive.

(e) Administrative agencies may have within their structure channels for complaint but such a system lacks impartiality. The appeal system, if one exists, is expensive and time consuming.

7. The Ombudsman gives the citizen an expert and impartial agent without personal cost to the complainant, without time delay, without the tension of adversary litigation, and without requirement of counsel or the intervention of those highly placed.

Objections to the Adoption of the Ombudsman System

No study of the Ombudsman would be complete without a list of objections that have been stated against the Ombudsman:

1. The Ombudsman can work only in small countries with homogeneous populations.
2. Concentration on the adjustment of grievances of individuals bogs down the processes of government and places undue emphasis on relatively minor matters.
3. Legislators who receive complaints are already performing the functions of Ombudsmen. The relatively large number of legislators is more effective to bridge the gap between the citizenry and government than a single Ombudsman or even several.

4. Courts, administrative courts and tribunals are adequate and, where required, reforms can be made to make them more responsive.
5. Too much power is placed in a single individual. There is little or no review of the Ombudsman's actions.
6. The executive grievance handling machinery is adequate and, if not, can easily be corrected or adjusted.
7. The Ombudsman causes the civil servant to be cautious and timid. Emphasis may be on keeping records rather than action.
8. The Ombudsman system simply creates another bureaucratic institution with more red tape.
9. The Ombudsman is a generalist who attempts to do more than he is qualified to do.
10. The Ombudsman will not obtain the support and assistance of administrators whose support he needs to function successfully.
11. The system impedes progress toward strengthening existing institutions.
12. Administrators and legislators are inclined to treat his general proposals for reform as impractical.
13. After a while the Ombudsman becomes government-minded.
14. The system interferes with the doctrine of ministerial responsibility.
15. The Ombudsman's accomplishments are exaggerated. He does not really do an effective job.
16. The institution cannot successfully be transplanted from the Scandinavian countries.
17. In a large country, the Ombudsman could not handle the vast number of complaints without an equally vast bureaucratic organization.
18. The Ombudsman may cause officials who believe they are correct to agree with him not because his judgment is valid but because of his status and prestige. This does not make for good government.
19. The Ombudsman attempts to apply a rule of conscience as opposed to the rule of law.[30]
20. The Ombudsman tends to create the illusion that all is well with government.
21. The Ombudsman is part of the "Establishment."
22. The office of Ombudsman ignores the desirability of participation by the people themselves in the processes of revision and reform.[31]
23. The Ombudsman after all deals only with relatively little matters.
24. Most complaints are unfounded and the system encourages filing of such complaints.

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[30] MacLeod, The Ombudsman, Ad. L. Rev. Vol. 19, 93, 95 (1966).

[31] Rosenblum, Controlling the Bureaucracy of the Antipoverty Program, Vol. 31, Law and Contemporary Problems, 187, 195, Duke University School of Law (1966).

25. The office is adaptable only to parliamentary countries.
26. The Ombudsman works best in a society that doesn't need him.
27. The Ombudsman stays away from the pertinent social problems and keeps to the safe subjects.

GROWTH OF THE OMBUDSMAN SYSTEM

Interest in the Ombudsman has grown in recent years. It has been discussed at numerous seminars and conferences by two major groupings:

1. The regional seminars sponsored by the United Nations Division of Human Rights on the general topic of judicial and other remedies against the abuse of administrative authority in Ceylon (1959), Buenos Aires (1959), and Stockholm (1962). In April-May, 1967, the United Nations Division of Human Rights in co-operation with Jamaica organized a Seminar on the Effective Realization of Civil and Political Rights at the National Level which endorsed the Ombudsman system.[32]
2. The conferences and congresses of the International Commission of Jurists, including: the South-East Asian and Pacific Conference in Bangkok (1965),[33] the Colloquium on the Rule of Law at Colombo (January, 1966),[34] and the Conference on the Individual and the State held at Strasbourg (October, 1968).[35]

A survey of developments throughout the world shows that the Ombudsman has been placed on the world agenda for most serious consideration.

A. Canada.

Proposals have been put forward on the Federal level and on the province level.[36] Three of the ten provinces have Ombudsmen: W.T. Ross Flemington, New Brunswick, since October 11, 1967; George B. McClellan, Alberta, since September 1967; and Louis Marceau, Quebec,

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[32]Seminar on the Effective Realization of Civil and Political Rights at the National Level, supra note 29; see also 9 Journal of the International Commission of Jurists, 90-91 (June 1968).

[33]The Dynamic Aspects of the Rule of Law in the Modern Age, Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists, Bangkok (1965), 184.

[34]Working Papers, Ceylon Colloquium on the Rule of Law, Colombo, Ceylon, Jan. 10-16, 1966, International Commission of Jurists (Ceylon Section).

[35]European Conference of Jurists on the Individual and the State, "The Essential Legal Elements to Ensure the Protection of the Individual," Strasbourg, 26-27 Oct. 1968, Conclusion 17; 36 Bulletin of the International Commission of Jurists, 7-8 (Dec. 1968).

[36]ROWAT, supra note 2, Preface x-xii; and ANDERSON, CANADIAN OMBUDSMAN PROPOSALS (1966).

since May 1, 1969. The Manitoba Legislature enacted an Ombudsman Bill on September 30, 1969.

B. Ghana.

The new Constitution of Ghana adopted in 1969 contains provisions requiring the establishment of the Ombudsman system by Parliament.

C. Great Britain.

Prime Minister Wilson announced in Parliament on July 22, 1969 that an Ombudsman system would be established to investigate complaints of maladministration by local government. It would be separate from the Parliamentary Commissioner for Administration system but the scope and relationship to local government would be similar to the scope of the Parliamentary Commissioner for Administration in central government affairs. In addition, the Prime Minister approved in principle a Health Commissioner to look into complaints against the National Health Service.[37]

D. Greece.

In June 1968, the Greek Government announced it would appoint an Ombudsman answerable personally to the Prime Minister and later to Parliament.[38] In July 1969, the Greek Government announced the appointment of Maj. Gen. Spyridon Vellianitis as an Administration Commissioner, or Ombudsman, to keep an eye on the Administration to see that it is "honest, just and fair," according to the decree creating the position. The Commissioner is empowered to investigate any state employe's behavior "as regards the discharge of his duties and his demeanor in society, as related to morals, dignity and honesty."[39] Necessary legislation is pending.[40]

F. Hong Kong.

On June 23, 1969, a question was put in the British House of Lords to the Minister of State, Foreign and Commonwealth Office, concerning the appointment of an Ombudsman for consultation with the underprivileged Chinese. The reply was made that very careful consideration had been given by the Minister of State and the Governor of Hong Kong to the matter of the Ombudsman and that both regarded the City District Officer scheme as "perhaps the first step in such a system."[41]

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[37] The Times (London), July 23, 1969.
[38] The Times (London), June 13, 1968, p. 6.
[39] New York Times, July 3, 1969, p. 6.
[40] Letter from S. Vellianitis to Bernard Frank, Oct. 29, 1969.
[41] 732 HANSARD, HOUSE OF LORDS, 1 and 2 (1969).

Under date of July 12, 1969, the Hong Kong Branch of Justice (the British Section of the International Commission of Jurists) issued a report urging the appointment of an Ombudsman, pointing out that the "system has a strong backing in Chinese History and its introduction can well be explained in terms of the Censorial System of Ancient China."

F. Indonesia.

In October 1967, six associations—the Indonesian Judges Association, the Indonesian Jurists Association, the Association of Prosecutors, the Association of Scholars of Political Science, the Indonesian Bar Association, and the League of Human Rights, formed the Pengabdi Hukum to handle "complaints by individuals of treatment by public authorities as well as by society itself." The institution is entirely private and consists of a joint secretariat, the executive of which is manned by six members each appointed by the respective organization. During its first year from October 1967 through December 1968, it handled 202 complaints, settling 154.[42]

G. India.

Establishment of a two tier system of Ombudsmen has been proposed by the Government: the Lok Pal would be appointed by the President after consultation with the Chief Justice and the Leader of the Opposition, and the Lokayutkas by the President after consultation with the Lok Pal. Jurisdiction would cover complaints of injustice due to maladministration or complaints alleging corruption based on actions of all central government public servants including Ministers and Secretaries.[43]

H. Ireland.

A Commission has issued a report recommending a major reorganization of the public services in Ireland. Included is a proposal for the creation of an Ombudsman.[44]

I. Israel.

The State Controller without express legal authority deemed himself the institution to handle complaints because he had "also to examine whether the inspected bodies have operated efficiently, economically, and in a morally irreproachable manner."[45] In 1966, the Knesset formed a

[42] Paper, Abdulkadir Besar, Bangkok World Peace Through Law Conference (1969).
[43] Weekly India News, May 24, 1968, p. 4.
[44] The Times (London), Sept. 24, 1969, p. 3.
[45] The State Comptroller of Israel and His Office at Work, Jerusalem (1963), p. 9.

committee to look into the handling of public complaints and to determine whether to set up an Ombudsman as a separate institution or whether to delegate this task to the State Controller by statutorily broadening his power. In November 1968, the Committee reported that the office of Ombudsman be created to be operated by the State Controller through a special division of his office; a recommendation was adopted by the Cabinet on December 15, 1968. A draft law is in preparation.

The City of Jerusalem has had an Ombudsman, Shelomo Kaddar, since July 1967. From July 1967 to March 1968 inclusive, he handled 532 complaints and found 262 justified.[46] Tel Aviv similarly has an Ombudsman.

J. Jamaica.

The Jamaican Section of Justice has issued a report recommending the establishment of the Ombudsman system in Jamaica.

K. Malaysia.

On the invitation of the Government of Malaysia, the New Zealand Ombudsman, Sir Guy Powles, spent nearly four weeks in Malaysia in February—March, 1968, and completed and delivered a report to the Malaysian Government on the desirability and practicability of setting up an Ombudsman system in that Country. However, the Malaysian Government has apparently concluded the adoption of the Ombudsman system would not be expected to produce better results than that already achieved by the Anti-Corruption Agency set up in 1958 as a unit of the Prime Minister's Department. This Agency was reorganized in 1967 and was set up with headquarters in Kuala Lumpur and a branch office in every state capital effective October 1967. The director is senior member of the Legal Service and the staff of the Agency is drawn from the Legal Service, the Administrative Service and the police. The Agency has two functions: research and prevention of corruption and the investigation and prosecution of all cases of corruption under the criminal laws.[47]

L. Mauritius.

The Mauritius Constitution provides for an Ombudsman. The Legislative Assembly enacted supplementary provisions for the proper functioning of the Office of Ombudsman on May 13, 1969 (Ombudsman Act, 1969).

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[46]The Ombudsman of Jerusalem, Shelomo Kaddar, Public Administration in Israel and Abroad 1968, Jerusalem (1969), p. 176.

[47]Report of the New Zealand Ombudsman, 1968, p. 10; and letter from M. Ben Haron, First Secretary, Embassy of Malaysia, Washington, D.C., to Bernard Frank, July 9, 1969.

M. The Netherlands.

In June 1969, the Dutch Government submitted to Parliament a proposal that an Ombudsman be appointed by Parliament. The jurisdiction of the Ombudsman would be restricted to complaints about the administration of the Central Government and would exclude complaints about generally binding regulations and about matters of general government policy. Complaints would be referred to the Ombudsman by the Committees for Petitions in both Chambers of Parliament. Complaints received directly by the Ombudsman would be dealt with after authorization by the Committee for Petitions of the Second Chamber.[48]

N. Northern Ireland.

Legislation was introduced in the House of Commons on September 30, 1969, to appoint a Commissioner for Complaints to investigate complaints from persons who claim to have sustained injustice in consequence of maladministration in connection with action taken by local and public bodies outside the sphere of central government.[49]

O. Singapore.

A special Constitution Commission recommended an Ombudsman but the Government has put aside the recommendations for five years.[50] Complaints of corruption or uncivil behavior by Government employees may be referred to the Anti-Corruption Bureau whose officials are answerable only to the Attorney General.

P. The United States.

Interest in the United States in the Ombudsman has become widespread. Federal legislation was proposed in the last Congress by Senator Edward Long for a Federal Administrative Ombudsman, a District of Columbia Ombudsman, and a Missouri Ombudsman. Congressman Henry Reuss has introduced in the 91st Congress his three-times-before-introduced bill for a Congressional Ombudsman handling complaints only through Congress. Legislation has been introduced in most of the

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[48] Letter from H.E. Th. L. Mathon, First Secretary, Royal Netherlands Embassy, Washington, D.C. to Bernard Frank, July 11, 1969; and letter from P.J.P. Verloop, Secretary, Netherlands Section of the International Commission of Jurists, to Bernard Frank, Sept. 2, 1969.

[49] The Times (London), Oct. 2, 1969, p. 2; and letter from K.P. Bloomfield to Bernard Frank, Nov. 17, 1969.

[50] Letter from Hing Yong Cheng to Bernard Frank, March 29, 1969; Republic of Singapore, Report of the Constitutional Commission, p. 18-22 (1966).

states and passed in two. In Hawaii, Herman S. Doi took office on July 1, 1969, as Ombudsman under Act 306 passed in 1967. During his first three months in office he received 218 complaints, 153 of which were received by telephone.[51] The Nebraska Act creating the office of Public Counsel was approved on July 29, 1969. In Oregon, Marko L. Haggard was appointed by the Governor to fill the post of Ombudsman created by executive action on July 1, 1969. The American Assembly of Columbia University devoted its October 1967 Conference to the Ombudsman and in its final report recommended state and local Ombudsmen with experimentation on a Federal level, essentially the same conclusion reached by the American Bar Association in January 1968. The National Conference of Commissioners on Uniform State Laws is preparing to start work on a uniform Ombudsman law. The National Commission on Violence and Law Enforcement in its report issued on November 1, 1969, recommended independent citizens' grievance agencies on a state and local level and that consideration be given to a federal citizens' grievance agency to act on complaints against federal employees and departments.

Proposals have been made for Ombudsmen in New York City, Newark, Philadelphia, Minneapolis, and other cities. Citizens' complaint offices exist in a number of local communities including Nassau County, New York, and Buffalo where the Citizens' Administrative Services is a project of the University of Buffalo Law School. In the United States there are proposals for college and university, consumer, airport, corporation, union, department store, newspaper, TV and radio station Ombudsmen. The most noteworthy of these are the "action line" activities of the press, radio, and TV and the emergence of Ombudsmen on at least three dozen or so campuses.

Consideration of Several Special Problems With Respect to the Ombudsman

A study of the Ombudsman brings to mind several special problems for brief discussion:

A. Should the Ombudsman be a Commission or Board?

It should be noted that the national Ombudsman is a single individual except in Tanzania where there is a Commission of three and in Sweden where there are three Ombudsmen. It was concluded at the Ceylon Colloquium on the Rule of Law that whether there should be one

[51] Herman S. Doi, speech delivered in Oct. 1969.

Ombudsman or several depends on the constitutional structure of the country concerned and the size and distribution of the population.[82] The real problem is not the number but whether the Ombudsmen are part of a committee operating on majority vote or individuals operating independently in a geographic or subject area. The Ombudsman generally everywhere relies on his power to persuade—he has no power to compel compliance (except in Sweden and Finland). A two-to-one recommendation by a commission signals some doubt as to whether or not there was abuse of a citizen. Government will not easily be persuaded to comply where even the Ombudsmen disagree.

B. Is the Ombudsman a Device in Bridging the Gap Between Government and Youth?

Recently a study for the United Nations stated that student demonstrations in more than 50 countries during 1968 represented only a warning of bigger and bolder protests to be expected from youth in the future. Young people are concerned with bureaucratization, bigness, and dehumanization of society (concerns shared equally by adults, of course). A lack of responsiveness by government to their demands is felt by the young who conclude that direct action is necessary. The question may be asked whether the Ombudsman would bridge the gap between the "Establishment" and youth? Certainly, the Ombudsman—considered by some as part of the "Establishment"—would not be of any help with those who have as a goal the destruction of present society's institutions. But to those youth still "with us," the Ombudsman with his informal, easily accessible, inexpensive, machinery in the handling of complaints may be a "bridging the gap" factor if the Ombudsman can convince the youth he is independent and will listen and give redress to legitimate complaints. On the other side of the coin is the inability of the Ombudsman to enforce his decisions which may render him an ineffective institution in handling problems of frustrated and impatient youth in dealings with bureaucracy. Perhaps the only answer is to experiment because not to have tried may be a greater fault.

C. Can the Ombudsman System Help the Poor?

The problem of poverty has become one of the greatest problems of modern society, even in the affluent countries, and the greatest problem of poverty has been the inability of the law to earn the respect of the poor because, as has been stated by a United States Federal Judge, "Rather than helping the poor surmount their poverty, the law has all

[82] 26 Bulletin of the International Commission of Jurists, 8 (June 1966).

too frequently served to perpetuate and even exacerbate their despair and helplessness."[83]

The National Commission on the Causes and Prevention of Violence in recommending independent citizens' grievance agencies said it supported this recommendation upon "evidence that the poor experience special frustrations in their relationship with the government and that these frustrations breed disrespect for law."

To the extent that the use of other existing remedies to handle complaints of the aggrieved requires financial resources and sophistication, the Ombudsman system with its lack of cost and easy access is of help. But is this sufficient? Can an institution which can recommend only be effective when complaints run contrary to public attitudes or to the views of a bureaucracy intent on its own conception of handling the problems of the poor? Can an institution which may only persuade, not compel, be effective if its enters into cases involving intense social problems, frequently with political overtones? It has been said that "Ombudsmanship promises the poor a good deal more than it can deliver."[84] Briefly stated objections which are said to impair its utility are: that he is part of the "Establishment," ignores the participation of the poor in the process of revision and reform, that an Ombudsman will fail because his recommendations would run counter to public attitudes towards the rights of the poor, that selection of cases of a nonpolitical nature would eliminate from scrutiny most administrative injustices perpetrated upon the poor, that injustices are so great that an Ombudsman system would be overwhelmed; and that only basic reform will achieve justice for the poor.[85] Yet even critics conclude that the fact that "the Ombudsman alone cannot cope with all the problems of the administrative state is hardly an adequate reason for arguing against its establishment as a supplement to other devices."[86]

Society is today threatened by its failure in the past to have recognized fully that poverty is inconsistent with democracy. Society has, therefore, nothing to lose and may gain if it experiments with the adoption of the Ombudsman system.

D. Can the Ombudsman Help in Aiding Minorities Against Discrimination?

The reports of the Scandinavian Ombudsmen and the British Parliamentary Commissioner do not indicate any special and pressing

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[83] Wright, The Courts Have Failed the Poor, The N.Y. Time Magazine, March 9, 1969, p. 26.

[84] Cloward, An Ombudsman for Whom?, 12 Social Work, p. 117, 118 (April 1967).

[85] Rosenblum, supra note 31; Cloward & Elman, Poverty, Injustice, and the Welfare State, The Nation, Feb. 28, 1966 and March 7, 1966.

[86] Rosenblum, supra note 31, 194.

concern with the treatment of minorities. The New Zealand Ombudsman in his report for the year ended March 31, 1968, indicates that out of 555 cases, 8 involve Maori affairs, of which 2 were not justified, 1 discontinued, 1 declined, 3 withdrawn, and 1 under investigation. The Tanzania Commission Chairman has stated that very few non-Africans (Asians and Europeans) have lodged complaints to the Commission and queries as to the reason for this, speculating one reason is that the non-African communities are suspicious of the Commission and another reason is that these people do not like to jeopardize their stay in Tanzania.[57] In Guyana, the racial imbalance with resulting racial discrimination resulted in the recommendation for an Ombudsman by the International Commission of Jurists. In the 1967 report, the Ombudsman stated that he received 161 complaints of which only one alleged racial discrimination and that one was unjustified.[58] Mauritius, with a multi-racial population, has provided in its Constitution for an Ombudsman and it was thought that the system would be valuable in protecting minorities against discrimination, but as yet no Ombudsman has been named. In Northern Ireland, where there is great religious antagonism between the Catholic and Protestant population, Sir Edmund Compton, the British Parliamentary Commissioner, has also taken office as the Northern Ireland Parliamentary Commissioner. It has been suggested that "given the religious antagonism in Ulster, the only way of choosing an acceptable neutral was to bring in someone from outside."[59]

We conclude that the Ombudsman has not developed an effective record of protecting minorities because in homogeneous populated countries no serious problem has evolved and in the heterogeneous populated countries the Ombudsman appears not to have been utilized. Nevertheless, there is a belief in some countries that the system will help to relieve tension where there is serious possibility of conflict between people.

As before, we wonder at the efficacy of an institution to help with intense problems where it can recommend only. The fight against discrimination requires more—anti-discrimination legislation and anti-discrimination agencies—with the Ombudsman as a supplement. As before we conclude that experimentation with the Ombudsman system is required before a definitive answer can be given.

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[57] Mang'enya, supra note 22, p. XIV.

[58] 1967 Report of the Guyana Ombudsman, supra note 20, 5.

[59] Letter from Rudolf Klein, Chief Leader Writer, Observer, London, to Bernard Frank, March 31, 1969.

E. Can the Ombudsman Work Only in Small Developed Countries With Homogeneous and Stable Populations?[200]

One of the most frequent criticisms of the Ombudsman system is that it will work only in a small country with a stable and homogeneous population. Today there are Ombudsmen in small countries with homogeneous populations (the Scandinavian countries and New Zealand), with multi-racial populations (Guyana and Tanzania), and with a mixed religious population (Northern Ireland). Great Britain is the first populous country to establish the system. But to say that because the system evolved in small developed countries with homogeneous and stable populations it cannot be properly transplanted is (as has been said frequently by others) to "stand logic on its head." A more pertinent question is why such countries required an Ombudsman? And from this question deduce that big or small countries, developing or developed, homogeneous or mixed, require an external supervisor to supplement existing institutions. Nevertheless, the problems of the reluctance of minorities to use the Ombudsman because of lack of confidence or the possibility of the receipt of an overwhelming number of complaints with the necessity of greater bureaucratization of the office, must not be overlooked.

EVALUATION

Evaluation of the Ombudsman system based upon its operation in nine countries is not premature.

Existing mechanism—courts, legislatures, the executive, administrative courts, and administrative agencies—are not sufficient to cope with the grievances of the aggrieved and there is a need for a supplementary institution. The Ombudsman system provides an informal, independent, and impartial public official who, with relative speed and without cost to the complainant, investigates, with access to governmental records, and recommends relief when the complaint is justified. The system can be transplanted and since its form is not rigidly fixed can be varied to suit the characteristics and needs of each country.

The Ombudsman cannot accomplish all of the promises of some of his most enthusiastic proponents. He is not a super-administrator and does not make policy. He cannot remake society or cure its problems. The Ombudsman generally can recommend only and whether this is a

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[200] CHENG, Emergence and Spread of the Ombudsman Institution, Annals, supra note 2, 20, 26-29; CAIDEN, Ombudsmen for Under-Developed Countries, Public Administration in Israel and Abroad 1967, 100, Jerusalem (1968).

virtue or defect cannot be conclusively determined at this early date in the life span of the system. But a tentative conclusion would lean toward the deficit side of the ledger. He can only supplement existing institutions which must be strengthened and made more responsive to the grievances of the citizens. But he does serve a steam valve function, permitting the release of frustration by the mere fact of complaint.

Officials also are the beneficiaries of the Ombudsman system. Unjustified complaints against them are determined to be such by an impartial adjudicator. Civil servants have also utilized the machinery for their own complaints, an interesting by-product of the system. In addition, officials are ofttimes influenced by the mere fact of the existence of the Ombudsman and make an effort to anticipate him and make changes earlier rather than later. A result which may weaken the effectiveness of officials is the willingness to agree with the Ombudsman on occasion even though they believe him to be wrong because they do not wish to tilt with the Ombudsman because of his status and prestige.

The Ombudsman does not appear to be flooded with complaints in any country which means not that grievances are non-existent but that many aggrieved are not aware of the Ombudsman or do not know how to invoke his aid or do not care to.

CONCLUSION

The Ombudsman, with his limitations and weaknesses, is on the world agenda for serious consideration. The growing list of countries, provinces, states, and local governments adopting the system indicates its great appeal. We believe this to be because it has long been evident that human rights are not protected simply by constitutions or legislation, by guarantees or speeches, by proclamations or declarations, but primarily by the availability of remedies. The Ombudsman system is one of the remedies which seeks to preserve human rights.

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Nominating:
Chisman Hanes, *Chairman*, 710 Ring Building, Washington, D.C. 20036
C. Roger Nelson, *Vice Chairman*, Suite 800, 888 17th St., Washington, D.C. 20006
Charles D. Ablard, *Vice Chairman*, U.S. Information Agency, 1750 Pennsylvania Ave., N.W., Washington, D. C. 20006

in danger or that he was in danger of suffering great bodily harm, but the belief must have been reasonable and in good faith. 40 Am. Jur. 2d, Homicide, §§ 151 to 159, pp. 439 to 447. Ordinarily a woman is justified in taking human life in protecting her chastity where she has been placed in fear for her life or great bodily harm. Here the defendant was admittedly engaged in prostitution and had negotiated with the deceased to engage in an act of prostitution with him for the sum of $20. It was for the jury to determine whether or not she killed in fear of death or of suffering great bodily harm, or on the other hand, whether or not the killing was motivated by anger, punishment, or vengeance. The character of the defendant and the fact of her engaging in prostitution did not deprive her of the right of self-defense, but they were circumstances to be considered by the jury, along with all other facts and circumstances shown by the evidence in determining the necessity for and the extent of the force used. The jury and not this court was charged with the duty of deciding these issues of fact.

Common law crimes are unknown to the law of this state. The definition of crimes and the punishment to be assessed for their violation are fixed by statute. If section 29-114, R. S. Supp., 1969, means ,as the defendant contends, that any person who finds it necessary in his own judgment to protect his person or property from another, no matter how great or trivial the invasion of his rights may be, to use force to the fullest extent, even beyond all reason, the punishment of the aggressor is placed with the person claiming self-defense and not with the state. Without fixing the amount of force that may properly be exercised in resorting to justifiable self-defense, over and above which is criminal, the Legislature has delegated the fixing of the punishment to the person asserting self-defense which it cannot do. The criminal laws under which we live in our social order are prescribed by the state through the Legislature and the

penalties for their violation are likewise prescribed by legislative enactment. Any attempt to delegate either of such powers to private persons with the excesses that naturally follow when crime or punishment are placed elsewhere than with the state, is violative of the powers placed exclusively with the Legislature by our state Constitution.

The argument has been advanced that section 29-114, R. S. Supp., 1969, when properly interpreted, has not changed the preexisting rule which has long been upheld in this state and elsewhere. We cannot accept the basis of this argument for two reasons, first, because unless the amendment here put in isuse was intended to change the existing law there would have been no reason for enacting section 29-114, R. S. Supp., 1969, and second, amendments were twice offered and rejected in the Legislature to properly limit the defense of self-defense. The intent of the Legislature, which we are required to determine and follow, is clear and not constitutionally acceptable.

We cannot in effect rewrite the statute to meet constitutional requirements. On the other hand, the constitutionality of the act is not raised which ordinarily precludes us from a consideration of that question. But where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried. Consequently we hold that section 29-114, R. S. Supp., 1969, is unconstitutional and void.

Instruction No. 9 contains no error prejudicial to the rights of the defendant, in fact, the instruction was more favorable to the defendant than she was entitled to. Defendant's requested instruction herein discussed was in effect given by inclusion in instruction No. 9 and it was properly denied by the trial court. The evidence is sufficient to sustain the verdict of the jury and the

judgment of the trial court ought to be and is affirmed.

AFFIRMED.

SPENCER and BOSLAUGH, JJ., dissenting.

The majority opinion herein violates a fundamental principle of constitutional construction. Neither the State nor the defendant raise an issue as to the constitutionality of the Self-Defense Act, section 29-114, R. S. Supp., 1969. Yet the majority opinion declares the statute invalid without the benefit of briefs or arguments upon the issue of constitutionality.

The following from Stanton v. Mattson, 175 Neb. 767, 123 N. W. 2d 844, indicates the extent of this abrupt departure from well-defined precedent: "All acts of the Legislature are presumed to be constitutional. The courts will not declare an act of the Legislature unconstitutional except as a last resort on the facts before the court. Courts will not decide questions of constitutionality unless they have been raised by a litigant whose interests are adversely affected. A court has no power to summarily pass upon the constitutionality of an act of the Legislature."

It is unnecessary to reach any question of the constitutionality of section 29-114, R. S. Supp., 1969, in this case. The instruction relating to self-defense, which was given in this case, advised the jury that self-defense was "the use of such force *by any means necessary* to repel an attack as at the time appeared to defendant to be necessary." (Emphasis supplied.) The instruction conformed to the statute in that the only limitation placed upon the force that might be used was that it be "necessary."

The instruction as given also conformed to the instruction requested by the defendant except that the trial court included a paragraph, taken from NJI 14.33, stating that a person who uses more force than that permitted by the definition contained in the instruction is criminally responsible therefor. The defendant contends that this part of the instruction was erroneous.

The Self-Defense Act does not authorize the use of unlimited force nor does it provide that persons who use more force than necessary should be immune from prosecution. The defendant's criticism of the instruction given is without merit.

IRENE NEEMAN, APPELLEE, V. OTOE COUNTY ET AL., APPELLEES, IMPLEADED WITH AETNA INSURANCE COMPANY, APPELLANT.

MAURICE V. KARSPECK, APPELLEE, V. OTOE COUNTY ET AL., APPELLEES, IMPLEADED WITH AETNA INSURANCE COMPANY, APPELLANT.

RUTH M. WILLIAMS, APPELLEE, V. OTOE COUNTY ET AL., APPELLEES, IMPLEADED WITH AETNA INSURANCE COMPANY, APPELLANT.

LORETTA H. BASSINGER, APPELLEE, V. OTOE COUNTY ET AL., APPELLEES, IMPLEADED WITH AETNA INSURANCE COMPANY, APPELLANT.

— N. W. 2d —

Filed January 29, 1971. Nos. 37631, 37632, 37633, 37634.

1. Workmen's Compensation: Insurance. Rule XI of the Rules of Procedure of the Nebraska Workmen's Compensation Court requiring that notice of cancellation of compensation insurance be filed within 10 days after cancellation of the policy is primarily for the protection of claimants entitled to compensation.
2. ———: ———. Where a workmen's compensation insurance policy is canceled and is replaced by a new policy issued and certified by another insurance company and effective on the date of cancellation of the old policy, a failure to file notice of cancellation with the Nebraska Workmen's Compensation Court within the time supecified by Rule XI does not in and of itself invalidate the cancellation.
3. ———: ———. A new compensation insurance carrier has no standing to complain of a delay by the former carrier in complying with Rule XI. The new carrier should be held solely responsible for payment of workmen's compensation liability arising on or after the effective date of its policy and after the date of cancellation of the replaced policy.
4. Workmen's Compensation: Words and Phrases. A workmen's

HB-40

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

February 9, 1971

Mr. Jack W. Rodgers
Director of Research
Nebraska Legislative Council
State House
Lincoln, Nebraska 68509

Dear Mr. Rodgers:

A local news article mentioned that your self-defense statute was held invalid by your supreme court on January 29. Please send a copy of the court's decision. Presumably the statute in question is sec. 29-114 of the Nebraska Revised Statutes, Supp. 1969. If not, please send a copy of the right statute too.

Our legislature is presently considering enactment of a more-or-less similar statute (using the phrase "reasonably necessary force" rather than "by any means necessary"), and your early reply would be much appreciated. Thank you.

Yours truly,

Arthur H. Peterson
Revisor of Statutes

AHP/sm

re HB 40

Nebraska Revised Statutes, Supp. 1969

shall have been issued, nor shall any person be prosecuted, tried or punished for any misdemeanor or other indictable offense below the grade of felony, or for any fine or forfeiture under any penal statute, unless the indictment, information or action for the same shall be found or instituted within one year and six months from the time of committing the offense or incurring the fine or forfeiture, or within one year for any offense the punishment of which is restricted by a fine not exceeding one hundred dollars and to imprisonment not exceeding three months; *Provided*, nothing herein contained shall extend to any person fleeing from justice; *provided further*, where any suit, information or indictment for any crime or misdemeanor is limited by any statute to be brought or exhibited within any other time than is hereby limited, then the same shall be brought or exhibited within the time limited by such statute; *and provided further*, where any indictment, information or suit shall be quashed or the proceedings in the same set aside or reversed on writ of error, the time during the pendency of such indictment, information or suit so quashed, set aside or reversed, shall not be reckoned within this statute so as to bar any new indictment, information or suit for the same offense.

Source: G.S. p. 783; R.S.1913, § 8910; C.S.1922, § 9931; C.S.1929, § 29-110; R.S.1943, § 29-110; Laws 1965, c. 147, § 1, p. 489.
Effective date November 18, 1965.

29-113. Convicts of other states; disqualifications enumerated; general pardon; effect. Any person who shall have been actually imprisoned in the penitentiary of any other state or territory of this Union, under sentence for the commission of any crime which, by the laws of this state, is punishable by imprisonment in the Nebraska Penal and Correctional Complex, shall be deemed incompetent to be an elector or juror, or to hold any office of honor, trust or profit within this state, unless such convict shall have received a general pardon from the Board of Pardons of the state in which he may have been imprisoned, agreeably to the laws thereof.

Source: G.S. p. 783; R.S.1913, § 8913; C.S.1922, § 9934; C.S.1929, § 29-113; R.S.1943, § 29-113; Laws 1951, c. 86, § 2, p. 240; Laws 1969, c. 236, § 1.
Effective date December 25, 1969.

29-114. Legal jeopardy; self defense; aiding another; indemnification; reimbursement. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, by any means necessary, himself, his family, or his real or personal property, or when coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.

When substantial question of self defense in such a case shall exist, which needs legal investigation or court action for the full determination of the facts, and the defendant's actions are subsequently found justified under the intent of this section, the State of Nebraska shall indemnify or reimburse such defendant for all loss of time, legal fees, court costs, or other expense involved in his defense.

Source: Laws 1969, c. 233, § 1.
Effective date June 5, 1969.

ARTICLE 2
POWERS AND DUTIES OF CERTAIN OFFICERS

29-204. Constables; powers and duties.

Constables have authority to execute writs and process throughout the county. State v. Carpenter, 181 Neb. 639, 150 N.W.2d 129.

29-206. City and village marshals; general powers and duties.

Police officers had the right to stop motor vehicle outside the limits of city where circumstances indicate commission of crime. State v. Carpenter, 181 Neb. 639, 150 N.W.2d 129.

ARTICLE 4
WARRANT AND ARREST OF ACCUSED

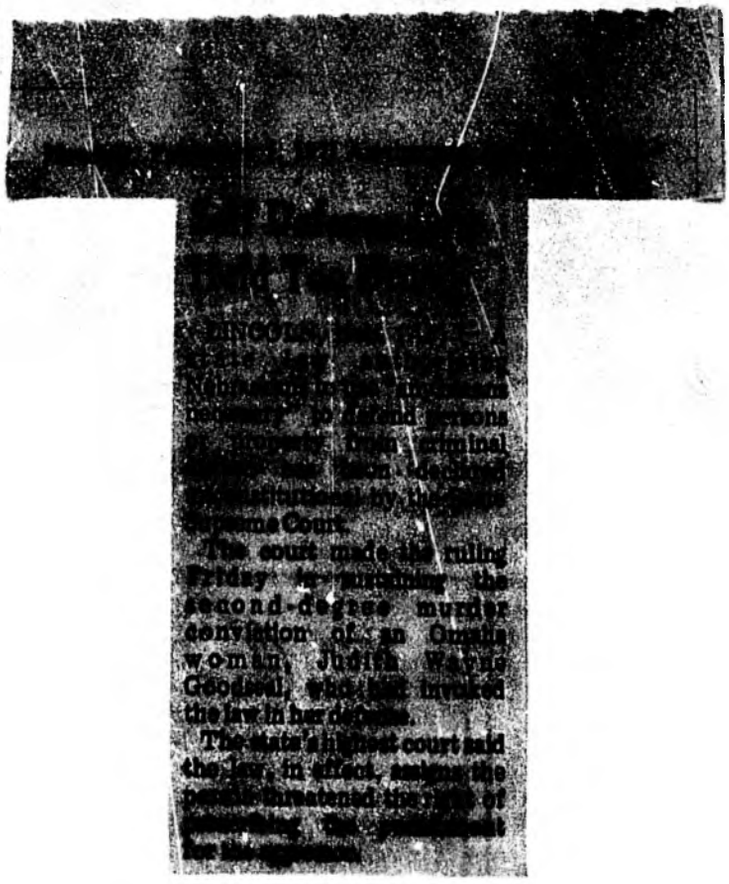
Section.
29-401. Law violators; arrest by sheriff or other peace officer.
29-404. Complaint; county attorney; Attorney General; other complainant with consent of county attorney; filing; consent to filing when given; warrant; issuance.
29-404.01. Warrant; supplemental act.
29-404.02. Warrant; arrest; when not required.
29-404.03. Warrant; reasonable cause for arrest; conditions.
29-411. Warrants; execution; powers of officer; direction for executing.

29-401. Law violators; arrest by sheriff or other peace officer. Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman, police officer, or peace officer as defined in subdivision (17) of section 49-801, shall arrest and detain any person found violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained.

Source: G.S. p. 789; R.S.1913, § 8937; C.S.1922, § 9961; C.S.1929, § 29-401; R.S.1943, § 29-401; Laws 1967, c. 175, § 1, p. 490.
Effective date April 19, 1967.

Firing of shots at tires of speeding automobile was justified in making arrest. Reese v. Newman, 179 Neb. 878, 140 N.W.2d 805.

29-404. Complaint; county attorney; Attorney General; other complainant with consent of county attorney; filing; consent to filing when given; warrant; issuance. No complaint shall be filed with the magistrate, unless such complaint is in writing and upon oath, signed by the county attorney or by any other complainant. If the complainant be other than the county attorney he shall either have the consent of the county attorney or shall furnish to the magistrate a bond with good and sufficient sureties in such amount as the magistrate shall determine to indemnify the person complained against for wrongful or malicious prosecution. Whenever a complaint shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest



Supreme Court.

The court made the ruling Friday in upholding the second-degree murder conviction of an Omaha woman, Judith Wayne Gogsell, who had invoked the law in her defense.

The state's highest court said the law, in effect during the [illegible]

MEMORANDUM State of Alaska

TO: John E. Havelock
Attorney General

DATE: February 2, 1971

SUBJECT: HB 47 (Rep. Colletta)

FROM: M. Gregory Papas
Assistant Attorney General

The following comments were made by me during a hearing of the House Judiciary Committee, held on January 29, 1971, in response to an invitation to the department to offer testimony regarding the above-mentioned bill. I made no recommendations as to what type of bill the department would wish to see enacted but limited myself to a statement of the arguments pro and con which have developed in the current judicial examination of the felony-murder rule. This discussion is in outline form since taken from my pre-hearing notes.

1. Alaska does not presently have a genuine felony-murder rule due to the use of the word "purposely" in our murder statute, AS 11.15.010.
   a) Gray v. State, 463 P.2d 902 (1970) points out this fact clearly.
   b) Smith v. Myers, (Pa. 1970) 261 A.2d 550 interpretes the Ohio statute, after which the Alaska Statute was patterned, as not being a true felony-murder rule.

2. HB 47 is a true felony-murder statute.
   a) Effect of rule at common law: To imply malice aforethought in a murder which occurred during the commission of one of the named felonies.
   b) Effect of HB 47: (1) Imputes the act of killing to the felon, whether he is the physical killer or not. This was not common in the United States until about 30 years ago.
      (2) Imputes the element of malice aforethought to raise a criminal homicide to murder in the first degree.
   c) Applications of the felony-murder rule:
      (1) i, felon kills victim
          ii, felon kills co-felon
          iii, felon kills resister (cop/ 3rd person)
          iiii, felon kills bystander

(2) i, victim kills felon
ii, cop kills felon
iii, cop or victim kills bystander
iiii, unusual situations
(victim kills co-victim)

d) Under those situations denominated as c(1), above, successful prosecution does not depend entirely upon the felony-murder doctrine; whereas in those situations denominated as c(2), above, the felony-murder rule is essential if stern prosecution is desired.

3. Many states still follow the rule that any killing which is perpetrated in the commission or attempt to commit one of the enumerated felonies, even if accidental or unintentional, is first degree murder.

a) The wording of section B of the bill (HB 47) makes completely unnecessary proof of a strict causal connection between the felony and resultant homicide.

b) The only specific intent is that needed to commit the felony involved.

c) Courts in states following this concept apply the civil tort concept of "proximate cause", i.e. a felon is criminally responsible for the natural or reasonably foreseeable results of his felonious undertakings.

4. Theoretical criticisms of the broad rule which are applicable, equally, to HB 47.

a) The extension of the common law doctrine to its present stage is based on a misinterpretation of the word "murder" to mean "killing". The common law application was, first, to classify the killing as murder, manslaughter or justifiable or excusable homicide and, if found to be murder, then to characterize it as in the first degree. That is, under a proper application of the rule as taken from the common law malice aforethought may be imputed to the felon but not the act of killing; that the mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine. Under this view the rule is limited in application to situations where the felon is the physical killer. See Clark & Marshall, section 10.07.

b) The presumption which is utilized when imputing the act of killing to the felon in cases where he provokes another person to kill is subject to possible Constitutional strictures.

(1) Background: the U.S. Supreme Court has rejected the idea that a state legislature has the power to create any presumtion it wishes. The constitutional right to a fair trial and the presumption of innocence requires the prosecution to prove beyond a reasonable doubt

every element of the offense charged; that is, there can be no directed verdicts of guilty in a criminal case. Purely arbitrary presumptions violate these rights.

(2) Premise: a criminal statutory presumption must be regarded as irrational or arbitrary, and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Leary v. U.S., 395 US at 36.

(3) In HB 47 the proved fact is the commission of a felony, the presumed fact is that the felon committed the act of killing.

(4) HB 47 glosses over the numerous distinctions between types of homicides by use of this presumption and lumps them all together as murder first.

c) The concept of proximate cause in connection with felony-murder has been abolished in Penn. and Calif.; other states have recognized numerous limitations in its application.

(1) Smith v. Myers, supra, held that the concept of proximate cause has undergone great expansion in recent years; utilizing this concept in prosecutions for criminal homicide would be to extend possible criminal liability to persons chargeable with unlawful or reckless conduct in circumstances not generally considered to present the likelihood of a resultant death.

(2) People v. Washington, (Calif. 1965) 402 P.2d 130 held that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application, thus by implication rejecting the proximate cause argument.

(3) Later Calif. cases have rejected the rule's use in situations where the underlying felony is assault with a deadly weapon, on the basis of the "included in fact" test, in

an effort to preserve distinctions between types of homicides. 22 Stan. L. Rev., No. 5, 1970.

d) The felony-murder concept is legally unsound.
(1) A crime is generally defined as the unity or joint operation of an act (declared unlawful) and intent (to do that act).
(2) It is argued that the unity of act and intent that exists when the felony-murder doctrine is utilized is fictitious at best for it is the combination of the intent to do one act (the felony) with the commission of another act (the homicide).
(3) The presently accepted theory is characterized as particularly unsound when it is carried one step further by considering a homicide to be murder when the actual, physical killer (cop/victim/3rd person) has no legal or moral culpability. The argument is that the felon's guilt should be no greater than the actual killer's.

e) Absence of Mens Rea.
(1) Homicides are distinguished on the basis of the state of mind of the perpetrator; that is, whether his act is wilfull, deliberate and premeditated, upon a sudden heat of passion, in the commission of an unlawful act, or constitutes culpable negligence.
(2) The felony-murder rule sweeps all these distinctions away, notwithstanding the facts of the particular case. It thus imposes the most serious penalties in cases otherwise meriting lesser punishment.

5. Arguments which favor application of the rule in its broadest terms.

a) Underlying each of the arguments in support of the rule is the statement of justice Oliver Wendell Holmes in The Common Law:
"Acts should be judged by their tendency under the

known circumstances, not by the actual intent which accompanies them. . . the object of the law is to prevent human life being endangered or taken. . . the law requires [men] at their peril to know the teachings of common experience, just as it requires them to know the law. . . the test of murder is the degree of danger to life attending the act under the known circumstances of the case".

b) The moment that a person forms the intent to commit a felony which is inherently dangerous to human life he develops a man endangering state of mind, which is malice aforethought. Thereafter any killing is a product of that malice. The law does this very thing in other circumstances. Example - it is first degree murder to shoot and kill one man even though the actor's intent was to kill another person.

c) A killing (done by any person) is initiated by the felon since: (1) he is committing an act in itself dangerous to human life and (2) the killing would not have occured but for the provocation of the felony. The law does not measure the delicate scruples of a felon but rather imputes to him the knowledge that he is inviting dangerous countermeasures.

d) The legislature may properly classify murders committed with premeditation, or by torture, poison, or lying in wait as first degree. It may also classify murders during heinous felonies as first degree.

e) America is experiencing a rampant crime wave, which necessitates, for the protection of society in general, sentences which are commensurate punishment for the crime. This means severe sentences which will act as a deterrent to prospective and repeating criminals. The argument implies that the sentence for robbery, for example, should be more severe when a killing occurs than when no harm is caused.

APPENDIX A

During the course of the discussion, in which I characterized the arguments against the felony-murder rule as somewhat theoretical and those in support as a hard-line approach, it became apparent that the bulk of the committee were not overly impressed with those theoretical arguments. One of the committee members commented that a victim or bystander is just as dead whether killed by the felon or some other person. Chairman Moran, Mr. Hillstrand, Mrs. Banfield and one other seemed to prefer the view that a felon be charged with the consequences of his act. However, each member seemed to grasp the validity of some of the arguments against the rule and expressed a desire to avoid the pitfalls which are becoming evident. The Chairman thereupon inquired if the department has any recommendation, to which I responded that none had formally been agreed upon. However, as a point of discussion, I threw out the formulation of the rule which I proposed in my January 27 memo to you. This statement, plus a committee substitute for HB 47, are currently under consideration. The chairman expressed a wish to proceed judiciously and has agreed to accept further testimony from this department regarding our suggested approach to the problem. My specific request for additional time during which you will be able to formulate the department's position was granted. At this point the committee awaits your pleasure.

One suggestion that I would make, in view of the committee's attitude, is to adopt my suggestion of January 27, 1971 (which is a restatement of HB 496, 6th Legis. - Second Session, introduced at the request of the governor) which fixes the felon's responsibility for his direct acts. In combination with this AS 11.15.080 (negligent homicide) might be beefed up to refer specifically to situations where a felon provokes another person to kill when the killing occurs as a result of resistance to the commission of the felony or during the apprehension of the felons. This approach is, I feel, preferable to the features of CSHB 47 which would necessitate the exploration of what is a probable result of the commission of a felony.

MGP:slb

CC: Secretary of
House Judiciary Committee

HB-47

THE SUPREME COURT OF THE STATE OF ALASKA

ARLIE ROY POPE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. 1127

OPINION

[No. 660 - December 21, 1970]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Ralph E. Moody, Judge.

Appearances: James R. Clouse, Jr., Anchorage, for Appellant. G. Kent Edwards, Attorney General, Juneau, Harold W. Tobey, District Attorney, and Richard R. Felton, Assistant District Attorney, Anchorage, for Appellee.

Before: Boney, Chief Justice, Dimond, Rabinowitz, Connor and Erwin, Justices.

ERWIN, Justice.
CONNOR, Justice, concurring in part and dissenting in part.

Appellant, Pope, was convicted of second degree murder in connection with the death of one David Silva on July 9, 1968. According to his own testimony, he arose on that date at his usual hour and prepared himself for work. While driving to work he began to feel sick and decided to have only coffee in place of his usual breakfast. As appellant continued towards his job, the sickness became more severe and he

decided to turn around and drive back to his motel. He testified that this condition of nervousness and sickness at his stomach had occurred with frequency in the period of time shortly before the shooting occurred.

After returning to his motel room, appellant consumed a little less than one-half of a pint of alcoholic beverage, remaining in his room and watching television. He made several attempts to reach his former wife, Irma Pope, and was at last successful. However, Mrs. Pope refused to speak with him, slamming down the telephone. Appellant stated that the reason that he had attempted to call his former wife was that he felt really sick and was looking for help from someone.

After being rejected over the telephone, appellant described a strange feeling, "like something was spinning around the top of my head, from right to left, right underneath the skin against the skull and when you closed your eyes you could see -- could see a streak of light coming around and around. . . ." He described the light as not being mean or anything, but the light said "kill him, kill him, kill him" -- just kept repeating it; and finally he said it to himself and as soon as he did he felt very good and was not sick any more. Appellant further stated that after the lights had stopped in his head, he felt very sorry for David Silva because of what was going to happen; he did not think there was anything that he could do to prevent the killing of David Silva, and he knew he was going to do it, but he didn't yet know just how. When

appellant finally agreed with the light in his head which told him to kill Silva, the nervousness disappeared, as did his upset stomach.

Appellant's recollection of the events that occurred after he left the motel was hazy and vague. He recalled only being near the parking lot at Anchorage Bedding and Furniture and next seeing the gun in his hand on the door ledge of his automobile. Appellant did not recall shooting the decedent, but only remembered watching the decedent sitting down and then lying backwards on the ground.

Officer Pavlovich was the first law enforcement officer to arrive on the scene. Upon arriving he observed the deceased, a woman at the head of the decedent, and another man, later identified as the appellant, alongside the decedent in either a squatting or kneeling position. Officer Pavlovich went over to the decedent, checked his pulse, and pronounced him dead. He next asked the woman what had happened. The woman, Mrs. Silva, indicated that appellant had shot Mr. Silva. In response to this, Pavlovich stood the appellant up and started to search him for weapons.

At this point in the sequence of events there is a dispute as to the actual occurrences. A Mr. McConnell testified that he observed Officer Pavlovich going over to appellant and questioning him for a minute or two before finally searching him for a weapon. The officer, on the other hand, testified that after he had examined Silva he immediately started to search

appellant. Appellant's version of the story is that as he was being frisked by Officer Pavlovich, he was asked if he had a gun, to which he responded yes, that it was in the car. Officer Pavlovich claims that the information about the gun was volunteered by Pope and that no such question had been asked.

Mr. McConnell stated that after eliciting this information, Officer Pavlovich proceeded to appellant's car, with his arm on appellant's arm, to retrieve the weapon, which was located in the middle of the front seat. Officer Pavlovich stated that after Pope had volunteered the information as to the whereabouts of the gun, Pope proceeded to the automobile and Pavlovich hurried to beat him to the car in an effort to retrieve the weapon.

On cross-examination Officer Pavlovich described the appellant's appearance as being dazed and testified that his feeling at the time was that appellant was not drunk, but either dazed or at least under the influence of alcohol -- but he could not tell which. Officer Pavlovich further testified that although he detected nothing radically wrong with appellant, that is, appellant walked normally and spoke clearly and distinctly, albeit very slowly, he nevertheless seemed to be preoccupied. At another point in his testimony Pavlovich stated that he thought appellant was either under the influence of alcohol or in a state of shock. Furthermore, he was not sure whether appellant was in possession of his faculties at this time.

On August 5, 1968, Pope was indicted by the grand jury for first degree murder and arraigned immediately thereafter.

Appellant entered a plea of not guilty, and the trial date was set for December 12, 1968, before the Honorable Edward V. Davis, Superior Court Judge. Prior to trial, on November 29, 1968, at the request of the prosecutor, a competency hearing was held. On January 16, 1969, the Superior Court entered an order to the effect that the appellant was competent to stand trial.

Because of continuances, trial did not begin until February 10, 1969. At that time the defendant appeared before the Honorable Ralph E. Moody, Judge of the Superior Court, rather than Edward V. Davis, to whom the case had been assigned originally. Timely objection was made by appellant to the unannounced change. On February 18, 1969, the jury returned a verdict of guilty of murder in the second degree. Notice of appeal was duly filed.

Appellant raises four specifications of error in the trial below. His first specification is that the court committed prejudicial error in reassigning appellant's case from Judge Davis to Judge Moody without giving appellant five days from the date of reassignment to consider and possibly file a peremptory challenge affidavit as provided in AS 22.20.022; his second, that the trial court erred in overruling the appellant's motion to suppress the evidence seized by Officer Pavlovich from the appellant's car prior to a lawful arrest; and his third, that the trial court incorrectly admitted the statements of appellant made prior to his being given the proper Miranda warnings and after he had become a suspect in the crime and had been substantially deprived of his freedom of action.

Finally, he contends that the trial court should have ruled as a matter of law that the burden of proving sanity is on the state rather than the burden of proving insanity being upon the defendant, when there was some evidence in the record to indicate that sanity was at issue.

I

In his first claim of error, appellant contends that because of the assignment procedure used herein,[1] he did not have sufficient opportunity to determine and if necessary file an affidavit alleging he believed that he could not obtain a fair and impartial trial.

Trial proceeded on February 10, 1969, appellant making timely motion,[2] which motion was denied.

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[1] There was no advance notice to counsel of the reassignment of this case from Judge Davis to Judge Moody on the day of trial. It should be noted that subsequent to the trial herein this court in the case of Roberts v. State, 458 P.2d 340, 346 (Alaska 1969) pointed out the potential problems of such a practice in suggesting that this method of reassignment of a case should be avoided in the future:

> A method should be devised and utilized to make assignment of cases to judges sufficiently in advance of trial or hearing, with notice of the assignment being given to the parties, so that the parties can be afforded their rights under AS 22.20.022 without interfering with the scheduled hearing or trial dates.

[2] The motion was as follows:

> Mr. Clouse: Your Honor, for the record, at this time, I would like to state an objection to the Court's requiring us to go to trial at this time and not before the -- Judge Davis who was previously assigned this case. This deprives the defendant of the opportunity to investigate and exercise any challenge that he may have within the five day period as provided by rule and statute.

Appellant correctly points out that the granting of the five-day period is to allow a party or his attorney an opportunity to investigate the judge to whom the case is assigned and if necessary file the requisite affidavit for disqualification, thus avoiding the waste of judicial time which would result if an affidavit or disqualification were not filed until the date of trial because this would mean that the case would have to be continued until another judge could be assigned and the disqualified judge would not be ready at that time to start the trial of another action.[3] Appellant

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2 [Contd.]

> The Court: Motion's denied since this is merely a procedural matter and it delays the -- delays the carrying on of Court business if we give effect to that for the five days rule. Other than the objection, is defense ready to proceed?
>
> Mr. Clouse: Yes, your Honor.

AS 22.20.022 states in relevant part:

> "Peremptory disqualification of a superior court judge. (a) If a party or his attorney in a superior court action, civil or criminal, files an affidavit alleging under oath that he believes that he cannot obtain a fair and impartial trial, the presiding judge shall at once, and without requiring proof, assign the action to another judge of that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay."
>
> * * *
>
> "(c) The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, whichever event occurs later, unless good cause is shown for the failure to file it within that time."

3 Roberts v. State, 458 P.2d 340, 346 (Alaska 1969).

further correctly argues that the provisions of this statute have been interpreted by this court to mean that once the affidavit is filed, the judge involved is without power or jurisdiction to take any further action in the proceeding. Channel Flying Inc. v. Bernhardt, 451 P.2d 570 (Alaska 1969).

But appellant has not shown that any harm resulted to him from the denial of his motion. Instead, he invites us to speculate that he suffered some possible prejudice, even though he did not challenge the trial judge because he felt that any challenge he made might have a prejudicial effect on the jury. The gist of appellant's argument appears to be that since any challenge might affect the jury he never seriously considered whether or not he should exercise the challenge because the reassignment made the choice more difficult. Since appellant could have exercised the challenge at any time within five days of reassignment, even during trial, we hold that his failure to do so was a waiver of his right to a peremptory challenge to the trial judge, and it was not error for the court to refuse to grant a continuance of five days to permit appellant to ponder this matter at length.

II

Appellant claims that the trial court committed error in refusing to suppress as evidence (1) appellant's oral statement about the gun, and (2) the gun itself, which the officer seized in appellant's car. The argument is that this evidence is tainted because the required warnings under Miranda v.

Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966) were not given by the officer until after the seizure of the gun, that appellant had already become a suspect in the crime, and that he had been substantially deprived of his freedom in a significant way. The test of when warnings must be given under Miranda is whether the accused has been "taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning." 384 U.S. at 478, 16 L.Ed.2d at 726.

We need not explore such problems as whether the "in custody" test of Miranda displaces the "focus" test of Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977 (1964), or whether the two tests can be regarded as alternatives to some extent.[4] For it is plain to us that this case falls within an important exception stated by the court in its opinion in Miranda. After pointing out that it did not intend to hamper the traditional function of police officers in investigating crime, the court said:

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling

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[4] United States v. Hall, 421 F.2d 540 (2nd Cir. 1969); Graham, What is Custodial Interrogation?: California's Anticipatory Application of Miranda v. Arizona, 14 U.C.L.A. L.Rev. 59, 114-15.

> atmosphere inherent in the process of in-custody interrogation is not necessarily present. 384 U.S. at 477-78, 16 L.Ed.2d at 725-26.

In interpreting Miranda various courts have had to draw lines between what are permissible investigative interviews and custodial interrogations. The United States Supreme Court itself has made it plain that custodial interrogation could take place outside the station-house where one was "not free to go where he pleased but was 'under arrest.'" Orozco v. Texas, 394 U.S. 324, 325, 22 L.Ed.2d 311, 314 (1969). The courts must determine, therefore, in each case whether the atmosphere and setting of an interrogation are of such coercive effect or indicate such significant restraint as to trigger the need for a Miranda warning. There is not always agreement about the criteria for such a determination.

But the case at bar is a strong one for applying the "on-the-scene questioning" exception to the Miranda warning requirement. The officer here was presented with a situation of great emergency. A crime of violence had occurred, the victim was lying on the ground dead. There was more than one person present. Both to protect his own safety and that of others, the officer had to elicit information about what had happened, and about the gun which had obviously been used in the killing. For the same reason the officer also had the right to conduct a strictly limited search ("frisk") of Pope's person for weapons under the rule of Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968),

which he did.[5] To hold that, while a policeman faced with an emergency such as the one which confronted Officer Pavlovich may "frisk" a suspect for weapons he may not simultaneously ask him whether he is armed, would be an unrealistic and unreasonable extension of the Miranda rule.

Appellant also contends that, because the revolver was seized from Pope's automobile prior to the time he was placed under arrest, it was inadmissible because it was not the product of a search incident to arrest. The difficulty with this line of argument is that the gun was not the product of a "search" at all; it was lying on the front seat of the car in plain view. As soon as he saw it, Officer Pavlovich seized it and unloaded it, both to preserve it and its cartridges as evidence and to prevent appellant, who was standing beside him, from getting hold of it. His conduct was entirely justified.

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.[6]

III

The final point raised by appellant is a challenge to the burden of proof in insanity cases as set forth in the

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[5] See Maze v. State, 425 P.2d 235, 238 (Alaska 1967).

[6] Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069 (1968); Creighton v. United States, 406 F.2d 651 (D.C. Cir. 1968); Klockenbrink v. State, 472 P.2d 958, 961 (Alaska 1970). See Stevens v. State, 443 P.2d 600, 602 (Alaska 1968).

opinion of this court in Chase v. State.[7] A review of the record reveals that the only testimony before this court in reviewing this point is the testimony of Officer Pavlovich, the appellant, Pope, Bill McConnell, and the cross-examination of appellant's ex-wife. Testimony given by Dr. J. Ray Langdon, a psychiatrist, and Marie Doyle, a psychologist, at the trial, as well as the testimony of additional police officers and others at the scene of the crime, was not made a part of the record on appeal.

While proper objections were made at the trial concerning burden of proof in insanity cases, no objection was made to instructions on the test for insanity as given by the trial court, nor was any testimony presented nor instructions requested concerning such an issue.

Since in our opinion the burden of proof as to the defense of insanity and the actual test for insanity are inseparably intertwined,[8] we are placed in the position of attempting to review the entire basis for the present rule on the defense of insanity in Alaska on an inadequate record without complete presentation of these issues to the trial court. This we decline to do.[9]

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[7] 369 P.2d 997, 1003 (Alaska 1962).

[8] Approximately one-half of the states put the burden on the defendant while the other half and the federal courts put the basic burden on the prosecution. See annot. 17 A.L.R.3rd 146 (1968).

[9] For a similar action by a federal court, see Ramer v. United States, 390 F.2d 564 (9th Cir. 1968).

The importance of the defense of insanity has been underscored recently by a series of excellent opinions in federal courts which have considered, and in many cases adopted, the A.L.I. test for insanity,[10] and a series of equally searching state court opinions which have noted more than one position, but have tended to retain the M'Naghten rule.[11] These opinions note that there are presently four separate tests for insanity[12] which have received varying degrees of judicial acceptance. They serve to underscore the difficulty of choosing a proper test for insanity and the corresponding burden of proof without

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[10] Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651, 20 L.Ed.2d 1317 (1968); United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966); Wion v. United States, 325 F.2d 420 (10th Cir. 1963), cert. denied 377 U.S. 946, 12 L.Ed.2d 309 (1964); United States v. Smith, 404 F.2d 720 (6th Cir. 1968).

[11] FOR A.L.I.: State v. White, 456 P.2d 797 (Idaho 1969).
FOR M'NAGHTEN: State v. Malumphy, 461 P.2d 677 (Ariz. 1969); State v. Moeller, 433 P.2d 136 (Hawaii 1967); State v. Harkness, 160 N.W.2d 324 (Iowa 1968); Williams v. State, 451 P.2d 848, 851 (Nev. 1969); State v. Gilmore, 410 P.2d 240 (Ore. 1966); Commonwealth v. Rightnour, 253 A.2d 644 (Pa. 1969) (Aff'd by equally divided court).

[12] (1) The M'Naghten Test, Daniel M'Naghten case, 8 Eng. Rep. 718 (H.L. 1843).
(2) Durham Test, Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
(3) American Law Institute Test, American Law Institute, Model Penal Code, Section 4.01(1) (Final Draft 1962).
(4) English Test, British Royal Commission on Capital Punishment, 1949-1953, 1953 Report at page 116, quoted in United States v. Currens, 290 F.2d 751, 774, n. 32 (3rd Cir. 1961).

complete presentation on the issue in the trial court and ultimately in this court.[13]

The judgment of the Superior Court is hereby affirmed.

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[13] Once before this court has refused to review the test for insanity for Alaska based on an inadequate record. See Dimmick v. State, 449 P.2d 774, 776 (Alaska 1969).

CONNOR, J., concurring in part and dissenting in part.

I concur with the majority opinion except the portion dealing with the burden of proof in insanity cases, and allied questions. As to that portion of the majority opinion I must respectfully dissent.

This case went to the jury on instructions concerning the defense of insanity which were patterned on those approved by this court in Chase v. State, 369 P.2d 997 (Alaska 1962). Counsel for appellant objected to those instructions as improperly placing the burden on the accused to establish his insanity by a preponderance of the evidence. He thus raised and preserved for appeal the questions of what is the burden of proof and where it should be placed in these cases. He is properly entitled to a decision on those questions.

The majority of my colleagues feel that the burden of proof question and the substantive test of insanity are interrelated. I agree. But for that very reason I believe that both topics logically can, and properly should, be determined by the court.[1/]

The lack of an adversary presentation of the legal arguments bearing upon the proper test of insanity in criminal cases should not be an impediment to decision in this particular instance. Ultimately one must read a large body of legal and

1/ For a case in which a distinguished court took a relaxed view of the manner in which counsel raised the question of the proper test of insanity in the trial court, see United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). The failure of trial counsel in that case to object to the insanity test itself was not deemed critical.

psychiatric material even to become conversant with these subjects. Appellate briefs are of much less value here than in the resolution of more usual questions.[2] Surely this would not be the first time that this court decided a case on grounds or under a doctrine not fully presented in the briefs.[3]

There is another reason why we should decide these questions now, not later. In my opinion the test currently obtaining under Chase v. State, supra, is so inherently unfair as to dissuade either defendants or their counsel from raising the defense of insanity, or adducing evidence in support of it. Thus it is difficult to get the insanity question before us on appeal.

The insanity defense is much like a confession and avoidance. One virtually admits all factual elements of the crime but claims insanity as a special ground of exoneration. One claiming that he did not commit the offense, but who alternatively claims that he was insane when he did commit it, has little hope of success. While such an approach is procedurally permissible, as a practical matter it is a foolhardy strategy.

2/ The question of the test of insanity as a criminal defense has already been briefed in Chase v. State, 369 P.2d 997 (Alaska 1962). There the state urged that if the M'Naghten test was not employed, the American Law Institute test (discussed later herein) would be the most suitable.

3/ One such case was Grossman v. State, 457 P.2d 226 (Alaska 1969), adopting an objective standard of entrapment, though neither party directly briefed that doctrine. Surely others could be found by searching the briefs and comparing them with the opinions rendered by this court during the last ten years.

A person invoking the Alaska rule on insanity, even in a strong case, has almost precluded himself from an acquittal. The current test thus exerts a chilling effect upon one who might seek a change in the law through the appellate process. This is true even though he may have suffered from serious mental illness, of a psychotic type, at the time he committed the act with which he is charged. Because of the in terrorem effect of the current Alaska test, I see no reason to postpone corrective measures, especially if we believe that the test can be improved.

I

All discussion of the tests of criminal responsibility inevitably must refer to M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843), which is regarded as the English source of the rule followed in most American jurisdictions for over a century. In that case Daniel M'Naghten attempted to assassinate Robert Peel, the Prime Minister. Because Peel, on the fatal day, happened to ride in Queen Victoria's carriage instead of his own, M'Naghten shot into the wrong carriage and killed Drummond, Peel's secretary. From all of the available information it seems quite plain that M'Naghten was suffering from psychotic delusions of persecution. At his trial Lord Chief Justice Tindal virtually directed a verdict in his favor.[4/] At the trial the medical witnesses and the court had been influenced by the writings and

4/ Guttmacher & Weihofen, Psychiatry and the Law, 403 (1952); Roche, "Criminality and Mental Illness - Two Faces on the Same Coin," 22 U. Chi. L. Rev. 320, 324 (1955); Biggs, The Guilty Mind, 95-97, 102 (1955).

theories of such advanced thinkers as Dr. Isaac Ray, the first great forensic psychiatrist in America. It was Dr. Ray's thesis that insanity must be measured by evaluating the entire personality structure of an individual, and not by tests such as merely the ability to know right from wrong.[5/] At any rate, M'Naghten was acquitted. Unfortunately for the development of law, the case did not end there.

Despite commitment of the hapless M'Naghten to an insane asylum, Queen Victoria was outraged by the acquittal, probably because there had already been three attempts on her life and one on that of the Prince Consort. In a letter to Sir Robert Peel, the Queen deplored the action of the judges in allowing verdicts of not guilty by reason of insanity in cases of this kind because she was convinced that such malefactors "were perfectly conscious and aware of what they did." She pressed for legislation to require judges "to interpret the law in this and no other sense in their charges to the Juries."[6/] The House of Lords was convened, and the fifteen judges of the common law courts were called upon, in an atmosphere of political pressure, to answer five rather vacuous questions about criminal responsibility in English law. Interestingly enough, it was Lord Chief Justice Tindal who

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5/ Dr. Ray's views have a modern ring. "[T]he insane mind is not entirely deprived of ... power of moral discernment, but on many subjects is perfectly rational and displays the exercise of a sound and well balanced mind." Ray, Medical Jurisprudence of Insanity 13 (3d ed. 1853).

6/ Biggs, supra n. 4, 103.

responded with a test more rigid than that which he had used when M'Naghten was tried before him. The M'Naghten rule in essence is:

> "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing: or, if he did know it, that he did not know he was doing what was wrong." 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722.

Thus, in a case which was no longer a case, in response to hypothetical questions based on notions of phrenology and monomania which were then in vogue, the judges, in a dramatic departure from common law decisional technique, acting more as a governmental committee than a court, pronounced a rule which has been followed unthinkingly by many courts ever since. Of little avail was the restrained observation of Sir James Stephen that "every judgment delivered since the year 1843 has been founded upon an authority which deserves to be described as in many ways doubtful."[7/] The test could at least have been limited to cases of paranoia like that suffered by M'Naghten, but instead it was applied by many courts as a rule of universal and implacable validity, appropriate for all types of mental and emotional derangement.

The M'Naghten test has been supplemented in many jurisdictions by the "irresistible impulse" test, under which one suffering from a mental disease, of such severity that the

7/ II Stephen, History of the Criminal Law of England 153 (1883).

freedom of will is destroyed, may be excused from culpability.[8]

In Alaska, before statehood, the right-and-wrong test, supplemented by the irresistible impulse test, was considered the applicable rule.[9] In Chase v. State, 369 P.2d 997 (Alaska 1962), however, this court adopted a particular version of what it regarded as the M'Naghten rule. The test laid down there was that in order to exculpate the defendant he must be laboring under such mental disease or derangement at the time of the act "as to render him incapable of knowing the nature and quality of his act and of distinguishing between right and wrcng in relation to the act with which he is charged." 369 P.2d, at 998. (Emphasis supplied.) This results in a formulation more rigid than the M'Naghten test, and without the irresistible impulse supplement which had previously obtained in Alaska.[10] In that sense the Chase case is a retrograde decision in a time of

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8/ As of 1955, about 14 states, and the federal judiciary, had adopted the irresistible impulse addition to the test.

Mod. Penal Code, Tent. Dr. No. 4,161 (1955).

9/ Matheson v. United States, 227 U.S. 540 (1913); Davis v. United States, 165 U.S. 373 (1897); Sauer v. United States, 241 F.2d 640 (1957), cert. denied 354 U.S. 940; Rivers v. United States, 270 F.2d 435 (1959).

10/ That the Alaska test is more restrictive than M'Naghten is apparent from the following example. One laboring under a psychotic delusion, such as that he is being persecuted or that God has ordained that he must kill, may well know the nature of the act committed, yet not be able to appreciate its wrongfulness. Under M'Naghten he would not be culpable, but under Chase he could not be acquitted. Cf. People v. Schmidt, 110 N.E. 945 (N.Y. 1915), per Cardozo, J.

generally forward legal progress.[11/]

The court in Chase relied on three cases: Jessner v. State, 202 Wis. 184, 231 N.W. 634, 71 A.L.R. 1005 (1930); Maas v. Territory, 10 Okla. 714, 63 P. 960 (1901); and Montgomery v. State, 68 Tex. Crim. 78, 151 S.W. 813 (1912). As the Note, "Criminal Insanity," UCLA-Alaska L. Rev., 8 Alaska L.J. 152, 153-54 (Aug. 1970), points out, these cases were decided before many of the modern advances in psychiatry had been widely disseminated. Moreover, the instructions given in these cases lacked clarity and therefore were extremely confusing. Jessner and Montgomery indeed held that the phrases "the nature and quality of the act" and "the difference between right and wrong" were synonymous; if the defendant could not understand the one, he could not distinguish the other. However, as the Note, supra, indicates, these phrases are not at all synonymous in ordinary speech.

To torture English into performing such a linguistic cakewalk requires unusual skill. Since juries are composed of but ordinary reasonable laymen, additional complicated instructions would have to be given to insure that the jury does not consider the terms according to their usage in common everyday

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11/ Speculation persists in Alaska legal circles that the use of the conjunctive "and" in the instructions which were validated in Chase possibly came about through a typographical error by the secretary to the trial court judge. If this is so, then Chase is no less an historical accident than M'Naghten's Case.

speech and thereby misapply the law. Such verbal gymnastics should not be employed in jury instructions. The purpose of jury instructions is to instruct and enlighten the jury on the law, not to confuse them.[12/]

It also appears that the instructions in Jessner focused solely on the defendant's ability to distinguish between right and wrong, ignoring completely his ability to understand the nature and quality of his act.[13/] In Maas, the actual instruction did follow the disjunctive form of the M'Naghten test.[14/] If anything, this case stands for an adoption of the true M'Naghten rule, not the rule of Chase. In sum, I do not find any of these cases of sufficient precedential value to warrant an adherence by this court to what is little more than a modified "wild beast" test.[15/]

Since the M'Naghten case, and even in the eight years since Chase v. State was decided, a great deal of critical

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12/ "But 'glory' doesn't mean 'a nice knockdown argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master--that's all."

L. CARROLL, Through the Looking Glass, in THE ANNOTATED ALICE 269 (1960).

This nonsensical repartee brings sharply into focus a problem which has plagued logicians since at least the time of William of Occam. A lack of awareness of this problem has led to much mischief in legal interpretation.

13/ 202 Wis. at 196, 231 N.W. at 639.

14/ 10 C[illegible], at 717, 63 P. at 961.

15/ Re[illegible]old, 16 How. St. Tr. 695, 764 (1724).

evaluation and development has occurred, in an effort to achieve more advanced and just techniques for handling this serious problem.

The torrent of legal writing is so vast that it is nearly impossible for all but a few to read or comprehend everything which has been said on this basic issue of criminal responsibility. Still, certain broad outlines can be stated. There is nearly universal dissatisfaction with the M'Naghten rule on the part of scholars, jurists, and psychiatrists who have seriously inquired into the subject. The main difficulty with the M'Naghten rule is that it focuses exclusively on the cognitive element in mental life, that is, the knowledge of right and wrong or of the nature of one's act. One of its underlying assumptions is that mental illness is a failure of intellectual function. This reflects an artificial dualism of mind and emotions which ignores the affective aspects of the human personality. While there are many schools of psychiatric thought, there is broad agreement that mental illness can be understood only by looking at man as an integrated, psychobiological whole.[16/] Because the M'Naghten

16/ "Psychiatry may be defined as that branch of medicine which deals with the genesis, dynamics, manifestations and treatment of such disordered and undesirable functionings of the personality as disturb either the subjective life of the individual or his relations with other persons or with society.... Viewed a little differently, psychiatry may be regarded as the science which deals with the psychopathological aspect of human biology. The latter considers man not only as a living organism but also as a thinking, feeling and striving one." Noyes & Kolb, Modern Clinical Psychiatry (5th Ed. 1958), 1.

rule views man within the artificial strictures of cognition, courts and juries are deprived of much of the benefit to be gained from the modern science of psychiatry.[17]

Other criticisms of the M'Naghten rule would probably be applicable to any verbal formulation.[18] The difficulty stems from the different functions and purposes of law and psyciatry. The aim of psychiatry is to examine human behavior and mental disease in a scientific manner and to develop therapeutic methods of dealing with the emotional problems of mankind. On the other hand, it is the task of the law to develop normative rules to control human behavior. It has always been recognized that certain persons must be regarded as not the proper subjects of criminal conviction, and that because of their mental aberrations it would be unjust to hold them responsible for their conduct.[19] Ultimately this is an ethical and social judgment and not a medical determination.

Scholars and jurists have expended great effort over the years to achieve a standard reflecting both society's need for criminal accountability and the converse demand for a rule flexible enough to cover the varieties and combinations of serious emotional and mental illness which destroy the capacity to commit a crime, in any just conception of the term.

17/ P. Roche, The Criminal Mind (1957), 168-195, 244-274.

18/ F. Allen, The Borderland of Criminal Justice (1964), 111.

19/ A. Platt & B. Diamond, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey," 54 Calif. L. Rev. 1227 (1966). In early law the "insane" were considered homologous to children.

One great developmental breakthrough occurred with the famous decision in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). There Judge Bazelon laid down a test under which a defendant was to be held not responsible "if his unlawful act was the product of mental disease or mental defect." 214 F.2d at 874. This was an adaptation of a rule which had previously existed solely in New Hampshire, and which had developed under the influential work of Dr. Ray. State v. Pike, 49 N.H. 399 (1870). While Durham represents a courageous attempt to state a modern standard of responsibility, certain deficiencies were encountered in its administration. For example, the use of the term "product" created difficult problems of causation.[20/] And as Judge (now Chief Justice) Burger complained, concurring in Blocker v. United States, 288 F.2d 853, 860 (D.C. Cir. 1960), the test in many cases put the legal determination in the hands of psychiatric witnesses rather than judge and jury. Finally, in Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967), Judge Bazelon noted certain shortcomings of the Durham test, in that it allowed the psychiatrist to make too many legal and moral judgments which should be within the province of the jury. In substance, he appears to have acceded at least partially to the view of Judge Burger that psychiatrists should no longer be permitted to render an opinion on whether the act was a "product" of mental disease. A lengthy form of instruction was adopted to clarify the respective functions of expert

20/ Weihofen, "The Flowering of New Hampshire," 22 U. of Chi. L. Rev. 356, 360 (1955).

witness and jury.

Shortly after the Durham rule was announced, the American Law Institute promulgated a draft rule on this subject. This rule represents the collective efforts of some of the leading thinkers in this field. After nine years of research and consideration, the proposed rule was stated as follows:

> "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> "(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."
>
> A.L.I. Mod. P. Code §4.01 (final draft) (1962).

Since then this test, or some variant of it, has met with increasing judicial acceptance, particularly in the federal courts. In a luminous opinion by Judge Kaufman, the Second Circuit adopted the test in United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966). Chief Judge Haynsworth adopted it for the Fourth Circuit in United States v. Chandler, 393 F.2d 920 (4th Cir. 1968) (en banc), and the Ninth Circuit has now embraced it in Wade v. United States, 426 F.2d 64 (9th Cir. March, 1970)(en banc). The M'Naghten test has now been overthrown in all but the First Circuit.[21] These

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21/ In addition to the above cited cases, see United States v. Currens, 290 F.2d 751 (3rd Cir. 1961); Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (en banc); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Shapiro, 393 F.2d 680 (7th Cir. 1967) (en banc); Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (en banc), vacated on other grounds, 392 U.S. 651 (1968); Wion v. United States, 325 F.2d 420 (10th Cir. 1963) (en banc), cert. denied, 377 U.S. 946 (1964). While not all of these cases embrace the A.L.I. test totally, they reject the

cases contain excellent disquisitions on the M'Naghten rule, its deficiencies, and the legal and psychiatric framework underlying the A.L.I. test. As Chief Judge Haynsworth said of the A.L.I. test:

> "With appropriate balance between cognition and volition, it demands an unrestricted inquiry into the whole personality of a defendant who surmounts the threshold question of doubt of his responsibility. Its verbiage is understandable by psychiatrists; it imposes no limitation upon their testimony, and yet, to a substantial extent, it avoids a diagnostic approach and leaves the jury free to make its findings in terms of a standard which society prescribes and juries may apply. [Footnotes omitted.]" United States v. Chandler, supra, at 926.

This wide acceptance of the American Law Institute test is significant. I believe that this formulation affords a workable standard, permitting realistic expert testimony about the personality and characteristics of the defendant as a whole man, but leaving to the court and jury the ultimate legal pronouncement. It avoids many of the problems encountered under the Durham rule.

No verbal formulation of this standard can achieve perfection, as there may always be doubt about the application of general terms to marginal situations. Yet the American Law Institute standard, in the view of many, does represent the best in current thinking on this subject. It is the standard

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21/ [cont'd] M'Naghten rule and include a test whereby the effect of mental illness on one's capacity to conform his conduct to law is stressed. Judge (now Chief Justice) Burger, in his separate concurring opinion in Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1960), laid great emphasis on a test which would focus on the relationship between mental illness and one's capacity to refrain from wrongdoing.

which should be employed in Alaska.[22] I regard it unfortunate that we are not taking this step today.

II

Appellant has raised the question of where the burden of proof should be placed in these cases. In Chase v. State, supra, this court adopted the rule that the burden was on the defendant to establish his insanity by a preponderance of the evidence. Approximately one-half of the states follow this rule.[23] But in the rest of the states, and in the federal

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22/ The standard need not be frozen entirely within only one rigid form of words. In appropriate cases the testimony might require some amplification of the test in the instructions to the jury. Nor is this an occasion to consider the undue resort to diagnostic labels and conclusionary medical terms which plagued the court under the Durham rule and which the court sought to limit in Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967). Hopefully, care would be taken to see that experts explain such labels and terms in language understandable to the jury.

23/ Alabama, Knight v. State, 142 So.2d 899 (Ala. 1962); Alaska, Chase v. State, 369 P.2d 997 (Alas. 1962); Arkansas, Kelley v. State, 242 S.W. 572 (Ark. 1922); California, People v. Monk, 363 P.2d 865 (Calif. 1961); Delaware, Longoria v. State, 168 A.2d 695 (Del. 1961); Georgia, Ross v. State, 124 S.E.2d 280 (Ga. 1962); Iowa, State v. Drosos, 114 N.W. 2d 526 (Iowa 1962); Kentucky, Tungent v. Commonwealth, 198 S.W.2d 785 (Ky. 1947); Maine, State v. Park, 193 A.2d 1 (Me. 1963); Minnesota, State v. Finn, 100 N.W.2d 508 (Minn. 1960); Missouri, State v. King, 375 S.W.2d 34 (Mo. 1964); Montana, State v. DeHann, 292 P. 1109 (Mont. 1930); Nevada, State v. Behiter, 29 P.2d 1000 (Nev. 1934); New Jersey, State v. Kudzinowski, 147 A. 453 (N.J. 1929); North Carolina, State v. Swink, 47 S.E.2d 852 (N.C. 1948); Ohio, State v. Stewart, 198 N.E.2d 439 (Ohio 1964); Oregon, 14 Ore. Rev. Stat. 136.390 (1960); Pennsylvania, Commonwealth v. Updegrove, 198 A.2d 534 (Pa. 1964); Rhode Island, State v. Gunnites, 161 A.2d 818 (R.I. 1960); South Carolina, State v. Tidwell, 84 S.E. 778 (S.C. 1915); Texas, Carrell v. State, 283 S.W.2d 793 (Tex. 1951); Virginia, Christian v. Commonwealth, 117 S.E.2d 72 (Va. 1960); Washington, State v. Mays, 395 P.2d 758 (Wash. 1965); West Virginia, State v. McCauley, 43 S.E.2d 454 (W. Va. 1947). See 17 A.L.R.3d 146 (1968).

courts, the accused need only show some evidence of insanity. The prosecution must then prove his sanity beyond a reasonable doubt.[24/]

Those who place the burder of establishing sanity on the defendant usually argue that this accords with the presumption of sanity. Because there is a presumption, it is said that the prosecution should not be put to proving that which normally is not imposed upon it. But under the federal rule, the presumption of sanity is still employed. It is operative until some evidence is produced which adequately brings into issue the sanity of the defendant. The presumption then disappears and the mental capacity of the defendant to commit the crime becomes an essential element, to be proved beyond a reasonable

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24/ Those states following the federal rule are: Arizona, State v. Schantz, 403 P.2d 521 (Ariz. 1965); Colorado, Castro v. People, 346 P.2d 1020 (Colo. 1959); Connecticut, State v. Joseph, 115 A. 85 (Conn. 1921); Florida, Farrell v. State, 101 So.2d 130 (Fla. 1958); Hawaii, State v. Moeller, 433 P.2d 136 (Hawaii 1967); Idaho, State v. Clokey, 364 P.2d 159 (Idaho 1961); Illinois, People v. Robinson, 174 N.E.2d 820 (Ill. 1961); Indiana, Whitaker v. State, 168 N.E.2d 212 (Ind. 1960); Kansas, State v. Penry, 368 P.2d 60 (Kan. 1962); Maryland, Jenkins v. State, 209 P.2d 616 (Md. 1965); Massachusetts, Commonwealth v. McHoul, 226 N.E.2d 556 (Mass. 1967); Michigan, People v. Eggleston, 152 N.W. 944 (Mich. 1915); Mississippi, McGarrh v. State, 148 So.2d 494 (Miss. 1963); Nebraska, Thompson v. State, 68 N.W.2d 267 (Nebr. 1955); North Dakota, State v. Barry, 92 N.W. 809 (N.D. 1902); New Hampshire, State v. Bartlett, 43 N.H. 224 (N.H. 1861); New Mexico, State v. Roy, 60 P.2d 646 (N.M. 1936); New York, People v. Kelley, 99 N.E. 2d 552 (N.Y. 1951); Oklahoma, Whisenhunt v. State, 279 P.2d 366 (Okla. 1954); South Dakota, State v. Waugh, 127 N.W.2d 429 (S.D. 1964); Tennessee, Jordan v. State, 135 S.W. 327 (Tenn. 1911); Utah, State v. Green, 40 P.2d 961 (Utah 1935); Wisconsin, State v. Esser, 115 N.W.2d 505 (Wis. 1962); Wyoming, State v. Pressler, 92 P. 806 (Wyo. 1907). The District of Columbia also follows this rule: Jones v. United States, 284 F.2d 245 (D.C. Cir. 1960). See 17 A.L.R.3d 146 (1968).

doubt, like any other.[25/]

It has been said that the burden of establishing insanity should be placed on the accused because sanity is not an element of the offense but a quality of the one who commits it. Chase v. State, supra, at 1003. But this overlooks the important consideration that once sanity is in issue it is a fact to be established like any other ultimate fact essential to culpability. The United States Supreme Court made this plain in Davis v. United States, 160 U.S. 469 (1895), when it said:

> "No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." (Emphasis supplied.) 160 U.S. at 493.

Realistically speaking, when sanity is an issue, it is not only a major element of the criminal proof, it may be the central factual issue in the case. For that matter, it may be the only issue. Logically, sanity is an essential element of a crime because mens rea is a necessary primary factor. If insanity exists at the time of the criminal act, mens rea fails, there is

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25/ Fitts v. United States, 284 F.2d 108 (10th Cir. 1960). There the court said:

> "When, however, evidence of insanity is produced, from whatever source, the presumption of sanity disappears, and the mental capacity of the accused to commit the crime becomes an essential element to be proved by competent evidence beyond a reasonable doubt." 284 F.2d at 112.

This is the general rule which is followed in approximately one-half or more of the jurisdictions of the United States.

no jointure of act and intent, and under the traditional analysis no crime has been committed. As Mr. Justice Frankfurter noted, dissenting in Leland v. Oregon, 343 U.S. 790, 803 (1952):

> "Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder."

Placing the burden on the prosecution has substantial advantages. First, it accords with the presumption of innocence and the thesis that the accused need not undertake to prove anything in a criminal case.[26/]

An additional advantage is that the jury is not given the confusing task of juggling two different burdens, each of which carries a different standard. This anomaly is pointed out by Professor McCormick:

> "Thus it seems inconsistent to demand as to some elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress or capacity to know right from wrong, the jury may convict though they have such doubt. Accordingly, the recent trend both in English and American decisions is to treat these so-called matters of defense as situations wherein the accused will usually have the first burden of producing evidence in order that the issue be raised and submitted to the jury, but at the close of the evidence the jury must be told that if they have a reasonable doubt of the fact on which the justification is based they must acquit." McCormick, Evidence § 321, p. 684 (1954). (Footnote omitted.)

26/ As a practical matter the accused often must undertake to adduce proof of insanity if he is to prevail in creating a reasonable doubt on the whole evidence.

There are also important aspects of constitutional policy to be weighed in the balance. It has been held unconstitutional to shift the burden of persuasion on the defense of alibi to the accused. Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968) (en banc), and cases cited therein. This may or may not represent some future trend. But when it comes to shifting burdens, there is not much difference between proof that a defendant was physically present, and not elsewhere, at the commission of a crime, and that he was "mentally present," in the sense that he was sane.

Lastly, the experience of the federal courts, in their treatment of the burden of persuasion, is of value. The federal courts have worked under the rule of Davis v. United States, supra, since 1895, and have not found it a handicap in effecting criminal justice. In my view, when sanity is in issue, the burden of persuasion should be upon the prosecution to establish the sanity of the accused beyond a reasonable doubt.

III

In fairness, to avoid surprise, the prosecution should be entitled to notice that it must adduce evidence of the defendant's sanity. Because the mental status of an accused, in terms of sanity, is usually not in issue in a criminal prosecution, it would be an unfair burden to require the state invariably to guess at whether this issue might be raised at trial, and possibly to prepare on this issue, only to have it not raised at all. Nor is it fair for defendants to wait in

ambush until trial to inject the sanity issue as a surprise tactic.

Therefore, if we were to alter our insanity rules, we should also change our procedural rules to require that at the time of plea, or within a certain number of days thereafter, one intending to raise the issue of insanity at his trial must specially plead that he was insane at the time he committed the act charged.

For the reasons given I would reverse and remand for a new trial.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

January 27, 1971

MEMORANDUM

TO: Rep. William J. Moran, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson AHP
Revisor of Statutes

SUBJECT: HB-47, felony-murder, insanity and mens rea

I.

You will find attached as Appendix A a draft of a committee substitute for HB-47, adopting an "aggravated offense" approach as an alternative to the broad, common law felony-murder doctrine, as requested by the committee. (Regarding the present Alaska law, see Gray v. Alaska, 463 P 2d 897 (Alaska, 1970).) Concerning four basic purposes of the criminal law -- deterrence, punishment ("an eye for an eye"), rehabilitation, and isolation -- the felony-murder doctrine appears quite inadequate with regard to the first (because, even if the gas station robber, for example, knowsthe law, it is usually not his intent that anybody be killed in connection with the robbery), it is unnecessary and frequently results in great injustice with regard to the second (as illustrated during earlier committee discussions), it appears to be irrelevant to the third, and while it results in isolating the defendant from the community it often does so without benefit to the community and without justice to the defendant.

In 1968 the legislature provided for an additional penalty if a firearm is used or carried during the commission of specified offenses. As a further deterrent to the use of weapons in the commission of these offenses, sec. 3 of the committee substitute changes "firearm" to read "dangerous weapon". (Regarding the latter, see Berfield v. Alaska, 458 P 2d 1008 (Alaska, 1969) and Ransom v. Alaska, 460 P 2d 170 (Alaska, 1969).)

Note that sec. 3 goes so far as to impose the additional penalty for merely carrying the weapon. In light of the Berfield and Ransom cases, supra, holding that boots on a person's feet may be considered dangerous weapons, the committee may wish to consider again whether it wants to make this change in AS 11.15.295.

HB-47

Also, see Whitton v. Alaska, 479 P 2d 302 (Ak. 1970)

Sec. 1 of the committee substitute deals specifically with the case of a reasonably foreseeable death occurring during the commission of or attempt to commit specified offenses and in which situation the offender is not guilty under the provisions on first degree murder, second degree murder, manslaughter or negligent homicide. (See Appendix B, which sets out the text of those provisions, along with various assault provisions and the section on carrying or using a firearm during the commission of certain crimes.)

Sec. 2 deletes the felony-murder concept from the first degree murder provision. It also deletes the specific reference to poison, on the understanding that it is not necessary to enumerate the means of effecting the killing and that use of poison is just one means. And it deletes the somewhat anomolous reference to "sound memory and discretion" appearing in the present wording of the provision. (See Item 7 on page 3 of the attached Appendix C, which is a memorandum from Don Craddick, the Assistant Public Defender for Juneau, to Herbert Soll, the Alaska Public Defender.) However, this section does not delete the word "deliberate", as the committee had requested. Upon reading the annotations under AS 11.15.010 and the definition of the word in Black's Law Dictionary (4th Edition, 1957), it appears to have some merit in that section, being something more than simply a repetition of the concepts embodied in "purposely" and "premeditated malice". Appendix C presents a summary of Mr. Craddick's January 16 testimony before the committee, and is helpful in understanding felony-murder and the attached committee substitute.

II.

Black's Law Dictionary (4th Edition, 1957) defines "mens rea" simply as "A guilty mind; a guilty or wrongful purpose. Guilty knowledge and wilfulness. United States v. Greenbaum, C.C.A.N.J., 138 F. 2d 437, 438." Related to the idea of the "guilty mind" is insanity -- a condition usually thought to preclude formation of the guilty mind and, when made an issue in a criminal proceeding, is usually raised as a defense to the charge. Thus the legal system is faced with the task of establishing criteria for determining insanity. The 1962 Annual Survey of American Law (at page 72) describes the Alaska Supreme Court's efforts in establishing the criteria in Chase v. Alaska, 369 P 2d 997 (Alaska, 1962): "Our next to newest state, Alaska, had the opportunity to choose any test it desired, without the fetters of case precedent. It chose a test no one could have foreseen. M'Naghten plainly exculpates a defendant who does not know the nature and quality of his act or the wrongfulness of his act. Alaska's highest court ... concluded that the defendant cannot be exculpated unless both his knowledge of the nature and quality of the act and his knowledge of the wrongfulness of the act are obliterated." (Emphasis in original.)

The dissenting opinion of Justice Connor in Pope v. Alaska, Ak. Sup. Ct. Opin. No. 660 (Dec. 21, 1970), presents a good explanation and historical review of mens rea and the defense of insanity, and

there is no need for a repetition of that here. (And since you distributed copies of the case to all committee members it is not attached to this memorandum.) At page 13 of his dissent, Justice Connor indicates his preference for the American Law Institute's Model Penal Code insanity-defense formulation because it "affords a workable standard, permitting realistic expert testimony about the personality and characteristics of the defendant as a whole man, but leaving to the court and jury the ultimate legal pronouncement." See Mod. P. Code, sec. 4.01, quoted at page 12 of the dissent.

Norval Morris and Gordon Hawkins, in their The Honest Politician's Guide to Crime Control (Univ. of Chicago Press, 1970), rather persuasively offer a different approach -- abolish the insanity defense altogether. Pages 174 -- 185 of their book are attached as Appendix D. Their point calls to mind the comments of Justice Connor at page 16 of his dissent, where he discusses the question of who has the burden of proof on the sanity issue. He states "... once sanity is in issue it is a fact to be established like any other ultimate fact essential to culpability. *** Logically, sanity is an essential element of a crime because mens rea is a necessary primary factor. If insanity exists at the time of the criminal act, mens rea fails, there is no jointure of act and intent, and under the traditional analysis no crime has been committed." However, whereas Justice Connor, agreeing with Justice Frankfurter's statement that "Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder.", apparently would view a successful insanity defense as exculpating the defendant, Prof. Morris and Mr. Hawkins introduce the term "insane mens rea" (at page 180, stating that it is not a contradiction in terms) and argue for the greater justice (practically and morally) of their approach. A summary here could not do justice to their theory, and a close, critical reading of Appendix D is suggested.

The majority of the Alaska Supreme Court in the Pope case refused to decide the insanity issues, and we are left with the rule of the Chase case unless the legislature resolves the matter -- perhaps along the lines of the American Law Institute approach (as suggested by Justice Connor) or perhaps along some other lines. The Morris-Hawkins book and the Model Penal Code, as well as other materials, are available to committee members wishing to study the matter. A bill will be prepared at the committee's request.

APPENDIX A

Original Sponsor: Colletta

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 47

For an Act entitled: "An Act relating to first degree murder and crimes involving dangerous weapons; and providing for an effective date."

BE IT ENACTED . . .

* Section 1. AS 11.05 is amended by adding a new section to read:

Sec. 11.05.160. ADDITIONAL PENALTY FOR CERTAIN OFFENSES. If a person is killed during the commission of or the attempt to commit arson, burglary, kidnapping, rape, or robbery, and the killing is a reasonably foreseeable consequence of the crime, the person committing or attempting to commit the crime is punishable by imprisonment for not more than five years in addition to the penalty specified for the crime. This provision does not apply if the person committing or attempting to commit a crime listed in this section has violated AS 11.15.010, 11.15.030, 11.15.040, or 11.15.080, and is punishable under one of those sections.

* Sec. 2. AS 11.15.010 is repealed and re-enacted to read:

Sec. 11.15.010. FIRST DEGREE MURDER. A person is guilty of first degree murder if he kills another person purposely, deliberately and with premeditated malice. A person who is convicted of first degree murder shall be sentenced to imprisonment for not less than 20 years to life.

* Sec. 3. AS 11.15.295 is amended to read:

Sec. 11.15.295. USE OF DANGEROUS WEAPON /FIREARM/ DURING THE COMMISSION OF CERTAIN CRIMES. A person who uses or carries a

dangerous weapon /FIREARM/ during the commission of a robbery, assault, murder, rape, burglary, or kidnapping is guilty of a felony and upon conviction for a first offense is punishable by imprisonment for not less than 10 years. Upon conviction for a second or subsequent offense in violation of this section, the offender shall be imprisoned for not less than 25 years.

Sec. 11.15.010. First degree murder. A person who, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, rape, arson, robbery, or burglary kills another, is guilty of murder in the first degree, and shall be sentenced to imprisonment for not less than 20 years to life. (§ 65-4-1 ACLA 1949; am § 4 ch 132 SLA 1957; am § 5 ch 43 SLA 1964; am § 4 ch 68 SLA 1965)

Sec. 11.15.030. Second degree murder. Except as provided in §§ 10 and 20 of this chapter, a person who purposely and maliciously kills another is guilty of murder in the second degree, and shall be sentenced to imprisonment for a term of not less than 15 years to life. (§ 65-4-3 ACLA 1949; am § 7 ch 43 SLA 1964; am § 6 ch 68 SLA 1965)

Sec. 11.15.040. Manslaughter. Except as provided in §§ 10—30 of this chapter, a person who unlawfully kills another is guilty of manslaughter, and is punishable by imprisonment in the penitentiary for not less than one year nor more than 20 years. (§ 65-4-4 ACLA 1949; am § 8 ch 43 SLA 1964)

Sec. 11.15.080. Negligent homicide. Every killing of a human being by the culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable, is manslaughter, and is punishable accordingly. (§ 65-4-8 ACLA 1949)

Sec. 11.15.160. Assault with intent to kill or commit rape or robbery. A person who assaults another with intent to kill, or to commit rape or robbery upon the person assaulted, is punishable by imprisonment in the penitentiary for not more than 15 years nor less than one year. (§ 65-4-16 ACLA 1949)

Sec. 11.15.190. Assault while armed. A person who assaults, or assaults and beats another with a cowhide, whip, stick or like thing, having at the time in his possession a pistol, dirk, or other deadly weapon, with intent to intimidate and prevent the other person from resisting or defending himself, is punishable by imprisonment in the penitentiary for not more than 10 years not less than one year. (§ 65-4-19 ACLA 1949)

Sec. 11.15.200. Careless use of firearms. (a) A person who intentionally, and without malice, points or aims a firearm at or toward a person, or discharges a firearm so pointed or aimed at a person, or points and discharges a firearm at or toward a person or object without knowing the identity of the object and maims or injures a human being, is guilty of the careless use of firearms, and upon conviction is punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or by both.

(b) If death ensues from the maiming or injuring, the person discharging the firearm may, in the discretion of the prosecuting officer or grand jury, be charged with the crime of manslaughter.

(c) This section does not apply to a case where firearms are used in self-defense or in the discharge of official duty, or in case of a justifiable homicide. (§ 65-4-20 ACLA 1949)

Sec. 11.15.220. Assault with dangerous weapon. A person armed with a dangerous weapon, who assaults another with the weapon, is punishable by imprisonment in the penitentiary for not more than 10 years nor less than six months, or by imprisonment in jail for not more than one year nor less than one month, or by a fine of not more than $1,000 nor less than $100. (§ 65-4-22 ACLA 1949)

Sec. 11.15.230. Assault and assault and battery. A person not armed with a dangerous weapon, who unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, is punishable by a fine of not more than $500, or by imprisonment in a jail for not more than six months, or by both. (§ 65-4-23 ACLA 1949)

Sec. 11.15.295. Use of firearms during the commission of certain crimes. A person who uses or carries a firearm during the commission of a robbery, assault, murder, rape, burglary, or kidnapping is guilty of a felony and upon conviction for a first offense is punishable by imprisonment for not less than 10 years. Upon conviction for a second or subsequent offense in violation of this section, the offender shall be imprisoned for not less than 25 years. (§ 1 ch 144 SLA 1968)

APPENDIX C

MEMORANDUM State of Alaska

TO: Herbert D. Soll
Public Defender
Anchorage

DATE : January 18, 1971

SUBJECT: House Bill 47
(First Degree murder;
amendment to A.S. 11.15.101)
DD

FROM: Donald L. Craddick
Assistant Public Defender
Juneau

Friday, January 15, I received a call from the secretary of the House Judiciary Committee, Mrs. Mason (586-1303) who advised that the committee was holding a hearing on House Bill 47 Saturday morning at 10:00 a.m. and wished to have someone present from the Public Defender Agency to present the position of that agency with reference to the bill. I tried to reach you on this matter, but my call to the Anchorage office was not returned.

Saturday morning I appeared before the committee, which is chaired by Representative William Morran. I advised the committee that as I had not been able to contact the Anchorage office, I was not presenting an official position of the Public Defender Agency on the bill but would be glad to give my views as an Assistant Public Defender if they were interested. They were, and we then proceeded, for approximately 45 minutes, to discuss the following aspects of the bill:

1. The bill was generated by the Alaska Supreme Court decision in Gray v. Alaska, (Jan. 16, 1970) 463 P. 2d 897 and by strong public opinion as a result of two recent incidents in Anchorage involving shootings during armed robberies. (Mr. Colletta, sponsor of the bill, was present and advised that these were the reasons for the bill being introduced.)

2. The bill removes the "purposeful" killing requirement for there to be a felony murder. I advised that if the felony murder concept is to be retained, then this is a good aspect of the bill as homicides occurring during the commission of felonies are accidental (the felon never having intended any such occurrence); more over, whenever a "purposeful" killing can be shown there is true murder without having to resort to the felony murder concept.

3. This bill removes the requirement that the killing be performed by the person ultimately charged as the felony murderer. I advised that this would be in keeping with the standard felony murder concept.

4. This bill enlarges the category of crimes to be included under the felony murder rule by adding escape and lewd or lascivious acts toward a child. In this regard we discussed the matter of crimes which should be covered: namely, those involving inherently dangerous acts. It was pointed out that an escape from prison could be such an act but hardly so if performed by a person who merely ran away from a police officer who had just made an arrest and where no violence or remote possibility of violence was involved; also, the absurd lewd or lascivious act possibilities were illustrated by committee member Mike Rose who pointed out that a child frightened by an exhibitionist might run out into a street and be killed by a passing car, which could result in a first degree murder charge being brought against the exhibitionist.

5. I argued against retention of the felony murder concept in the State of Alaska on the grounds that it did not serve any salutary purpose and could lead to absurd results. I gave the following illustrations:

   A. The get-away car driver (outside in the street) in an armed robbery situation who could be charged with first degree murder if a store owner shot down his cohort (in the store) in armed robbery. Note: This is an actual case which was handed down by the California Supreme Court in Taylor v. Superior Court (Dec. 1970). (See the Criminal Law Reporter, Volume 8, Pg. 1049, 2216-2217.) I left a copy of this decision with the committee.

   B. The bank robber who could be charged with first degree murder if a bank guard shot at him and killed an innocent bystander.

6. I suggested that if the legislature nonetheless felt it desirable to direly punish a person involved in a crime when the commission of that crime led in a natural dequence of events to the dealth of another person, then they could use an "aggrevated crime" approach---perhpas something as simple as adding additional years on the sentence in such a situation. The precedent for this could be the recently enacted gun laws which add additional penalties when a fire arm is used in

connection with a crime. (For example: see Alaska Statute 11.15.295)

In this regard, however, I advised the committee that they should bear in mind that there is a very strong doubt that any legislation such as the felony murder rule or even an aggrevated crime approach would act as a deterent to homocides during the perpetration of felonies; the reason being that it is one thing to deter an intentional act, such as the carrying of a fire arm, but entirely another to try to deter an event which was never intended to happen in the first place but happened because things got out of hand.

7. The last aspect of the bill considered was the deletion by the bill of the language contained in the present first degree murder statute that the person involved must be of "sound memory and discretion" before he is guility of any kind of first degree murder.

I made the following comments on this:

a. The phrase which is usually used in a civil context, such as the drafting of wills, has no place in the criminal laws dealing with insanity.

b. This language actually makes it possible for a person who is not insane even under the most liberal rule (Durham) to avoid a conviction of first degree murder.

c. Therefore, what is needed is a statute governing criminal responsibility in all cases and denotes the test of insanity to be applied.

You will be pleased to know that the committee appeared to be in agreement with this and is going to undertake to write up such a statute. The committee did not seem to be too taken with the McNaughton test of knowing right and wrong and seemed to be disturbed over Alaska's even more stringent rule as set forth in the Chase v. Alaska case (1962) 369 P 2d 997.

The committee chairman referred the committee to the recent decision in Pope v. Alaska (Dec. 21, 1970) Opinion 660, File 1127, in which Justice Conner, in the dissent, reviews and criticizes the development of Alaska's present law of insanity and emphasizes the desirability of adopting the American Law Institute Model Penal Code Provision, Sec. 4.01 (final draft 1962)....see page 12 of the Pope decision, wherein this test is set out verbatim.

I suggested to the committee that one of the contributing factors which might have led to the Chase decision could be (though it is not discussed in the opinion) the lack of facilities in Alaska to care for the insane should a less stringent rule apply in Alaska and should there be a result in the increase in the number of persons needing institutionalization.

You might consider writing to the committee as Public Defender should you wish to have the agency take a position on this bill. It seems to me it would be very ehlpful if the agency were also to take a position or make recommendations with reference to the legal test of insanity. We need not necessarily go as far as the Durham rule, but it is certainly time to move beyond the almost medieval concept of the McNaughton tests. Of the present alternatives I favor the American Law Institute approach.

Donald L. Craddick

DONALD L. CRADDICK

Norval Morris and Gordon Hawkins

the honest politician's guide to crime control

The University of Chicago Press • Chicago and London

The accused is, we are informed, "psychotic," and should therefore not be convicted of a crime. Further, though "acquitted" because of his mental illness, he is "dangerous" and should therefore be detained until he is both "cured" of his malady and no longer "dangerous." Lewis Carroll, in *Through the Looking-Glass*, offered a fine commentary on the superficialities involved in such a traditional response to the psychologically disturbed offender:

> "What sort of insects do you rejoice in, where *you* come from?" the Gnat inquired.
>
> "I don't *rejoice* in insects at all," Alice explained, "because I'm rather afraid of them – at least the large kinds. But I can tell you the names of some of them."
>
> "Of course they answer to their names?" the Gnat remarked carelessly.
>
> "I never knew them to do it."
>
> "What's the use of their having names," the Gnat said, "if they won't answer to them?"
>
> "No use to *them*," said Alice; "but it's useful to the people that name them, I suppose. If not, why do things have names at all?"

Our program on crime and the psychiatrist is designed both to eliminate our present futile name-calling from the criminal justice system and to engage the psychiatrist in the treatment of certain dangerous criminals, a task he now eschews. We achieve these results by three ukases:

1. The defense of insanity shall be abolished. The accused's mental condition will be relevant to the question of whether he did or did not, at the time of the crime, have the *mens rea* of the crime of which he is charged. His mental condition will, of course, also be highly relevant to his sentence and his correctional treatment if he is convicted.
2. High priority shall be accorded to research aimed at the definition of social dangerousness and the development of prediction tables designed to deal with the "dangerous," psychologically disturbed offender.
3. Special institutions for the treatment of "dangerous" psychologically disturbed offenders, on the lines set out in this chapter, shall be established in all states.

The vast literature dealing with psychiatric or psychoanalytic criminology ranges from detailed studies of particular cases to attempts to explain all criminal behavior in terms of psychopathy. Yet apart from providing a profusion of new labels the practical contribution that psychiatry has made to the problems of defining and treating the offender is very limited. This is in part, but by no means entirely, the fault of psychiatrists themselves. There is no doubt, however, that the leaders in corrections and in criminal law policy accord the psychiatrist a slim role indeed in treating the behavior disorders that come to the courts, the prisons, and other correctional agencies. The slight attention given to the role of the psychiatrist in the report of the President's Crime Commission, *The Challenge of Crime in a Free Society*, and in the same commission's task force report on corrections, is recent testament to this neglect. Let us be clear about this. We are not suggesting that the judges, academic and practicing lawyers, correctional administrators, and criminologists prominent in the criminal justice system are reactionary, or that they fail to keep up with the literature in the social sciences; their attitude to psychiatry is not usually one of ignorance, it is rather a thoughtful rejection. They see psychiatrists, as too frequently psychiatrists see themselves, merely as diagnosticians, classifiers, separating out from the bulk of criminal offenders those whose psychological disturbance is at the level of psychosis. Where, it is asked, are psychiatrists successfully treating criminal offenders? The psychiatrist is useful, it is agreed, in classification and in staff training, but he is not seen as a serious ally in the correctional process.

We do not share this view. We believe there has been gross failure both by leading forensic psychiatrists and by those responsible for the criminal justice system sufficiently to mobilize psychiatric resources for the prevention and treatment of crime. We believe part of the fault lies in our national monomania, our *folie à collective*, concerning criminal responsibility and the defense of insanity. This has distracted us from many important tasks, two of which we shall deal with in this chapter – first, the task of defining the dangerous offender for sentencing and treatment purposes, and second, the task of better mobilizing psychiatric and other clinical resources for the treatment of such criminals. We believe these three themes – the defense of insanity, the definition of dangerousness, and the mobilization of clinical resources for the treatment of criminals who are dangerous and psychologically disturbed – are closely interconnected. The importance of all three issues must be recognized if the psychiatrist is to assist appreciably in efforts to protect the community and to treat the criminal.

Abolition of the Defense of Insanity

Rivers of ink, mountains of printers' lead, and forests of paper have been expended on an issue that is surely marginal to the chaotic problems of the effective, rational, and humane prevention and treatment of crime. We determinedly insulate ourselves from the realities we are facing – the role of psychological disturbance in criminality and the measures we might effectively and fairly use to deal with psychologically disturbed and dangerous criminals. We do not propose here to contribute to the wastage or to pursue the traditional minutiae. Our view is that the defense of insanity itself is moribund and should be interred. We are not suggesting amendments to the rules concerning fitness to plead; that issue is relevant to our present topic, but it is not one we now wish to consider.

The suggestion that the defense of insanity should be abolished is not original. Many authorities including Lady Barbara Wootton, Professor H. L. A. Hart, and Chief Justice Joseph Weintraub of New Jersey among others have advocated its abolition, though for diverse reasons and with diverse substitutes for it. We do not propose to marshal and analyze their reasons and their suggestions. We have put forward a ukase on this topic and we shall here advance some of the reasons underlying it, a few of which are not to be found in the writings of the authorities on this subject.

Why should there be a defense of insanity?

The question strikes deep into the social function of the criminal law. Over the years, we have found the traditional answers less and less convincing – such as the uncritical acceptance of what is by the Royal Commission on Capital Punishment:

> It has for centuries been recognized that, if a person was, at the time of his unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law. Views have changed and opinions have differed, as they differ now, about the standards to be applied in deciding whether an individual should be exempted from criminal responsibility for this reason; but the principle has been accepted without question.

Or the answer in the American Law Institute's Model Penal Code:

> What is involved specifically is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction, with resultant sanctions in which there is inescapably a punitive ingredient (however constructive we may attempt to make the process of correction) and modes of disposition in which that ingredient is absent, even though restraint may be involved. To put the matter differently, the problem is to discriminate between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow.

Or that offered by Sir Owen Dixon:

> Now it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds.

Or that in the Durham case:

> Our collective conscience does not allow punishment when it cannot impose blame.

Our position, putting aside the difficult and important issue of fitness to plead – competency to be tried – is very simple. The accused's mental condition should be relevant to the question of whether he did or did not, at the time of the crime, have the *mens rea* of the crime of which he is charged. There should be no special rules of the M'Naughten or Durham types. The defense of insanity being abrogated, evidence of mental illness would be admissible on the *mens rea* issue to the same limited extent that deafness, blindness, a heart condition, stomach cramps, illiteracy, stupidity, lack of education, "foreignness," drunkenness, and drug addiction are admissible. In practice, such cases are rare, and they would remain rare were mental illness added to the list. There would not merely be a shifting of psychiatric testimony to the *mens rea* issue with the same problems as beset the courts which hear it in the defense of insanity. A quite different issue would be raised, and one traditionally within the competence of the

finder of fact. The convicted person's mental condition would, of course, be highly relevant to his sentence and to his correctional treatment if he were convicted.

Historically the defense of insanity made good sense. The executioner infused it with meaning. And in a larger sense, all criminal sanctions did so too, since they made no pretense of being rehabilitative. In the present context of the expressed purposes and developing realities of both the criminal justice system and the mental health system this defense is an anachronism. In the future, this defense would be not only anachronistic, it would be manifestly inefficient as well.

Let us offer a small statistical point before turning to the moral issue. In this country the defense of insanity is pleaded in about 2 percent of the criminal cases which come to jury trial. Overwhelmingly, of course, criminal matters are disposed of by pleas of guilty and trials by a judge sitting without a jury. Only the exceptional case goes to trial by jury. And of these exceptional cases, in only two of every hundred is this defense raised. In the United Kingdom, for the period on which the Royal Commission on Capital Punishment reported, the situation was very similar. The verdict of "guilty but insane" was returned, over a five-year period, in 19.8 percent of murder trials, whereas over the same period it was returned in only 0.1 percent of trials for other offenses. Does anyone believe that this measures the significance of gross psychopathology to crime? Let him visit the nearest criminal court or penitentiary if he does. Is not this defense clearly a sop to our conscience, a comfort for our failure to address the difficult arena of psychopathology and crime?

The practical difference between traditional tests of insanity and modern revisions was recently empirically tested. Various juries were given instructions based on the M'Naughten rules, the Durham test, and the following simple and uncluttered formula: "If you believe the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity." The juries failed to see any operative differences in the three instructions. Do we need to labor another century and a half to produce a mouse of such inconsequence?

Yet the moral issue remains central. Should we exculpate from criminal responsibility, or from "accountability" to use the preferable European concept, those whose freedom to choose between criminal and

lawful behavior has been curtailed by mental illness? It is too often overlooked that the exculpation of one group of "criminal actors" confirms the inculpation of others. Why not a defense of "dwelling in a Negro ghetto"? This defense would not be morally indefensible. Such an adverse social and subcultural background is statistically *more* criminogenic than is psychosis, and it also severely circumscribes the freedom of choice which a nondeterministic criminal law (and that describes all present criminal law systems) attributes to accused persons.

True, a defense of social adversity would be politically intolerable; but that does not vitiate the analogy for our purposes. Insanity, it is said, destroys, undermines, or diminishes man's capacity to reject the wrong and adhere to the right. So does the ghetto – more so. But surely, you might ask, you would not have us punish the sick? Indeed we would, if you insist on punishing the grossly deprived. To the extent that criminal sanctions serve punitive purposes we fail to see the difference between these two defenses; to the extent that they serve rehabilitative, treatment, and curative purposes, we fail to see the need for the difference. Some reply: it is not a question of freedom or morality, it is a question of stigmatization, and to this we shall return; but let us not brush aside the moral issue so lightly.

In Shavian terms: Vengeance is mine, saith the Lord – which means that it is not the Lord Chief Justice's! It seems to us clear that there *are* different degrees of moral turpitude in criminal conduct and that the mental health or illness of an actor is relevant to an assessment of that degree – as are many other factors in the social setting and historical antecedents of a crime. This does not mean, however, that society is obliged to measure any or all of these pressures for purposes of a moral assessment which will lead to conclusions concerning criminal responsibility.

In a few cases the question of moral irresponsibility is so clear that there is no purpose in invoking the criminal process. The example of accident, in its purest and least subconscious accident-prone form, is a situation where there is little utility in invoking the criminal process. The same is true of a person who did not know what he was doing at the time of the alleged crime. But to exculpate him there is no need for the M'Naughten or Durham rules for he falls clearly within general criminal law exculpatory rules. He simply lacks the *mens rea* of the crime. Thus, it seems to us that all we need to achieve within the

area of criminal responsibility and psychological disturbance is already achieved by existing and long-established rules of mental intent and crime, and we would allow a sane or insane *mens rea* to suffice for guilt.

Perhaps an example of this principle may help. The *Hadfield* case will serve our purpose admirably. Hadfield had been severely wounded in the head in the Napoleonic wars and subsequently decided that it was necessary for the salvation of the world that he kill George III. He equipped himself with a blunderbuss and secreted himself in the Drury Lane Theatre in a position from which he hoped to shoot George III as he waddled into the royal box. Hadfield saw the flabby creature in the royal box and discharged his blunderbuss in the direction of the king, unfortunately missing him.

There was no doubt of Hadfield's brain damage or of his psychosis, his gross psychological disturbance. He did, however, clearly intend to kill the king. He had the insane *mens rea* of murder, and indeed of treason. We do not regard the phrase "insane *mens rea*" as a contradiction in terms. Had his psychological disturbance led him to think that he was discharging the blunderbuss to start the performance on the stage, or to burst a balloon, he would have lacked the *mens rea* of murder and of treason. But he saw himself as sacrificing himself for the good of the world -- and he may not have been far wrong. We do not deplore the fact that Hadfield was held to be not guilty on the grounds of insanity. We do, however, maintain that there would be no greater injustice involved in convicting in such a case and applying the psychological diagnosis to the decision how to treat the offender than in convicting in any of the other thousands of cases that daily flow through our criminal courts.

Clearly the crucial question in this context is: what are the consequences of the defense of insanity? Is there an operative difference between peno-correctional and psychiatric-custodial processes which renders benefit to the accused who is found not guilty on the grounds of insanity? To this important inquiry we offer two replies. First, the differences if they exist are marginal; and second, the defense of insanity is an extraordinarily inefficient mechanism of deciding on the allocation of psychiatric treatment resources.

The American Law Institute's recommended modification of the M'Naughten rules in its Model Penal Code was accompanied by a recommendation requiring the indeterminate commitment of those found not guilty by reason of insanity. Likewise, within a month of the adoption of the Durham rules in the District of Columbia, Congress provided that being found not guilty on the grounds of insanity should be followed, mandatorily, not in the discretion of the court, by indeterminate commitment to Saint Elizabeth's Hospital until such time as the person so committed could meet the requirements that he prove, beyond reasonable doubt, his freedom from "any abnormal condition" and that he is not likely to repeat the act which resulted in his insanity acquittal. Dr. Winfred Overholser, the late superintendent of the mental hospital to which the recipients of this benevolence in the District of Columbia are sent, put the matter precisely: "The notion that a verdict of not guilty by reason of insanity means an easy way out is far from the truth. Indeed the odds favor such a person spending a longer period of confinement in the hospital than if the sentence was being served in jail."

Facilities and practice differ from country to country, and in this country from state to state. The point we wish to stress is that it is error to *assume* benevolence and to assume that there are more psychiatric treatment resources, better physical conditions, and earlier release practices pursuant to a finding of not guilty on the grounds of insanity than pursuant to a conviction. It all depends. We know of systems where there are more facilities per patient for psychiatric treatment in the penitentiary holding psychologically disturbed prisoners than in the nearby state mental hospitals. Frequently the converse is true.

Let us offer a final point on the sometimes assumed benevolence of the defense of insanity. It is more than a straw in the wind, more than a suggestion that this is not a liberal, benevolent, humanely exculpating defense, when one finds the prosecution alleging at trial the insanity of the accused at the time of the crime while the defense urges his sanity; but this has occurred in both the United Kingdom and this country. Lady Barbara Wootton has discussed at least six cases in which "the witness called by the Crown to rebut evidence of diminished responsibility sought to establish that the accused was in fact insane." And in a judgment in the House of Lords, Lord Denning said: "The old notion that only the defense can raise a defense of insanity is now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large."

It might be suggested that our attack on the defense of insanity mis-

conceives the problem. The task of the law, it might be suggested, is mainly to protect the community, and the defense of insanity will indeed permit better psychiatric treatment and, if necessary, longer custodial supervision of the disturbed and dangerous criminal. Later in this chapter we shall deal with the definition and prediction of social dangerousness; in the meantime, it suffices to note that the defense of insanity started on moral premises different from this, and that the defense is both unnecessary and inefficient to achieve this protective purpose.

A more sophisticated critic might suggest that we are missing the point in a different way. Criminal processes are, he might say, public morality plays. They have deterrent purposes, perhaps, but they certainly aim dramatically to affirm the minimum standards of conduct society will tolerate. By public ceremonial and defined liturgy, criminal trials stigmatize those who fail to conform to society's standards. In short, the criminal justice system is a name-calling, stigmatizing, community superego reinforcing system. And, it could be urged, we should not stigmatize the mentally ill. They are mad not bad, sick not wicked; it is important that we not misclassify them. Is there a rebuttal to this defense of the defense of insanity? We believe there is – the fact of "double stigmatization."

Consider the question, Are psychologically disturbed criminals seen by prison authorities only as "criminal," and are the mentally ill who have committed or have been charged with crime seen only as "mentally ill" by the hospital authorities? Or are the former seen as "mentally ill criminals" and the latter as "criminal and mentally ill"? Are the systems separate or confused in the minds of the staff and of the "patients"? It is clear that some belief in the separateness and purity of the two systems infects the position of those who advocate retention of the defense of insanity. Yet the fact is that the prison authorities regard their inmates in the facilities for the psychologically disturbed as both criminal and insane, bad and mad; and the mental hospital authorities regard their inmates who have been convicted of crime or even arrested and charged with crime as both insane and criminal, mad and bad.

In mental hospitals the fact that an inmate was arrested for a crime seriously influences the date of his likely discharge. Note, it is an arrest without a conviction that has this effect. Likewise the conditions of incarceration in the psychiatric divisions of correctional systems are

frequently less desirable than elsewhere in the system and the chances of obtaining parole are substantially lower. The truth is that our present intellectually loose approach to this problem inflicts gratuitous extra suffering both on those who are categorized as criminal and mentally disturbed and those who are categorized as mentally disturbed and criminal. The police power of the state and the mental health power of the state are surely sufficient unto themselves, separately, to control questions of dangerousness and the upper limits of power over individual citizens. It is mutually corruptive and a potent source of injustice loosely and thoughtlessly to blend these two powers, and thus to gloss over in each the proper balance between state power and the freedom of the individual.

There is one concept common to both, the concept of social dangerousness. The problem for both the prison authorities and the mental health authorities is reasonably and effectively to make assessments of social dangerousness and to design a process by which that assessment can be fed into the releasing procedure. We do not facilitate this difficult task by making a porridge, a farrago, out of the two powers – the mental health power and the police power – and using this mess to avoid facing and trying to dispose of a genuinely difficult problem.

Thus, in terms neither of the morality of punishment nor of stigmatization is the defense of insanity now essential or operative. Similarly, it is neither a necessary nor effective principle around which to mobilize clinical resources for the rational treatment of the psychologically disturbed criminal actor. It is, however, in our view, a political issue of some difficulty and the politics are concerned with the stigmatizing role of the criminal law.

While the hangman, or in this country the fryman, and the capital punishment controversy lurk in the background, the issue of criminal irresponsibility in relation to homicide is intractable. Yet, in the five years 1964, 1965, 1966, 1967, and 1968, the number of executions in this country was, respectively, 15, 7, 1, 2, and 0. Our ukase on this matter does no more than hasten the inevitable. Moreover, when one looks at the pattern of capital punishment for murder in the world, it becomes clear that this is a rapidly declining sanction. We can reasonably exclude it from our consideration of the future. What remains then is the question of stigmatization of conduct as either wicked or the product of sickness, as either bad or mad. This difference in stigmatization may result in different treatments but the differences are neither

essential to our system of criminal justice nor necessarily involved in either our correctional or mental health systems. The essential difference is the difference of nomenclature, of overt public stigmatization.

For our part, we look toward a future in which moral outrage and name-calling will not so significantly influence our reaction to the behavior of others. This is a generation that despoils our natural resources and prepares to terminate human life on this planet; but if the ruination of our environment and the eliminating of our species are avoided, if aggressions are controlled in favor of decency and creativity, we do not believe that systems of justice in which name-calling and vengeance figure so prominently can long survive. If this be so, then the issue becomes one of how we can, as rapidly as the traffic will allow, destigmatize our criminal law processes.

There is a choice. We could follow the pattern of a gradual extension of the exculpatory and allegedly destigmatizing processes of the defense of insanity, opening it more and more widely to cover larger and larger slices of criminal conduct until most criminal behavior is encompassed. Many of those working in this field, men whom we respect, favor that engulfing process. We do not oppose their purpose; but we think their political judgment wrong. It seems to us that we should not make an artificial and morally unjustifiable exception to a false general rule and allow the exception to swallow the rule. It seems to us better to support the advance that is now taking place, certainly in theory and rhetoric, in the treatment of all criminal conduct, and to a degree in correctional practice. In other words, to put it aggressively, we think society will move faster toward a rational system of criminal justice through honesty than by self-deception; and we think it dishonest to creat an artificial, morally unjustifiable, practically ineffective exception to the general rules of criminal responsibility. We think the English judges went wrong in the nineteenth century and that it is time we got back to earlier and truer principles.

We find it impossible morally to distinguish the insane from others who may be convicted though suffering deficiencies of intelligence, adversities of social circumstances, indeed all the ills to which the flesh and life of man is prey. It seems to us that our approach better accords with the total role of the criminal law in society than does a system which makes a special exculpatory case out of one rare and unusual criminogenic process, while it determinedly denies exculpatory effects to other, more potent processes. In the long run we will better

handle these problems, as well as the whole and more complex problem of criminality in the community, if we will recognize that within crime itself there lies the greatest disparity of human wickedness and the greatest range of human capacities for self-control.

Our perennial perseverations about the defense of insanity impede recognition of this diversity, since they push us to a false dichotomy between the responsible and the irresponsible. They should be abandoned. One occupation for the energies thus released might be suggested, a task in which the psychiatrist has an important role to play: the defining of those categories of psychologically disturbed criminals who are serious threats to the community and to whom special treatment measures should therefore be applied.

On Defining and Predicting Dangerousness

The policeman, the prosecutor, the jury, the judge, the probation officer preparing a presentence report, the clinician in the diagnostic and classification center, the correctional officer planning the inmate's treatment and custody, the parole board and the parole officer — all, like it or not, must make predictions about the possible social dangerousness of the offender they confront. This is frequently a complex and difficult task to which psychiatric insights are often relevant. It involves at least two interacting issues: what kinds of behavior are sufficiently threatening to be called "dangerous" and with what degree of certainty must the prognosis establish the likelihood of recurrence of the kind or kinds of behavior designated "dangerous" and over what period of time?

The task of conceptualizing and providing methodologically sound processes for reaching decisions on these twin aspects of "dangerousness" is of central importance to the development of the criminal law. It is critical at every level of the criminal justice system. The report of the President's Crime Commission stresses the

> necessity for identifying those dangerous or habitual offenders who pose a serious threat to the community's safety. They include those offenders whose personal instability is so gross as to erupt periodically in violent and assaultive behavior, and those individuals whose long-term exposure to criminal influences has produced a thoroughgoing commitment to criminal values that is resistive of superficial efforts to effect change. . . .

HB-47

ALASKA LEGISLATIVE COUNCIL

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE OVERSIGHT OF THE

ADMINISTRATION OF STATUTES

Review of

Judicial and Administrative Opinions

and

Administrative Regulations

JANUARY 1972

THE ALASKA LEGISLATIVE COUNCIL

and the

LEGISLATIVE AFFAIRS AGENCY

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C O N T E N T S

		Page
FOREWORD		iii
A.	Alaska Supreme Court Opinions	
(1)	Harmon v. North Pacific Union Conference Association of Seventh Day Adventists, 462 P 2d 432 (Opin. No. 591, 12/15/69)	1
(2)	Inglima v. Alaska State Housing Authority, 462 P 2d 1002 (Opin. No. 594, 1/2/70) . . .	3
(3)	Gray v. Alaska, 463 P 2d 897 (Opin. No. 595, 1/16/70); Pope v. Alaska, 478 P 2d 801 (Opin. No. 660, 12/21/70), rehearing denied 480 P 2d 697	4
(4)	Thorsheim v. Alaska, 469 P 2d 383 (Opin. No. 611, 5/22/70)	5
(5)	Glasgow v. Alaska, 469 P 2d 682 (Opin. No. 616, 5/29/70)	6
(6)	Searfus v. Northern Gas Company, Inc., 472 P 2d 966 (Opin. No. 630 7/31/70)	6
(7)	Dimmick v. Alaska, 473 P 2d 616 (Opin. No. 632, 8/7/70)	7
(8)	Delahay v. Alaska, 476 P 2d 908 (Opin. No. 648, 11/2/70)	8
(9)	Lynch v. McCann et al., 478 P 2d 835 (Opin. No. 659, 12/18/70)	9
(10)	Application of Park, 484 P 2d 690 (Opin. No. 690, 4/30/71)	10
(11)	Alvarado v. Alaska, 486 P 2d 891 (Opin. No. 704, 7/6/71)	11
(12)	RLR v. Alaska, 487 P 2d 27 (Opin. No. 706, 7/9/71)	13
(13)	In re EMD, 490 P 2d 658 (Opin. No. 737, 11/15/71)	14
B.	Alaska Superior Court Opinions	
	Bozanich v. Noerenberg (No. 70-389 Civil, 3/15/71); Bomhoff v. Boucher (No. 70-359 Civil, 3/15/71	15

C. Opinions of U.S. District Court, District of Alaska

First National Bank of Fairbanks v. Camp, 326 F Supp 541 (1971) 17

D. Attorney General Opinions 18

E. Administrative Regulations 18

F O R E W O R D

AS 24.20.065(a) requires the legislative council to examine annually administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

1) the courts and agencies are properly implementing legislative purposes;

2) there are court or agency expressions of dissatisfaction with state statutes;

3) the opinions or regulations indicate unclear or ambiguous statutes.

Under AS 24.20.065(b) the council is to make a comprehensive report of its findings and recommendations to the members of the legislature at the start of each regular session. The discussions on the following pages are not intended as in-depth analyses of the cases or issues involved, but merely present matters suggesting legislative action.

JOHN M. ELLIOTT
Executive Director

January 1972

A. ALASKA SUPREME COURT OPINIONS

This report is based on a review of Alaska Supreme Court Opinions Nos. 585, dated November 3, 1969, through 718, dated September 14, 1971, and No. 737, dated November 15, 1971.

(1) Harmon v. North Pacific Union Conference Association of Seventh Day Adventists, 462 P 2d 432 (Opin. No. 591, 12/15/69):

Facts. After its appeal to the Greater Anchorage Area Borough's board of equalization was denied, the appellee, a religious organization, brought an action against officials of the Greater Anchorage Borough and the borough itself, seeking a declaratory judgment that three parcels of residential property owned by the appellee were, under AS 29.-10.336, exempt from real property taxation. Of the three parcels, one was used by a minister of the church who also served as president of the church's statewide operations, another was used by another minister of the church who also served as treasurer of the statewide operations, and the third was used by a non-minister who was the principal of the church's parochial school. The lower court granted the church's motion for summary judgment, declaring the property in question to be exempt from real property taxation. The borough and its officials appealed, arguing (1) that because the church brought an action for declaratory judgment instead of directly appealing the decision of the board of equalization it was barred from litigating the claimed tax exemption, and (2) that the property in question was not exempt from taxation. The substantive aspect of the case turned upon the interpretation of AS 29.10.336, and the supreme court expressly stated, in its footnote 1, that it was not determining the constitutional validity of religious property tax exemptions.

Statute. The pertinent parts of the statute central to the substantive aspect of this case (AS 29.10.336) state:

> "(a) Property . . . used exclusively for nonprofit religious . . . purposes . . . [is] exempt from [property] taxation.
>
> (b) The term 'property used exclusively for religious purposes' includes the following types of property owned by a religious organization:
>
> (1) the residence of the pastor, priest, rabbi, minister, or religious order, which residence is owned by a recognized religious organization;

(2) a structure, and the land it stands on, which is used for public worship, solely charitable purposes, religious education, or a nonprofit hospital;

(3) the furniture and fixtures in a structure used exclusively for religious purposes;

(4) lots adjacent to a structure or residence mentioned in (1) or (2) of this subsection and which are reasonably necessary to the convenient use of the structure;

(5) lots required by local ordinance for parking in connection with the structure as defined in (2) of this subsection.

(c) Property or part of the property described in (a) or (b) of this section from which rentals or income are derived is not exempt from taxation under (a) of this section, unless the rentals or income are derived from the rental of the property by religious or educational groups for classroom space."

Decision. After ruling that the church's terming its action before the superior court an original action for declaratory relief instead of an appeal from the board of equalization did not bar litigation of the exemption issue, a majority of the supreme court held that the three pieces of property involved are not exempt from taxation. The exemption provision was rewritten in 1964, and the majority of the court stated "We view the action of the legislature in deleting the language 'and other property of the organization not used for business, rent, or profit,' as narrowing the type of residence which can be exempt from property taxation under AS 29.10.336(b)(1), as it now reads." The majority further stated, with reference to that provision, "To us the words 'the residence of the pastor,' etc., imply that only those residences may qualify that have some direct relationship to a structure used primarily as a house of worship. If the legislature desires a broader form of exemption, it may amend the statute." (Court's emphasis; footnote omitted.)

One justice concurred with the majority's opinion on the procedural issue but dissented from that opinion on the substantive issue. He stressed the difficulty in determining legislative intent, noting (in his footnote 7) that "Not untypically, the legislature has failed to provide an adequate record of the legislative history of the questioned amendments."

Legislative action. First of all, the legislature should continue its trend toward including more explanatory committee

reports in the legislative journals in order to furnish an interpretative aid to the public, administrative officers, lawyers, and the judiciary. Secondly, if the legislature believes that the court has construed the religious property exemption too narrowly, AS 29.10.336(b)(1) could be amended to read "a residence of a pastor . . ." or "residences of pastors. . ." with the addition of a phrase such as "or other employee or member of the religious organization". It should be noted, however, that the constitutionality of religious property tax exemptions is at least questionable. In Walz v. Tax Comm. of the City of New York, 395 US 957, 23 L ed 2d 744, 89 S Ct 2105 (6/16/69), the United States Supreme Court has granted review to determine this question.

(2) Inglima v. Alaska State Housing Authority, 462 P 2d 1002 (Opin. No. 594, 1/2/70):

Facts. The appellee filed condemnation proceedings to acquire land owned by the appellants in order to carry out an urban renewal project occasioned by the 1964 Alaska earthquake. The master's award exceeded the amount deposited in court by the appellee and the latter appealed to the superior court; the property owner did not appeal to the superior court. After the jury had been selected but before the trial began, the housing authority (appellant in the superior court) filed notice of dismissal of its appeal, to which the property owner objected, arguing that the right to a jury trial vested in both parties to the eminent domain proceeding when either party filed a notice of appeal. The superior court took the question of dismissal under advisement, but ordered the trial to proceed. At the close of trial, the jury awarded an amount greater than the master's award, but the superior court allowed the housing authority's dismissal and entered judgment for the amount awarded by the master. The property owner then appealed to the supreme court.

Statute. The statute which governs generally the rights of the parties upon appeal from a master's award is AS 09.-55.320, which provides:

> "An interested party may appeal the master's award of damages and his valuation of the property, in which case there shall be a trial by jury on the question of the amount of damages and the value of the property, unless the jury is waived by the consent of all parties to the appeal."

Decision. The supreme court reversed and remanded with directions that judgment be entered on the verdict of the jury, stating "We believe that the legislature intended in these circumstances that the owner against whom appeal is

taken is entitled to look forward to a jury trial as a matter of right, even though he may be the passive party. We are persuaded by the argument that the proceedings after the master's report are an appeal in name only and that the right to a jury trial vests by operation of law in all parties to the appeal."

Legislative action. To remove an ambiguity in the statute, the legislature could amend AS 09.55.320 by adding a sentence such as "The appeal may not be dismissed without the consent of all parties to it." if that would effectuate the legislative intent. This would make clear that not only does each party have a right to a jury trial, when there is a trial, but that he has a right to a trial in the first place.

(3) Gray v. Alaska, 463 P 2d 897 (Opin. No. 595, 1/16/70); and Pope v. Alaska, 478 P 2d 801 (Opin. No. 660, 12/21/70), rehearing denied 480 P 2d 697:

Summary. The Gray case involved two brothers who burglarized a liquor store in which a police officer was hiding. One brother, who was not carrying a weapon, was shot in the leg by the officer, and, as he lay on the floor, his brother shot and killed the officer. Both brothers were convicted of first degree murder, and one of the main issues in the case involved application of the felony-murder theory which states, essentially, that a killing occasioned by the commission of a felony is murder, rather than manslaughter, negligent homicide, etc. Formulations of the rule vary, but traditionally it does not require that an intent to kill be present. However, because of the wording of Alaska's first degree murder statute (AS 11.15.010), which includes a felony-murder provision, the court overturned the felony-murder convictions (issues separate from the other, respective murder convictions of the two brothers). Introduction of the Seventh Legislature's House Bill No. 47, substantially rewriting AS 11.15.010, was a response to this ruling.

Related to this bill and the Gray case, with regard to the matter of criminal intent, is the Pope case. In it, the defendant raised the defense of insanity, in response to a murder charge; the dissenting justice presented a good explanation and historical review of mens rea (guilty mind) and the defense of insanity and urged the overruling of Chase v. Alaska, 369 P 2d 997 (Alaska, 1962). He also indicated his preference for the American Law Institute's Model Penal Code insanity-defense formulation.

Material concerning HB 47 and these and related cases is in the files of the House Judiciary Committee, as is a

draft of a proposed committee substitute. The re-revision of the criminal code, to be introduced during the 1972 legislative session at the request of the Alaska Legislative Council, is based on the Model Penal Code and covers the points involved in these cases. Of substantial value to legislators considering a criminal code revision is Norval Morris' and Gordon Hawkins' The Honest Politician's Guide to Crime Control (Univ. of Chicago Press, 1970), which also specifically discusses mens rea.

(4) Thorsheim v. Alaska, 469 P 2d 383 (Opin. No. 611, 5/22/70):

Facts. The plaintiff, as administratrix of her husband's estate, filed a claim for death benefits under the Alaska Workmen's Compensation Act (AS 23.30). Her husband, employed by a flying service which was under contract to the Alaska Department of Administration, was killed while flying an agent of the Department of Fish and Game on a stream survey flight. The flying service did not carry workmen's compensation insurance, and the claimant argued that the State of Alaska, as a prime contractor, was liable under AS 23.30.045(a). The Workmen's Compensation Board and the superior court denied the claim, and the question for the supreme court was whether the state was a "contractor" and the flying service was a "subcontractor" under AS 23.30.-045(a).

Statute. The relevant portion of AS 23.30.045(a), referred to as the "contractor-under" provision, states:

> "If the employer is a subcontractor, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor unless the subcontractor secures the payment."

Decision. A majority of the supreme court affirmed the superior court's denial of the claim, holding that the state was not a contractor in the circumstances of this case. The majority stated that the absence of statutory definitions of the terms "contractor" and "subcontractor" posed especial difficulty, and employed the following for the purposes of interpreting AS 23.30.045(a): "contractor" means "a person who undertakes, by contract, the performance of certain work for another, including the furnishing of goods and services", and "subcontractor" means "a person to whom a contractor sublets all or part of his initial contractual undertaking."

One justice dissented, suggesting that "contractor" be defined "in terms of fitness to perform the function envisaged by the legislature, not in terms of the common law meaning of the semantic root of the word 'contractor'." He said it

should be construed to mean "one whose regular occupation is to undertake for others to do jobs by contracting with third persons for all or part of the performance."

Legislative action. The legislature should add a new subsection to AS 23.30.045, defining "contractor" and "subcontractor" for the purposes of that section. The suggestion in the majority opinion or in the dissent could be used.

(5) Glasgow v. Alaska, 469 P 2d 682 (Opin. No. 616, 5/29/70):

Facts. The appellant was convicted of two counts of an indictment charging four counts of larceny in a building. The main issue before the supreme court was the appellant's right to a "speedy trial" under the United States and Alaska Constitutions. Excluding those periods of time that can properly be attributed to the appellant, trial was delayed some 14 months.

Decision. Attempting to maintain a proper balance "between the needs of the accused and the commitments of the judicial process," the court stated "We think 14 months' delay is an improper balance to strike." The conviction was overturned. In its opinion, the court observed that in Alaska there is "no statutory provision by which to measure the definite time within which trial must be held." Footnote 9 states "Virtually all of the leading authorities who have studied the matter, however, agree that the right to speedy trial should be fixed in terms of days or months running from a specified event, excluding certain periods of necessary delay or delays at the instance of the defendant, which should also be identified precisely." Several states were cited as having such provisions, and the court referred to the "Standards Relating to Speedy Trial", sec. 2.1, Approved Draft, A.B.A. Project on Minimum Standards for Criminal Justice (1968).

Legislative action. The legislature should consider specifying, probably somewhere in AS 12.45, a statutory time limit for permissible delay. In most jurisdictions which so specify, the permissible delay ranges between 75 days and six months. (See the court's footnote 12.)

(6) Searfus v. Northern Gas Company, Inc., 472 P 2d 966 (Opin. No. 630, 7/31/70):

Facts. The appellant brought an action for personal injuries against the appellee Northern Gas Company. The gas company denied any negligence on its part, asserted that the appellant was contributorily negligent, and contended that since appellant was its employee at the time of the

injury her sole remedy was under the Alaska Workmen's Compensation Act (AS 23.30). The superior court jury specially found that she was an employee of the gas company, and returned a general verdict in favor of the company. The main issue on appeal involved the definition of the word "employee".

Statute. In the present wording of Alaska's Workmen's Compensation Act, AS 23.30.265(11) defines "employee" as "an employee employed by an employer as defined in paragraph (12)", and AS 23.30.265(12) defines "employer" as "the state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state." These definitions are of little help in resolving the frequent question whether a person is an employee or is a contractor or subcontractor.

Decision. While holding that the superior court's jury instruction defining "employee" was not prejudicial error, and affirming the judgment, the supreme court rejected the common law definition of "servant" as the definition of "employee" for workmen's compensation purposes and adopted instead the "relative nature of the work" test. The court stated, "Designation of the precise boundaries of, and the relevant factors involved in, the 'nature of the work' test must, absent legislative definition, await further development through judicial decision."

Legislative action. The legislature should consider amending AS 23.30.265(11) to distinguish "employee" from "independent contractor". The court and authorities cited by it discuss factors relevant to evaluating the nature of the work, and in footnote 12 the court quotes AS 23.20.-525(a)(4)(A), (B), and (C), the Alaska Employment Security Act's definition of "employment" at the time the decision was written. All of this, plus the present wording of AS 23.-20.525(a), should provide guidance in selecting language for the amendment.

(7) Dimmick v. Alaska, 473 P 2d 616 (Opin. No. 632, 8/7/70):

Summary. In this appeal from a conviction of robbery, one of the main issues was whether the appellant's accomplice's testimony was inadmissible because the police had obtained a statement from him in violation of the standards for custodial police interrogation set out in Miranda v. Arizona, 384 US 436, 16 L ed 2d 694 (1966). When the appellant was arrested he was with his accomplice who was not arrested (because the victim could not identify him), but both were advised of their right against self-incrimination and their right to have an attorney. The accomplice requested an attorney but

then made a confession without having one. One police officer testified, "the decision was made to go ahead and interview [the accomplice] after he had requested an attorney full-well knowing that then this confession could not be used against him but merely for the value of the confession against Mr. Dimmick."

With one vacancy on the supreme court, two justices favored affirming the superior court's conviction and two favored reversal, the result of which was to affirm the lower court. The affirming opinion reasoned that "The focus of Miranda was upon the right of an individual not to be compelled to incriminate himself," stating that the "constitutional prohibition against compelling any person in a criminal case 'to be a witness against himself'" is personal in nature and that the right "pertains only to the person from whom a statement is obtained." Thus, since the accomplice's illegally obtained confession was to be used against the appellant and not against the accomplice himself, his testimony was held admissible.

This opinion rejected the suggestion, made (in a separate opinion) by one of the two justices favoring reversal, that affirming the conviction would encourage the police to conduct "incommunicado custodial police interrogation, with concomitant violations of the constitutional rights of the persons subjected to questioning." The two affirming justices said that those whose constitutional rights are violated by reason of police activity may seek redress under the federal Civil Rights Act (see 42 U.S.C., sec. 1983), and that "Furthermore, Alaska's legislature is not without the authority, if it chooses to exercise it, to make certain types of police conduct a crime, or even to extend the exclusionary rule of Miranda and provide that statements obtained in violation of that rule are inadmissible against anyone for any purpose."

Each of the two justices favoring reversal wrote a separate opinion, and the final resolution of the main issue on which they disagree with the controlling opinion in this case will have to be achieved in a future decision which avoids the two-to-two split. Whatever the judicial outcome may be, the legislature could "make certain types of police conduct a crime, or. . . extend the exclusionary rule of Miranda."

(8) Delahay v. Alaska, 476 P 2d 908 (Opin. No. 648, 11/2/70):

Summary. The appellant questions the legality of his termination as a district judge of Alaska and the validity of the appointment of his successor. His termination resulted from 1966 and 1967 legislation changing the method of selection

and retention of district judges and terminating the appointments of all district judges sitting on a specified date. See ch. 138 SLA 1966 and ch. 117 SLA 1967.

The main question of legislative intent involved sec. 2 of the latter Act (AS 22.15.170(a)), which provided in part that "The governor shall fill a vacancy in an office of district judge by appointing one of two or more persons nominated by the judicial council." Under this provision, the judicial council nominated four persons for the three district judgeships in the fourth judicial district, interpreting the "two or more persons" requirement as meaning that the governor could select from among all four nominees for the first position, from among three for the second, and between two for the third. Referring to the proceedings of the Constitutional Convention which indicate an intent "to maximize the role of the judicial council in selection of judicial candidates", the supreme court agreed that the judicial council's action in sending the governor only one more nominee than the number of positions to be filled constituted compliance with the statute. The decision of the superior court, rejecting the appellant's position, was affirmed.

The legislature may wish to consider whether this interpretation of that part of AS 22.10.170(a) quoted above does, in fact, implement the legislative intent, especially since that language is virtually identical to that in the Alaska Constitution regarding selection of supreme court justices and superior court judges (art. IV, sec. 5).

(9) Lynch v. McCann et al., 478 P 2d 335 (Opin. No. 659, 12/18/70):

Facts. Paul and June Lynch had been in partnership with Joseph and Margaret Reilly in the ownership and operation of an Anchorage bar, which the latter couple wished to expand by adding a restaurant. The Lynches did not wish to do so, and the Reillys bought them out, borrowing some money from a bank upon the security of a deed of trust and executing a second deed of trust to the Lynches. After the trust deeds had been recorded, the Reillys began construction of an addition to the existing bar building and began refurbishing the old building. The addition was about one-seventh the size of the old building. The appellees furnished labor and materials, and subsequently the Reillys defaulted on their obligations to the Lynches and to the appellees. After the Lynches foreclosed their deed of trust and purchased the property at the foreclosure sale, the appellees instituted foreclosure actions on their respective mechanics' liens. The lower court granted the lienors foreclosure insofar as the new addition was concerned, stating that as to that property their liens were prior and paramount to all other interests of the other parties.

Statutes. The appellants would have priority under AS 34.20.090(b), which provides:

> "The purchaser at a [foreclosure] sale, his heirs and assigns are, after the execution of a deed to him by the trustee, entitled to the possession of the premises described in the deed as against the party executing the deed of trust or any other person claiming, through or under him, after filing the deed of trust for record in the recording district where the property is located."

The appellees would have priority under AS 34.35.-060(c), which provides:

> "A lien created by secs. 50 - 120 of this chapter in favor of a person actually performing labor upon or furnishing material used in a building or other improvement in its original construction is preferred to a prior lien, mortgage, or other incumbrance upon the land on which the building or other improvement is constructed."

Decision. Stating that the basic issue was whether the addition to the old building constituted "original construction" under AS 34.35.060(c), the supreme court held that it was not, and reversed the judgment in favor of the lienors. Observing that "Alaska's use of the phrase 'original construction' appears to be sui generis in the lien laws of this country," the court stated "Analysis of the text of AS 34.35.060(c) discloses a legislative intent to limit the priority granted generally to situations where the construction preceded all other construction in and upon a given area of vacant or cleared land." The court discussed Judge Ritchie's opinion in Wagner v. Shaw, 6 Alaska 647 (1922), as further evidence of legislative intent, but mentioned that "In the absence of a clearer indication as to the legislature's intent, more precise definition of the term must await decisional delineation."

Legislative action. The legislature should consider adding a definition of "original construction" to AS 34.35.-060 or amending AS 34.35.060(c) to delete that phrase and state the priority in terms of its basic purpose. Again, a legislative committee report, explaining the measure and giving some clue to the motivation behind it, would be helpful.

(10) Application of Park, 484 P 2d 690 (Opin. No. 690, 4/30/71):

Summary. The petitioner passed the Alaska bar examination and met all other requirements for admission to the bar,

except that he was not a citizen of the United States as required by AS 08.08.130(a)(1) and Alaska Bar Rule II. The Alaska Supreme Court did not reach the question of the constitutional requirement of equal protection, but held that AS 08.08.130(a)(1) violated the Alaska Constitution's art. IV, sec. 1, which vests the judicial power of the state in a supreme court, superior court and courts established by the legislature. In a consistent line of decisions, the court has ruled that it can not be required to admit attorneys "on standards other than those accepted or established by the court" and that admission requirements must have "a rational connection with one's fitness to practice law in Alaska." In the instant case, the citizenship requirement was held unacceptable to the court, after reviewing several arguments made in its defense. (The court also held the same requirement stated in its own Alaska Bar Rule II to be of no force and effect.) The court went on to suggest, however, that lawful residence and a sincere intent to become a citizen could be required, and Supreme Court Order No. 147, dated November 23, 1971, amended Alaska Bar Rule II to so provide.

AS 08.08.130(a)(1) should be amended to read: "is a citizen of the United States, or is a resident alien in the United States who intends to become a citizen of the United States." A section proposing this amendment will be included in the 1972 general revisor's bill. The legislature should also consider repealing or amending other United States citizenship requirements where they still exist in occupational licensing statutes (e.g., AS 08.62.100(2), 08.80.110(1) and 08.88.211(a)(5) and (b)(4)).

(11) Alvarado v. Alaska, 486 P 2d 891 (Opin. No. 704, 7/6/71):

Facts. The appellant sought reversal of his conviction for rape of his sister-in-law, contending that the jury which found him guilty was improperly constituted because of the long-standing practice in the third judicial district of selecting all prospective jurors from the area within a radius of 15 miles of Anchorage. (Neither did he live within that area nor was the location of the alleged crime in that area.) The result of this practice was the almost total exclusion from jury service of village residents. The appellant asserted that this deprived him of his constitutional rights to an impartial jury and to due process of law.

Statutes. Closely related to the problems involved in this case, but not interpreted in it, are AS 09.20.050 and 22.10.030. The relevant part of the latter is quoted below, in the discussion of the court's decision. In AS 09.20.050, subsection (b) specifies the sources of the names for the jury lists: persons who purchased a resident hunting, fishing or trapping license, persons who filed a state income

tax return showing an Alaskan address, and persons who have registered to vote. AS 09.20.050(a) provides as follows:

> (a) At such times as need may require, but not later than March 15 of each year, the administrative director of courts shall prepare for each judicial district a list of the names of the residents of the district who are qualified by law for jury service. If the superior court is located in different cities in the same judicial district, the administrative director shall prepare for each location of the court a list of the names of the qualified residents of that portion of the district considered by him to be appropriate.

Decision. After reviewing authority and considering pertinent sociological and anthropological factors in some depth, the supreme court reversed and remanded, holding that "an individual should not be forced, against his will, to stand trial before a jury which has been selected in such a manner as to exclude a significant element of the population of the community in which the crime was allegedly committed." The court stated that "in determining whether the source from which a given jury is selected represents a fair cross section of the community, we must adhere to a notion of community which at least encompasses the location of the alleged offense", observing that two alternatives would be selection from among residents of the entire judicial district (see the court's footnote 26) in which the crime is alleged to have occurred or from among residents of the senate district in which the crime is alleged to have occurred.

In connection with this second alternative, the court (in its footnote 40) referred to ch. 126 SLA 1971 (see AS 22.10.030(d)) which requires that the actual place of trial in criminal cases be "in an election district within the judicial district at a location which would best serve the convenience of the parties and witnesses," pointing out that the "administrative and financial impact of selecting jurors from within the [senate] district in which the crime occurred will be considerably diminished given the fact that trial will at any rate have to be held within the district." Affirming the notion that expense does not "justify the perpetuation of a system which denies to a large segment of our citizens the opportunity to participate in our system of justice," the court quoted from its earlier decision in Baker v. City of Fairbanks, 471 P 2d 386 (Alaska, 1970), to the effect that:

> "If an individual right is vested by the Constitution, the overriding demands of governmental efficiency must be of a compelling nature and must be identifiable as flowing from some enumerated constitutional power. To

allow expediency to be the basic principle would place the individual constitutional right in a secondary position, to be effectuated only if it accorded with expediency.

"This would negate our entire theory of constitutional government."

Legislative action. AS 09.20.050(a) could be amended to require the administrative director of courts to prepare jury lists by senate district, which the court seems to prefer to judicial districts or election districts while still meeting constitutional requirements. Also, for the sake of consistency, AS 22.10.030(d) (added by ch. 126 SLA 1971) could be amended to refer to "senate district" rather than "election district". (The Alaska Constitution's distinction between these two terms should be borne in mind. In art. XIV, sec. 1, for example, "election district" means "house of representatives election district", and in art. XIV, sec. 2, senate districts are described in terms of their component election districts. This usage of the terms seems to be consistent in our constitution; see, e.g., art. XV, sec. 10.)

(12) RLR v. Alaska, 487 P 2d 27 (Opin. No. 706, 7/9/71):

Summary. This is one of several recent significant decisions in the long constitutionally neglected area of children's rights. (Also see, e.g., Doe v. Alaska, 487 P 2d 47 [Opin. No. 707, 7/9/71]; In re EMD, 490 P 2d 658 [Opin. No. 737, 11/15/71]; and In re GMB, 483 P 2d 1006 [Opin. No. 687, 4/8/71].) On the main issue in this case -- that of a child's right to a jury trial -- the court stated "We hold that whenever a child in a delinquency proceeding is charged with acts which would be a crime, subject to incarceration if committed by an adult, the Alaska Constitution guarantees him the right to jury trial," and in its footnote 35 added "To the extent In re White, 445 P 2d 813 (Alaska 1968), is inconsistent with this opinion, it is overruled. Implicit in our holding is that AS 47.10.070 is unconstitutional insofar as it denies the right to a jury trial to the child in the adjudicative phase of the delinquency proceeding." The supreme court did not reach the issue whether this unconstitutionality required reversal; it vacated and reversed the superior court's adjudicative and dispositive orders, however, on the grounds that the procedures below were a blatant violation of Children's Rule 12(c)(1) which requires the presence of the child at the child hearing.

The portions of AS 47.10.070 which most clearly require legislative action in light of this case state:

"The court may conduct the hearing in an informal manner in the courtroom or in chambers. All hearings under this chapter are without a jury and the usual rules of evidence do not apply. . . . The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor."

The court's footnote 74 contains the statement that "The statute providing for exclusion of the public from juvenile hearings is procedural, so is outside the scope of legislative authority unless two-thirds of each house of the legislature votes to change the rule promulgated by the supreme court in this matter. Alaska Const. art. IV, sec. 15." Since the statutory language was enacted in ch. 145 SLA 1957, before the effective date of the Alaska Constitution and before adoption of the Alaska Rules of Court Procedure and Administration and adoption of the Alaska Statutes, this statement appears to overrule the decision made in the preparation of those two bodies of material; the 1963 foreword to the Court Rules states (on its fourth page) "The objective of this [recodification] program was to separate all procedural law from the existing statutes, recodify the remaining substantive law into new titles and promulgate the procedural provisions as rules of court." Using that approach, what is now AS 47.10.070 was left in the statutes.

The July 1971 decision in this case, then, suggests that the legislature not deal with this point unless it does so as a change of the Court Rules under art. IV, sec. 15 of the Alaska Constitution. That special handling is not required in order to repeal AS 47.10.070 or delete the quoted language in line with the RLR case. However, the legislature may wish to go further than simply delete this language which denies a child the right to a public trial by jury; the entire section could be rewritten and AS 47.10.075, providing for "young adult advisory panels", could be amended to provide for actual jury service by minors (an issue mentioned but not decided by the court). (Cf. AS 09.20.050.)

(13) In re EMD, 490 P 2d 658 (Opin. No. 737, 11/15/71):

Summary. In this case the court was called upon to decide whether a minor who has been adjudged a "child in need of supervision", under AS 47.10.080(j), could be institutionalized. "Child in need of supervision" is a category created in 1970 to lie between "dependent child" and "delinquent child". As defined in AS 47.10.290(7), the term does not describe a child who has committed a crime. (See AS 47.10.010(a)(2), (3) and (6).) Under our statutory arrangement, only a child who violates a law, ordinance or regulation, i.e., a delinquent child, may be institutionalized. (See AS 47.10.080, 47.10.290(2) and 47.10.010(a)(1).)

The state argued that since AS 47.10.080(j)(1) allows any order for a child in need of supervision which is authorized for a dependent child (see AS 47.10.080(c)) and since one of those authorized orders is commitment to the Department of Health and Social Services, the department may institutionalize a child in need of supervision under AS 47.10.190 which provides:

> "When the court commits a minor to the custody of the department, the department shall arrange to place the juvenile in a detention home, facility or another suitable place which the department designates for that purpose. A juvenile detained in a jail or similar institution at the request of the department shall be held in custody in a room or other place apart and separate from adults."

The supreme court held that the department does not possess broader powers of commitment than does the trial court. In the supreme court's view, AS 47.10.190 "prescribes conditions of confinement after the court has lawfully determined that a child should be confined in an institution." (Footnote omitted.) The legislature could amend that section to reflect more clearly that interpretation.

B. ALASKA SUPERIOR COURT OPINIONS

All superior court opinions published in the Alaska Law Journal in 1970 and through May 1971 have been reviewed. However, none of those reported has been found to be relevant to this report. The last Alaska Law Journal was issued in May 1971, but will again be published in 1972. Therefore, any relevant opinions handed down between May and December 1971 will be included in the oversight report covering 1972. One unpublished superior court opinion which is a matter of special interest to the legislature is the March 15, 1971 opinion in the case of Bozanich v. Noerenberg, (No. 70 - 389 Civil).

The plaintiffs, Bozanich, et al., challenged the constitutionality of ch. 186 SLA 1968 (relating to persons eligible to obtain fishing gear licenses) in an action for a declaratory judgment and for a permanent injunction against the enforcement of the law (see AS 16.05.536, 16.05.540 and 16.05.250(12)). The plaintiffs based their challenge to the law on art. I, secs. 1 and 7, and art. VIII, secs. 3, 15 and 17, Constitution of Alaska.

Some of the plaintiffs had earlier challenged the same law in the U. S. District Court and a three-judge panel ruled the act was unconstitutional as being in violation of the United States Constitution and the Alaska Constitution. Bozanich v.

Reetz, 297 F. Supp. 300 (D. Alaska 1969). The three-judge U. S. District Court decision was set aside by the United States Supreme Court as violating the doctrine of abstention. Reetz v. Bozanich, 397 U.S. 82, 25 L.Ed. 2d 68 (1970). The supreme court did not consider the merits of the case but remanded it to the district court, staying proceedings in order for the parties to litigate the Alaska Constitutional questions in the Alaska courts.

The plaintiffs' motion for summary judgment in the subsequent state court action was granted by Judge Victor Carlson and the law was held unconstitutional. The court found that the statute violated the equal protection guarantee of art. I, sec. 1, the common use provision of art. VIII, sec. 3, and the prohibition of an exclusive right of special privilege of the fishery provision of art. VIII, sec. 15, Constitution of Alaska. The court stated that the "general meaning of the words of the constitutional provision require that no distinction between persons equally situated is to be made with regard to fish in their natural state." The case has not been appealed to the Alaska Supreme Court and it is anticipated that the invalid language will be removed by the 1972 general revisor's bill.

Another unpublished superior court opinion, also by Judge Carlson, which is of interest to the legislature is that in the case of Bomhoff v. Boucher, (No. 70-359 Civil).

The plaintiffs, Bomhoff, et al., brought suit to enjoin the lieutenant governor from issuing a call for a constitutional convention based on the results of the referendum proposition approved by the Alaska electorate on November 3, 1970, and to have the following proposition placed on the ballot in the next general or special election: "Shall there be a Constitutional Convention?" with appropriate boxes for marking "yes" or "no".

The challenged referendum proposition on the November 3, 1970, general election ballot was set out, punctuated but not spaced or set in the following type:

Referendum
As required by the
Constitution of the State of Alaska
Art. XIII, Sec. 3
Shall there be a constitutional
convention?

YES [ ]
NO [ ]

The court, in finding for the plaintiffs, held that the language of art. XIII, sec. 3, is mandatory and specific in the form of the question that is to be submitted to the voters when it says: "If during any ten-year period a constitutional convention has not been held, the secretary of state shall place on the ballot for the next general election the question: 'Shall there

be a Constitutional Convention?'" Since the proposition required by the constitution was not presented to the voters, the lieutenant governor was held to have no election results on which to base a call for a constitutional convention, and was therefore enjoined from doing so.

The court further found that the unauthorized introductory words in the proposition were misleading and confusing and held that "the election process is to be kept free from taint and the suggestion of impropriety, however unintentional. . . . The electorate should be given the opportunity to cast their ballots free from confusing, extraneous, or superfluous verbiage in the proposition."

A new election was ordered to be held at the next general election in 1972.

C. OPINIONS OF UNITED STATES DISTRICT COURT, DISTRICT OF ALASKA

First National Bank of Fairbanks v. Camp, 326 F. Supp. 541 (1971):

Facts. Plaintiff, First National Bank of Fairbanks, filed suit for declaratory judgment and injunctive relief with respect to approval by the defendant, Camp (Comptroller of the Currency), of an application of the First National Bank of Anchorage to open a branch in Fairbanks. On cross motions for summary judgment, the district court held that the defendant was not required to follow interpretive declarations by the state banking director with respect to an Alaska statute governing approval of branch banks, that the approval had rational basis in light of the state statutory requirements and that the plaintiff was not denied administrative due process by failure of the defendant to state reasons for his approval. Summary judgment for defendant.

Statute. Congress has authorized the Comptroller of the Currency to approve the establishment and operation of branch offices by national banks "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks." (12 U.S.C. 36(c)(2)).

The director of the division of banking and securities of Alaska is, in authorizing state banks to operate a branch, subject to the provisions of AS 06.05.415, which provides in pertinent part that

> "The department shall issue a certificate of authority to operate a branch bank ... if (1) the department determines

that the addition of the proposed facilities in the community is not detrimental to a sound banking system;"

Decision. The part of the court's decision relevant to this oversight report is that in which the court, in deciding the issue of whether the defendant's decision to allow the establishment of a branch bank had rational basis in the light of state statutory requirements, stated:

> "No Alaska statute or cases have been found which define what is meant by 'a sound banking system' or which suggest factors, proof of which would show that a proposed branch was or was not 'detrimental to a sound banking system.' In the absence of any binding State standard and because the Comptroller had sufficient evidence from which to determine whether or not the new branch would be detrimental to the soundness of Fairbanks' banking system, his construction of that criterion cannot be upset."

Legislative Action. The legislature may wish to remove the ambiguity in AS 06.05.415(1) which allowed the Comptroller of the Currency to substitute his own standards of what is meant by a "sound banking system" for those of the state. This action should be in the nature of legislatively prescribed standards of what constitutes a "sound banking system."

D. ATTORNEY GENERAL OPINIONS

There have been no numbered, formal opinions issued by the Office of the Attorney General since 1969. It is the understanding of the Legislative Affairs Agency that formal opinions of the attorney general will again be issued and numbered beginning in 1972 and that certain informal opinions issued in 1970 and 1971 will be given numbers and published as formal opinions. All of these opinions will be reviewed for the oversight report covering 1972.

E. ADMINISTRATIVE REGULATIONS

(1) Revision of Alaska Administrative Code:

Again, this year's report does not contain a review of administrative regulations because in prior years the staff has reviewed the regulations of all administrative agencies of the state and because the revision of the Alaska Administrative Code, under 1967 Senate Concurrent Resolution No. 15 and sec. 2, ch. 70 SLA 1966, is still in progress. As part of this project, the Drafting Manual for Administrative Regulations has been revised; this fourth edition is dated August 1971.

In actions related to this project, the attorney general recently designated a "regulations attorney" under AS 44.62.125, and a member of the lieutenant governor's staff is now working on coordinating the regulation-adopting efforts of the various state agencies and encouraging adoption of revisions of their respective regulations. In addition, information is being gathered and bid specifications being prepared for eventual professional publication of the Alaska Administrative Code and Alaska Administrative Register (the quarterly supplement to the code). The following indicates the present status of the revision project:

Preface -- revised at least twice and presently in good shape.

Title 1 (General Provisions) -- old title repealed and a new title prepared but not yet adopted.

Title 2 (Department of Administration) -- no regulations ever filed for publication in the AAC. However, the department is completing preparation of the state personnel rules for voluntary filing under AS 44.62.-120. In addition, the department's Division of Supply is drafting some regulations to be included in the AAC.

Title 3 (Department of Commerce) -- revision almost completed, with a couple of batches yet to go.

Title 4 (Department of Education) -- revision completed.

Title 5 (Department of Fish and Game) -- revision completed, and revised again.

Title 6 (Governor's Office) -- revision virtually complete.

Title 7 (Department of Health & Social Services) -- a large, unrevised title with little spots of revision.

Title 8 (Department of Labor) -- a relatively large, unrevised title.

Title 9 (Department of Law) -- no regulations ever filed for publication in the AAC.

Title 10 (Department of Military Affairs) -- four pages of old regulations were recently repealed and have not been replaced.

Title 11 (Department of Natural Resources) -- a large, unrevised title with little spots of revision.

Title 12 (Professional and Vocational Boards and Commissions) -- partially revised. There are 17 of these licensing

agencies, not counting the Alaska Bar Association (which is not required to file its regulations under the Administrative Procedure Act [AS 44.62] for publication in the Alaska Administrative Code. In 1963, however, the bar association's regulations were published in the AAC as chapter 2 of Title 12 [12 AAC 2], where they remain, unrevised. The relationship between these regulations and the association's bylaws and the supreme court's Alaska Bar Rules is not entirely clear.) Of the 17, regulations of only the Collection Agencies Board and the Board of Nursing have been neither revised nor reviewed. During the past three-and-a-half years, regulations of the remaining 15 have been revised by or revisions of them have been reviewed by the staff of the Legislative Affairs Agency; these are: Board of Public Accountancy, Board of Barber Examiners, Board of Chiropractic Examiners, Board of Hairdressing and Beauty Culture Examiners, Board of Dental Examiners, Board of Electrical Examiners, Board of Engineers and Architects Examiners, State Medical Board, Board of Examiners in Optometry, Board of Pharmacy, Board of Marine Pilots, Board of Psychologist Examiners, Real Estate Commission, Board of Veterinary Examiners, Board of Welding Examiners. Of these 15, revised regulations of only six have actually been adopted; these are for the chiropractors, dentists, doctors, optometrists, marine pilots, and veterinarians. Adoption of the regulations is, of course, the responsibility of these individual agencies.

Title 13 (Department of Public Safety) -- revision completed.

Title 14 (Department of Public Works) -- a relatively small, unrevised title.

Title 15 (Department of Revenue) -- a relatively small, unrevised title.

Title 16 (Department of Economic Development) -- revision completed. Before the October 1971 register, there were no regulations in this title. The few pages of new ones are in the new format.

Title 17 (Department of Highways) -- revision apparently completed.

Title 18 (Department of Environmental Conservation) -- a new title with new regulations in the new format.

This summary does not take into account corrections that should be made in various revised titles, nor does it consider the absence of required regulations.

(2) A special regulation:

A regulation handled somewhat differently from those discussed above is the one adopted April 13, 1971 by the commissioner of highways in his Order No. 71-1. This document prohibits the operation of a motor vehicle equipped with studded snow tires upon a paved portion of the state highway system between May 1 and September 15 of each year. AS 19.-05.010, 19.05.020, 19.10.060 and 28.05.020 were cited as authority for the regulation.

The order also stated that the regulation was adopted in accordance with AS 44.62.040 and 44.62.290 (sections in the Administrative Procedure Act). The latter is the provision exempting from the effective date, notice, hearing, etc., requirements regulations which are not required to be submitted to the lieutenant governor under the Administrative Procedure Act. The former section, in its (a)(2), states that submission under the APA is not required for a regulation which "relates to the use of public works, including streets and highways, under the jurisdiction of a state agency if the effect of the order is indicated to the public by means of signs or signals." The seasonal ban on studded snow tires has been indicated on large signs posted on the edge of highways throughout the state.

This regulation has been treated as exempt from the APA, and therefore the APA requirements of notice and public hearing have not been followed. The legislature should consider whether this properly implements the legislative intent in enacting AS 44.62.040(a)(2). It should be noted that under the Department of Highways' interpretation of this provision, virtually every regulation pertaining to use of highways could be adopted without notice or a public hearing, so long as the regulation was proclaimed by means of a sign or signal. Two consequences of this would be the circumvention of the Administrative Procedure Act and the cluttering of the roadside with hundreds or thousands of signs. Perhaps the original intent of AS 44.62.040(a)(2) covered only such things as stop signs and lights, and indication of no-passing zones, one-way streets and speed limits.

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HB 52

MARCH 23, 1971

MEMO TO THE MEMBERS OF THE HOUSE

RE: ATTACHED LETTER

THE ATTACHED LETTER IS ONE THAT MR. R[illegible]
TOOK FROM THE ANCHORAGE TIMES, DATED FEBRUARY
3, 1971, AND HAD PLACED ON YOUR DESK.

Anch Times 2/3/71

LETTERS

'M' Stands For Methodist

Dear Editor:

I was dismayed by the interview with Lewi
Simpson as reported in Thursday's Times. Simp
son, head of Alaska Methodist University's presi
dential search committee, said some things tha
could not help but disturb anyone interested in th
survival of the only avowedly Christian universit
in the State of Alaska. In such a choice positio
AMU should be able to give moral and spiritua
leadership, not only to its students, but also to th
state. In a day and age when young and old alik
are grasping for firm belief and solid foundations
AMU should be free, as the only sectarian school i
the state, to take the lead boldly and creatively

Simpson said the new president must b
supreme in being a politician, a fund raiser, an
administrator. He said nothing about the new pres
ident's concern for students or about his integrit
and honesty or about his moral leadership qualitie
or about his vision or about his personal achieve
ments. It would seem to me that if AMU could b
creatively sectarian it could challenge and inspir
the students so that its life would not have to rel
upon a politician-fund raiser-administrator for it
continuance.

Simpson said that AMU places no emphasi
upon religion courses and is attempting to be trul
non-sectarian. Why is there no emphasis upo
good, creative, challenging religion courses tha
cause people to think and grow? AMU is the onl
university so far in this state that ha
the freedom to be openly and unapologetically
sectarian. Why shouldn't it be? Is someone afra
religion might be offensive to some sensitive ath
ist? A church-related university without an em
phasis upon the faith which founded it is an oc
kind of animal to say the least.

As for being non-sectarian — that is ridiculous
The University carries Methodist in its name.
has a Methodist instructor of religion and philos
phy. It was built at the behest of the United Met
odist General Conference — a national body of th
United Methodist Church. It was admitted in th
article that $1 million is being sought from Unite
Methodist people in the Southeastern Jurisdictio
of the United Methodist Church. It is on the ad
anced special giving list of every church and co
ference in United Methodism. Whether Simpso
likes it or not, sectarian interests provide a gre
deal of the bread and butter for AMU.

In a day and age when the drug culture is bein
dropped by great numbers of kids because the
find more offered them in the Christian faith or,
least, in some form of belief, the position of Sim
son seems to be especially cowardly and unenlig
tened. Personally, I hope they go for someone wi
is less interested in success than he is in goo
honest, creative, sectarian leadership in high
education.

It is interesting to note that Simpson's two so
attend Pacific Lutheran -- an avowedly sectaria
school operated unashamedly by the America
Lutheran Church. I wonder why?

Robert D. Bowers, Pastor
Church of the New
Covenant (United Methodist)
Kenai

HB-52

March 23, 1971

Dear Bill Moran

Admittedly, my concern for the financial condition of Alaska Methodist University has prompted me to write this letter, but there are other, more important reasons that I urge you to ensure the passage of the legislation known as the "Tuition Remission Bill" and the "Contractual Services Bill", House Bill 52.

I am a graduating senior in Business Administration at AMU and I am also a second-generation Alaskan. Because I am concerned for the welfare of all Alaskans, I am shocked at the unwillingness of the members of the legislature to favor the program I have mentioned.

If the purpose of state government is to benefit the citizens of the state, then one wonders why the elected officials refuse to assist in implementing the financial aids program. One part, as I understand it, will provide supplimentary funds to ALASKA RESIDENTS in order to assist them to earn a college degree In The State Of Alaska. If one can assume that most, if not all of those given assistance will remain in Alaska, then can it not be said that their education will benefit the entire population of the state? I feel that the financial aids proposition can only help the state. Why then, are the legislators so hesitant?

I feel I can say without fear of contradiction that Alaska Methodist University is a beneficial entity in the Anchorage (and for that matter, Alaskan) environment. If it is also true that the cost (not the income from students)

of educating a resident for one year at the University of Alaska is nearly $3,600.00 , and the program provides for something less than $1,200.00 in aid to AMU and Sheldon Jackson, then it is evident that the state will spend less to educate a student because private institutions are willing to charge the state less for furnishing the same services. The State Government spends less money, and thus saves money, does it not?

I have heard no valid reasons for opposing the program to provide financial aid to the private sector of Education in Alaska, while I have heard many impressive arguments favoring the program. I have stated only a few of my own observations. I hope that the elected officials of the state will see fit to hasten the passage of this legislation for the benefit of all Alaskans.

Respectfully,

Don Karabelnikoff

Don Karabelnikoff
7603 Old Harbor Avenue
Anchorage, Alaska 99504

WESLEY DRIVE, ANCHORAGE, ALASKA 99504

ALASKA METHODIST UNIVERSITY

23 March 1971

HB 52

THE SEVENTH LEGISLATURE, FIRST SESSION
State of Alaska
Pouch V, State Capitol
Juneau, Alaska 99801

Dear Bill —

Please forgive this format. However, we wish to address each member of the Seventh Legislature and believe this the most expeditious means of communication open to us.

In 1960 (RAF) and 1962 (SAF) we came to Alaska from the Midwest and Europe to serve on the Faculty of Alaska Methodist University. We have taught in the fields of history, art and speech to Alaskans (young and old) and students from other states and foreign countries. We have now seen ten graduating classes many of whose members have remained in the Great Land to serve the growing edge of civilization in the North. Along the way, each of us have given something of our talents and time to Alaska-at-Large. We have come to love AMU and Alaska. If at all possible, we wish to continue our work in this State.

As members of the teaching profession and as citizens, each of us believes that higher education in our new State should provide for a variety of institutions and curricula. This is why, after conferences with Dr. Patty, then President of the University of Alaska, officials of our state university encouraged the Board of National Missions to found AMU. In the years since, Alaskan and non-Alaskan private citizens and the Methodist Church have contributed millions of dollars of non-tax monies for Alaskan higher education. Such monies would not otherwise be contributed for these purposes if AMU and Sheldon Jackson College did not exist. For the record it should be remembered that Sheldon Jackson was the first educational institution in Alaska's American period.

As long as Sheldon Jackson College and AMU continue to live, private monies will continue to be invested in Alaskan higher education. The Tuition Equalization Act of the last session and HB52 now before this Legislature would make the State of Alaska a partner in the lives of these two important educational endeavors. It should be remembered that the physical plants and operating costs heretofore have not been financed with State funds nor would the State's share ever amount to the full amount necessary for year-to-year operation. Each of us is optimistic that the passage of HB52 and new leadership will assure a successful partnership in the years ahead. It is our opinion that HB314 should not be passed without a full hearing or prior to a Legislative study of higher educational institutions in Alaska. We urge the passage of HB52 in this Session.

Respectfully,

Robert A. Frederick
Professor of History

Respectfully,

Saradell A. Frederick
Professor of Art and Speech

WESLEY DRIVE, ANCHORAGE, ALASKA 99504

ALASKA METHODIST UNIVERSITY

March 23, 1971

HB #52

Representative William J. Moran
Pouch V
Juneau, Alaska 99801

Dear Representative Moran:

It is with surprise and dismay that I learn that (1) CSHB 52 has been returned to the House Finance Committee, and (2) HB 314 has been written. The former is a model of progressive legislation which will be of great benefit, not only to the people of Alaska, but because of its national significance, to the people of our nation. HB 314, relatively, is retrogressive legislation and effectively maintains the status quo. Maintenance of the status quo is sometimes good, but in the case of higher education such a position cannot be justified in light of the volumes of material available which collectively call for substantial changes in our approach to higher education.

Let me explain why I conclude that CSHB 52 should be acted on positively by you and your colleagues. In doing so, I will only mention its relationship to AMU, Sheldon Jackson and the University of Alaska. These are cogent and valid arguments to be sure, but I am sure that you are familiar with them. Instead, I should like to concentrate my remarks on what I think is the most important facet of the bill and one which has not been mentioned very often.

If we agree that higher education, public or private, is of fundamental importance to a democratic style of governing ourselves and, therefore, of intrinsic value to our society, it follows that the citizens of that society have a right to choose a form of education best suited to their needs and aspirations. This, of course, is the constitutional basis for taxation of peoples for a purpose which is not required of nor available to the whole. The important word, to me, is choice. For the first time in the history of Alaska, HB 52 will allow, within the limits of institutional accommodation and public funds, an honest choice to Alaska citizenry, not only between public and private higher education, but more important between styles of education. The present system of public support for higher education is grossly unfair not only to the taxpayer, but to the student, an unfairness which HB 314 will maintain and CSHB 52 eliminates.

To a graduating high school senior, the present system says the following: "You have the credentials to enter an institution of higher learning; we, therefore, through taxation, offer you a $7,000 scholarship for each year you attend." (I am unsure as to the cost/year/student at the University of Alaska.) "However, if the University of Alaska does not offer a program or the caliber of program to your choosing, we will not give you a scholarship."

Although we commonly do not use the term scholarship as synonymous with free tuition, they are the same in this case.

Thus the student who qualifies for Harvard, Princeton, Stanford, etc. is patently dismissed from financial aid from the state because he does not choose the University of Alaska.

This stance, I maintain, is unfair to the taxpayer, the student (who may be a taxpayer), prohibits the important element of choosing a personally compatible program of study, and can lead to empire building by state universities because a monopoly on higher education aspirants.

Other states have recognized the value of private higher education to their citizens. Recently the United States Congress recognized the value of choice when they ruled that private schools of higher education should be included in the educational support for the Native student (in effect, HB 52 gives the non-native student the same choice as the native student). By doing so they have recognized the intrinsic value of choice as a fundamental aspect of our society. I ask you to give Alaskans that choice by passing CSHB 52 and rejecting HB 314.

Cordially yours,

Ross G. Schaff

Ross G. Schaff
Professor of Geology

RGS/dkr

HB-54

AFV

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AB
AFA 066 NL PDF
ANCHORAGE ALASKA 27
HONORABLE MIKE ROSE
HOUSE OF REPRESENTATIVES JUN
RE HOUSE BILL 54. THANK YOU FOR SENDING ME COPY OF
BILL. THIS BILL ATTEMPTS TO NULLIFY THE LAW AS LAID
DOWN BY OUR SUPREME COURT IN PHILLIPS VERSUS STATE.
NOT ONLY IS THIS UNFAIR TO THE MOTORISTS OF THE
STATE AND ENCOURAGES NEGLIGENCE ON THE PART OF EMPLOYEES
OF THE STATE HIGHWAY DEPT BUT IT IS PROBABLY BEYOND THE
POWER OF THE LEGISLATURE, WHICH CAN ONLY LEGISLATE WITH
RESPECT TO PROCEDURE IN SUITS AGAINST THE STATE,
UNDER ARTICLE 2 SECTION 21 OF THE ALASKA CONSTITUTION.
ACCORDINGLY THIS BILL AND THE PRESENT RESTRICTIONS IN THE
LAW ARE FAR TOO RESTRICTIVE AND PROBABLY
UNCONSTITUTIONAL BECAUSE THEY VIOLATE THE SECTION OF THE
CONSTITUTION JUST CITED. SUGGEST PRESENT STATUTE BE REPLACED
BY A SIMPLE LAW PROVIDING THAT THE STATE OF ALASKA MAY BE
SUED IN THE SAME MANNER AND FOR THE SAME CAUSES AS ANY
PRIVATE PERSON. THIS WAS THE LAW IN EFFECT WITH RESPECT
TO THE TERRITORY OF ALASKA WHEN THE CONSTITUTIONAL
PROVISION REFERRED TO ABOVE WAS ADOPTED AND WAS UNDOUBTLY
WHAT THE FFRAMERS OF THE CONSTITUTION HAD IN MIND.
ALSO, DISCRIMINATORY REQUIREMENT OF COST BONDS SHOULD BE
ELIMINATED ENTIRELY AS IT IS REGULARLY USED TO DEFEAT
OR IMPEDE MERITORICUS CLAIMS BY POOR PERSONS AGAINST
THE STATE. ALSO SUGGEST ENACTMENT OF A GENERAL LAW PERMITTING
POOR PERSONS TO SUE OR PROCEED IN ANY COURT OF THE STATE
WITHOUT PRE-PAYMENT OF OR SECURITY FOR FILING FEES OR
COSTS OF ANY KIND. RESPECTFULLY,
EDGAR PAUL BOYKO

54 2 21.

HB 113

THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of)	
)	File No. 1524
E.M.D.)	
)	O P I N I O N
A Minor Child.)	
)	[No. 737 - November 15, 1971]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Harold J. Butcher, Superior Court Judge.

Appearances: Herbert D. Soll, Public Defender, and Bruce A. Bookman, Assistant Public Defender, Anchorage, for the minor child. John E. Havelock, Attorney General, Juneau, Seaborn J. Buckalew, Jr., District Attorney, and Robert L. Eastaugh, Assistant District Attorney, Anchorage, for the State of Alaska.

Before: Boney, Chief Justice, Dimond, Rabinowitz, Connor, and Erwin, Justices.

RABINOWITZ, Justice.

In this appeal we are called upon to decide whether a minor who has beer adjudged a child in need of supervision can be institutionalized under our children's code.

Both Alaska's statutes relating to children's proceedings and the rules of procedure governing such proceedings establish three distinct categories of children. Thus, a child can be declared a dependent minor, a child in need of supervision, or a delinquent minor. AS 47.10.290(7) defines a "child in need

of supervision" as a minor whom the court determines is within the provisions of AS 47.10.010(a)(2), (3), or (6). Those provisions include a minor who:

> (2) by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian, or custodian;
>
> (3) is habitually truant from school or home, or habitually so conducts himself as to injure or endanger the morals or health of himself or others;
>
> . . . .
>
> (6) associates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others.[1]

Regarding the dispositive phase of children's proceedings, Alaska's children's code provides that if the court determines the minor is a child in need of supervision, it shall make any of the following orders of disposition regarding the minor's supervision, care, and rehabilitation:

> (1) any order which is authorized under (c) of this section; or
>
> (2) order the minor placed on probation under those conditions and limitations that the court may prescribe.[2]

Under section (c) of AS 47.10.080, the court is

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[1] Compare R. 12(b), Rules of Children's Procedure.

[2] AS 47.10.080(j).

empowered to order the minor committed to the Department of Health and Welfare or order the minor released to his parents, guardian, or some other suitable person.[3]

In the case at bar, the superior court found that E.M.D., a 14-year-old-runaway girl, was a child in need of supervision. The court's findings were made after several hearings before a master and the superior court, and were based largely upon the master's findings of fact and recommendations. In the dispositive portion of the trial court's judgment, it was ordered that E.M.D. be

> committed to the custody of the Department of Health and Welfare for an indeterminate period . . . .

The court further ordered that E.M.D.

> be placed by the Department in a correctional or detention facility

---

[3] AS 47.10.080(c) reads in part as follows:

> (1) order the minor committed to the department for an indeterminate period of time not to exceed the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment;
>
> (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 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment . . . .

> as defined in AS 47.10.080(b)(1), to be held in that facility until released therefrom upon a showing by an officer of the Division of Corrections that the minor has completed a program of rehabilitation and has been amenable thereto, and that the Court has been advised in writing that such release is contemplated.

In this appeal it is argued that the superior court exceeded its authority in ordering the institutionalization of E.M.D. who was found to be a child in need of supervision. We are in agreement with the minor's contentions. As mentioned at the outset, Alaska's pertinent statutory provisions and procedural rules distinguish between categories of children for purposes of administering our children's laws. Of controlling significance here is that each class or category mandates distinct differences regarding the permissible content of any dispositional order the trial court can enter.

Study of our childrer's laws leads to the conclusion that the legislature has authorized institutionalization only where the child is found to be a delinquent minor. The term "delinquent minor" is defined as a child who has violated a law of the state, or an ordinance or regulation of a political subdivision of the state.[4] As to the appropriate disposition once the child has been determined to be a delinquent minor, the

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[4] AS 47.10.290(2).

legislature has in part provided that the court shall order the minor committed to the Department of Health and Welfare for an indeterminate period and

> may direct the minor's placement in a juvenile correctional school, detention home, or detention facility designated by the department. . . . .[5]

Thus the only instance under our children's laws authorizing institutionalization or incarceration is when the child has violated the laws of the state, or any of its political subdivsions, and in turn has been adjudged a delinquent minor. Since the runaway child in the case at bar was found to be a child in need of supervision, not a delinquent minor, no legal basis existed for her incarceration.[6]

In reaching this conclusion, we have rejected the state's contention that the trial court's order of incarceration is sustainable in light of the legislature's broad policy declaration to the effect that protection of children is the paramount purpose governing its enactment of laws pertaining

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[5] AS 47.10.080(b)(1).

[6] Cf. Fish v. Horn, 14 N.Y.2d 905, 200 N.E.2d 857 (1964).

to children's courts and institutions.[7] In another context we recently held that the benevolent social theory supposedly underlying children's court acts does not furnish justification for dispensing with constitutional safeguards.[8] As to the case at bar, it is equally appropriate to note that notions of benevolent protective policies cannot be used to validate departures from positive law relating to the adjudicative and dispositive phases of children's proceedings.

We also reject the suggestion that the Department of Health and Welfare possesses the authority to institutionalize any minor, including one who has been declared a child in need of supervision, who has been committed to its custody. We find it unreasonable to construe our children's statutes in a manner which would result in the grant to the Department

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[7] AS 47.10.280 provides:

> The purpose of this chapter is to secure for each minor the care and guidance which is as nearly as possible equivalent to that which should be given him by his parents. The principle is recognized that minors under the jurisdiction of the court are wards of the state, subject to its discipline and entitled to its protection, and that the state may act to safeguard them from neglect or injury and to enforce the legal obligation due to them and from them.

[8] RLR v. State, 487 P.2d 27, 30-31 (Alaska 1971).

of Health and Welfare of broader powers of commitment than possessed by the trial court.[9] In our view the statute relied upon by the state for this construction prescribes conditions of confinement after the court has lawfully determined that a

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[9] The state argues that even if the trial court lacks power to institutionalize a child in need of supervision, it can order the child committed to the Department of Health and Welfare which in turn can place the child in a detention facility. The argument is that under AS 47.10.080(c)(1) a minor can be committed to the Department of Health and Welfare. The state argues that AS 47.10.190 permits the department to institutionalize any minor committed to them. AS 47.10.190 reads as follows:

> When the court commits a minor to the custody of the department, the department shall arrange to place the juvenile in a detention home, facility or another suitsuitable place which the department designates for that purpose. A juvenile detained in a jail or similar institution at the request of the department shall be held in custody in a room or other place apart and separate from adults.

child should be confined in an institution.[10]

One additional aspect of this appeal should be discussed for we think it appropriate that an explanation be given as to why this matter has been treated as an appeal rather than coming before us for review. Counsel for the minor sought to invoke our discretionary review jurisdiction in the belief that appeal was unavailable for two reasons. First, he cites In re White, 445 P.2d 813, 815 (Alaska 1968) (Rabinowitz, J., concurring). There this court interpreted AS 22.20.022, which allows peremptory disqualification of a superior court judge in a civil or criminal action. A majority of the court in White said:

> While juvenile proceedings have some of the characteristics of both civil and criminal actions, we hold that they are basically different from both, and that the words 'civil or criminal' as used in AS 22.20.022 must be strictly construed. The trial judge was correct

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[10] We note with approval the state's candor in briefing the issues in this case. The state, in its brief, initially conceded that if this court looks only to the express language of AS 47.10.080(j) and 47.10.080(c), a strong argument can be made that the judgment entered below exceeded the court's disposition jurisdiction. The final portion of the state's brief concludes on the following note:

> Nevertheless, it is the belief of the Department of Law that the judgment ordering petitioner detained exceeded the authority of the court below. This belief is founded on the State's concern that courts should comply with their granted powers even where, as here, the factual circumstances cry out for a disposition beyond the fingertips of the lower court.

> in holding that peremptory challenge procedure applied only to civil and criminal actions and not to juvenile proceedings.

Counsel for the minor reads White as requiring the filing of a petition for review because the final judgment rule embodied in Supreme Court Rule 6 applies only to civil or criminal actions.[11] Such an expansive reading of White, assuming without deciding its continued validity in light of several of our recent decisions which vindicated certain constitutional and procedural rights of children in children's proceedings,[12] would result in precluding any review of children's decisions. For the rules which delineate this court's review jurisdiction limit such jurisdiction to "any order or decision of the superior court, not otherwise appealable under Rule 6, in any action or proceedings, civil or criminal . . . ."[13] Adoption

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[11] In regard to what may be appealed, Supreme Ct. R. 6 states:

> An appeal may be taken to this court from a final judgment entered by the superior court or a judge thereof in any action or proceeding, civil or criminal, except that the state shall have a right to appeal in criminal cases only to test the sufficiency of the indictment or on the ground that the sentence is too lenient.

[12] Doe v. State, 487 P.2d 47 (Alaska 1971); RLR v. State, 487 P.2d 27 (Alaska 1971).

[13] Supreme Ct. R. 23.

of counsel's interpretation of White would also conflict with AS 22.05.010 which places final appellate jurisdiction in all cases in the supreme court.[14] We think White should be limited to its interpretation of the peremptory disqualification statute. On the other hand, we hold that the right to appeal from the type of disposition order which was entered in this children's proceeding has been clearly established by the legislature. In this regard, AS 47.10.080(i) provides:

> A minor, his parent, or guardian acting on his behalf, or the department may appeal a judgment or order or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

The dispositive provisions of the superior court's judgment are set aside and the matter is remanded for such further disposition proceedings as are necessary and the entry of an appropriate disposition order.

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[14] For a discussion of another facet of this court's final appellate jurisdiction see State v. Browder, 486 P.2d 925, 929-33 (Alaska 1971).

272-9461

HB-132

ANCHORAGE COMMUNITY HOSPITAL
825 L Street, Anchorage, Alaska 99501

March 24, 1971

The Honorable William J. Moran
Alaska State House of Representatives
Pouch "V" State Capitol Building
Juneau, Alaska 99801

Dear Sir:

I strongly support and urge you to support House Bill 132 and Senate Bill 42, an act authorizing state loans from a revolving loan fund, for hospitals and related health facilities and providing for an effective date.

This legislation is necessary to the future development of health resources for the people of the State of Alaska. This is good legislation as it perserves the principle of State funds intact, earns interest income for the State and results in expanded health service for the people of the State.

We also strongly support a separate bill "an act authorizing state grants for hospitals and related health facilities, and providing for an effective date".

House Bill 276 could be supported if the new language being added to the bill was changed to include the words "or non-profit facility" following the words "local government", and other changes as shown in the attached proposed substitute for House Bill 276.

Sincerely,

Robert O Byrnes

Robert O. Byrnes
Administrator

SEVENTH LEGISLATURE - FIRST SESSION

Proposed Substitute for HB 276

For an Act entitled: "An Act relating to state aid for hospitals, health facilities and health services; and providing for an effective date."

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

*Section 1. AS 43.18.010(h) is amended to read:

(h) During each fiscal year the state shall pay to an organized borough or a city outside an organized borough, in which a health facility is operated, a sum equal to $1,500 ($1,000) for each bed licensed by the State Dept. of Health and Welfare (actually used)for patient care within the facility, (limited to the maximum number of beds provided for in the construction design of the facility) or $4,000 for a facility, if the local government elects to accept payment on that basis for a particular facility. In addition, if construction of a facility was begun by a local government or non-profit facility after January 1, 1968 the state shall pay to the local government during each fiscal year a sum equal to $5,000 per bed for the maximum number of beds provided for in the construction design of the facility, until the local government has received from this aid an amount equal to 25 per cent of the total project cost. Sums received by a local government under this subsection shall be used for expenses of operation, maintenance or health services or facilities, as the health facility determines. (local government determines)

*Sec. 2. AS 43.18.010 (i) is amended to read:

(i) In (h) of this section "health facility" or "facility" includes hospitals, public health centers, community mental health centers, facilities for the mentally or physically handicapped, nursing homes and convalescent centers which are determined by the commissioner of health and welfare to satisfy minimum standards of safe and adequate patient care LICENSED BY THE STATE UNDER AS 18.20.010 - 18.20.130 and are owned or operated or both by a local government or by a nonprofit corporation or other nonprofit sponsor; the term excludes facilities operated or wholly supported by the state or the federal government.

*Sec. 3. This Act takes effect July 1, 1971.

Alaska Legislation
HB 164

February 23, 1971

Mr. Carl W. Jones (3)
O f f i c e

Reference is made to your communication of February 22, 1971, with its attached House Bill No. 164.

I only wish to add two comments to my memo of March 17, 1970.

1. I honestly believe that passage of HB 164 can only unreasonably stifle economic growth and development of the resources in Alaska. HB 164 as its predecessor SB 392 makes every combine operating on the North Slope illegal. I believe the same is true for the contemplated Alaskan pipeline.

2. Sec. 45.51.080. EXEMPTION FOR COMMERCIAL FISHING. In substance, commercial fishing is exempt from the provisions of HB 164. For economic and growth reasons, it makes as much sense to exempt the Petroleum industry.

Lewis J. Ottaviani

March 26, 1970

Re: SB 392 - Alaska Legislature
An Act Prohibiting Monopolies
and Combinations in Restraint
of Trade

Mr. W. W. Hopkins
Alaska Oil and Gas Association
c/o Baranof Hotel
Second & Franklin Street
Juneau, Alaska 99801

Dear Mr. Hopkins:

Phillips Petroleum Company has asked one of our most experienced antitrust lawyers to review the bill. He has described it as ambiguous, confusing, onerous and generally poorly written. Whether by design or not, it will undoubtedly foster much irresponsible treble damage litigation with attendant great expense to all major business enterprises. Some of the comments expressed by our antitrust attorney are as follows:

Sec. 45.51.010. This provision is obviously taken from Sec. 1 of the Sherman Act of 1890. In interpreting Sec. 1 of the Sherman Act the courts have long since held that not every contract in restraint of trade is illegal--only those which unreasonably restrain trade. It seems to me that an 1890 act should be improved upon in 1970 by reciting the test in the act itself. Accordingly, this provision should be amended to read: "Each contract, combination in the form of trust or otherwise, or conspiracy, in (unreasonable) restraint of trade or commerce is illegal." For 60 years the Supreme Court has been holding that the legislators in 1890 must have intended that only unreasonable restraints are illegal. A 1970 legislature should make this test clear on the face of the act.

Sec. 45.51.020. PROHIBITED ACTS. Subsections (1) through (7) and subsection (b) should be deleted since they add nothing that is not already covered in the preceding paragraph. If these specific prohibitions remain, I fear that in the long run the court may hold that the legislators must have intended that these specifics be per se illegal.

Subsection (a) of Sec. 45.51.020 is ambiguous. It appears that it may be intended to exclude bathtub or intracorporate conspiracies from coverage. If so, this is desirable from our standpoint since parents and their subsidiaries have been found to have conspired under the federal law. This provision should be deleted as written and Sec. 45.51.020 should simply contain an exclusion from the act's coverage for single business entities and their subsidiaries.

Sec. 45.51.020. ACTS PERMITTED. The acts "permitted" by subsections (1) through (4) are taken away by the first three lines of the section. As written, subsections (1) through (4) permit reasonable specified activity for a legitimate business purpose for a reasonable time and area but only if competition is not substantially lessened. Under the comparable federal statute, the activities in subsections (1) through (4) are considered reasonable restraints and therefore lawful (whether or not competition is substantially lessened) because the objective and purpose is the protection of legitimate business rights for a reasonable time and over a reasonably limited area. Accordingly, the words "Unless the effect . . . in any part of the state" should be deleted.

Sec. 45.51.040. MERGERS, ACQUISITIONS, HOLDINGS, AND DIVESTITURES. In part, subsection (a) is ex post facto. It includes mergers, acquisitions, etc. "whether or not acquired before the effective date of this act." Further, although this is patterned after Sec. 7 of the Clayton Act, ultimately it will be more onerous than Sec. 7. Sec. 45.51.040 prohibits any merger, etc., which may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the state. In Alaska, this could mean that an acquisition of a single jobber, single dealer, or even a single service station may well be illegal in some town, village, or hamlet.

Subsection (b) is poorly written. The test of illegality under subsection (a) is "may be substantially to lessen competition," etc. Yet, under subsection (b) the court is to order divestiture if the court finds that the effect of the acquisition "is substantially to lessen competition." In other words, the test of illegality concern probability but divestiture depends upon a finding of actual substantial lessening of competition.

Sec. 45.51.050. INTERLOCKING DIRECTORATES AND RELATIONSHIPS. In essence, this is copied from Sec. 8 of the Clayton Act. However, it also adds "officer," "partner" or "trustee" whereas Sec. 8 relates to directors. In addition, the federal provisions (Sec. 8) prohibit interlocking directorates when any one of the "corporations" . . . "has capital, surplus, and undivided profits aggregating more than $1,000,000 . . ." Sec. 45.51.050 in the long run will be very onerous since it is an absolute bar to interlocking directorates, officers, partners, trustees regardless of the size of the business entities, regardless of the commerce involved. Accordingly, the only test of illegality depends upon whether the business entities "are or shall have been theretofore . . . competitors."

I am unable to determine the full import of subsection (b) which does not appear in the comparable federal statutes. However, it would in my view virtually prevent a bank officer from being on the board of a company that borrows money from the bank. In our case, I believe that a Phillips employee would have a most difficult time justifying his being a member of the board of a partially owned jobber or dealer company. This subsection (b) coupled with subsection (a) authorizing private suits would virtually dictate that Phillips not be represented on the board of any majority or minority owned retail subsidiary.

Sec. 45.51.110. SUITS BY PERSONS INJURED. This provision is patterned after the federal statute which authorizes treble damage actions. However, Sec. 45.51.110 authorizes trebel damage actions even in connection with interlocking directorates. As the federal provision, this provision also permits the successful plaintiff to recover costs and attorney fees. However, the successful defendant is not entitled to costs or attorney fees. Such a situation will encourage spurious lawsuits and legal blackmail just as the federal provision has.

Sec. 45.51.120. SUITS BY STATE OR LOCAL GOVERNMENT. Under the federal law, the federal government can only recover actual damages although states suing under the federal law can recover treble damages. The state or local governments, etc., suing under their own statutes should be limited to actual damages. This is particularly so in this instance since it will be relatively simple to find violations of this statute.

If subsection (b) means what it says, it will be much cheaper not to do business in the State of Alaska. As I read this provision, if the State of Alaska has a cause of action, then the Attorney General may undertake class actions on behalf of everybody and everything. This includes the state, counties, all political subdivisions, municipalities, governmental agencies, businessmen, and each and every citizen of the State of Alaska. Such suit can be maintained for violating the federal antitrust law as well as Alaska's, and the latter's clearly includes treble damages for everyone even under the merger and interlocking directorate provision. A defendant will never even know who the Attorney General represents except by class designations.

Sec. 45.51.130. PENALTY FOR VIOLATION. This provision converts the entire act into a criminal statute. The fine of $10,000 and/or one year in jail applies with equal force to merger situations and interlocking directorates as well as the basic restraint of trade provision. This, of course, is not the case under the federal statute. Only violations of Secs. 1 and 2 of the Sherman Act subject an individual or corporation to criminal penalties.

Sec. 45.51.140. JUDGMENT IN FAVOR OF THE STATE AS EVIDENCE IN ACTION; SUSPENSION OF LIMITATION. This provision is patterned after the federal statute but is much more onerous. The federal statute only applies to final judgments or decrees rendered after evidence has been taken or to guilty pleas. Consent judgments or decrees entered before evidence is taken are excluded under the federal provision. The Alaskan bill only excludes consent judgments or decrees entered before any complaint is filed.

Members of Congress have for many years tried to include the nolo plea and consent judgments and decrees within the prima facie category. Each time the Department of Justice and the Antitrust Division have opposed such proposals primarily because it would virtually eliminate inducements to plead nolo or to consent to judgments and thus substantially increase the number of cases that would go on to trial.

Sec. 45.51.130. ANTITRUST FUND. Obviously, this provision will set up a permanent war chest which will continually breed antitrust litigation. This is particularly onerous in view of Sec. 45.51.120 which empowers the Attorney General to sue on behalf of virtually every resident and entity in the State of Alaska. Thus, it will be a war chest for private actions as well as state actions.

Yours very truly,

Thomas M. Blume
Division Chief Attorney

MEMORANDUM

April 7, 1971

Statement of James Waters to House Judiciary Committee on

HB 164

H.B. 164 would enact a general antitrust statute for Alaska. In brief summary it would cover agreements in restraint of trade and certain acquisitions and management interlocks, with injunctive, treble damage and criminal sanctions for violation of any of the substantive provisions. For reasons detailed below, this bill should not be enacted without substantial revision.

Section 10. This section uses the language of section 1 of the Sherman Act to forbid "each contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade * * *." Although section 1 of the Sherman Act uses the same language, the Supreme Court has held that it forbids only "unreasonable" restraints of trade. It reached that result because any commercial arrangement to some extent restrains trade, and therefore the statute properly should be limited to agreements that effect unreasonable restraints. To make sure that this fundamental "rule of reason" would be applied in Alaska, the word "unreasonable" should be inserted in section 10 before the word "restraint" in line 15, page 1.

Another difficulty with section 10 is its failure to define the market in relation to which "trade or commerce" may be restrained. It is impossible to measure the reasonableness or unreasonableness of a restraint of trade except with reference to a market. The relevant market or geographic area in which suppliers may sell the particular product or service in effective competition with one another is not, of course, necessarily coterminous with the boundaries of Alaska. Therefore in determining whether challenged conduct unreasonably restrains trade it would be desirable to include the entire area in which the suppliers can effectively compete for sales. This can be achieved by designating the present substantive provision of section 10 as part ("a") and by adding part ("b") as follows: "(b) In deciding whether conduct unreasonably restrains trade or commerce determination of the relevant market or effective area of competition shall not be limited by the boundaries of this state."

Section 20. This section sets forth seven categories of unlawful agreements in restraint of trade, and is obviously designed to particularize specific examples of restrictive agreements within the scope of section 10. Section 20 provides as follows:

> "(a) No person, exclusive of members of a single business entity consisting of sole proprietorship, partnership, corporation or other single business entity, may agree, combine, or conspire, with any other person or persons, or enter into, become a member of, or participate in any understanding, arrangement, contract, pact, or trust, directly or indirectly, to
>
> (1) create or carry out restrictions in trade or commerce;
>
> (2) limit or restrict the production, or maintain or increase the price of any article of trade;
>
> (3) prevent competition in the harvesting, extraction, production, manufacturing, making, transportation, sale or purchase of any article of trade;
>
> (4) fix any standard of quality in respect to any article of trade intended for sale, barter, use or consumption in this state, whereby its price to the public, consumer or purchaser of any kind shall be in any manner controlled, maintained or increased;
>
> (5) agree not to sell, dispose of or transport any article of trade below a common standard, figure or fixed value;
>
> (6) agree to keep the price of any article of trade at a fixed or graduated figure;
>
> (7) establish or settle the price of any article of trade so as to preclude a free and unrestricted competition in the sale or transportation of such article of trade;

(b) Nothing in subsection (a) of this section shall limit the generality of sec. 10 of this chapter."

In view of the breadth of section 10 there is really no need for section 20. All of the conduct attempted to be particularized would violate section 10 if it satisfied the basic test by effecting an unreasonable restraint of trade. Moreover, the confusing and antiquated language of section 20 is of doubtful meaning and could be applied in anticompetitive rather than procompetitive ways.

For example, the introductory language, describing the persons who may not combine or conspire, expressly exempts agreements between "members of a single business entity consisting of sole proprietorship, partnership, corporation or other single business entity." This language implies that it would be improper for a parent company and its subsidiaries to agree upon such things as prices and the areas in which each shall market, although such arrangements could have no anticompetitive effect in any relevant market.

The specific categories, numbered 1 through 7, are substantially the same as those used to define unlawful "trusts" under California's Cartwright Act (Cal.Bus.& Prof. Code § 16720). Since the Cartwright Act has no provision comparable to section 1 of the Sherman Act or section 10 of S.B. 392, it made sense to attempt a particularization of those agreements or arrangements sought to be prohibited. But it is undesirable and unnecessary to do so if the basic principle of regulation is stated as in section 10.

In addition, the wording of many of the categories in section 20 is so obscure that it could lead to unsound decisions. In the first place, none of these categories is modified by the term "unreasonable," which could lead to condemnation of ordinary commercial arrangements having no unduly restrictive effects. To take an obvious example, any contract for the purchase of goods or services, whatever its duration or quantities, restricts trade because the buyer has committed himself to a particular supplier, which to that extent prevents other suppliers from filling the buyer's needs. But even though the usual supply contract should not be condemned under the antitrust laws, it could be held to fall within subpart (1) of section 20. Similarly, subparts (5) and (6) could be construed to forbid ordinary and wholly innocuous supply arrangements merely because they

establish the prices at which the products will be sold or the cost of their transportation.

It is therefore recommended that section 20 be dropped in favor of reliance on the appropriately broad language of section 10 (amended to add "unreasonable") which will outlaw each of the particularized kinds of conduct to the extent that it would effect an unreasonable restraint of trade.

Section 30. This section would exempt certain agreements from sections 10 and 20 if they do not "substantially lessen competition or * * * create a monopoly in any line of commerce in any part of the state." Exempted are certain agreements by the seller of a business not to compete with the buyer, by a partner not to compete with the partnership following his withdrawal, by a licensee restricting his use of leased property, and by an agent restricting his use of the principal's trade secrets.

Apart from the vague and obscure wording of these stated exemptions,* they would be most unfortunate because there are numerous other arrangements that have been approved under the Sherman Act and comparable state legislation as lawful restraints when they are reasonably ancillary to legitimate business goals and are not seriously anticompetitive.**

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* E.g., subpart (1) refers to an agreement "not to compete" without indicating with what the covenantor is not to compete; the word "for" in subpart (2) should presumably be "after"; and subpart (3) refers to restricting the use of leased property "to certain business or agricultural areas," whatever that may mean. Note also that subpart (4) would forbid the use of trade secrets only if used in competition with their owner. In contrast, the general rule at common law protects against any unauthorized appropriation and use. 2 Restatement, Agency 2d, §§ 395,396.

** See generally United States v. Addyston Pipe & Steel Co. (6 Cir. 1898) 85 Fed. 271, 280-283, affirmed (1899) 175 U.S. 211; 2 Restatement, Contracts, § 516. See also, Snap-On Tools Corporation v. F.T.C. (7 Cir. 1963) 321 F.2d 825, 837; Nelson Gas Stations Number Six, Inc. v. Shell Oil Company (4 Cir. 1962) 307 F.2d 306, certiorari denied (1963) 372 U.S. 911.

The development of these exceptions was begun at common law and has continued under the Sherman Act's "rule of reason" concept. It is therefore recommended that the advantage of this adaptability be taken in Alaska by inserting "unreasonable" in section 10, as noted above, and by eliminating section 30 as too restrictive, confusing, and indeed superfluous.

Sections 40 and 50. These sections would largely enact for Alaska the essence of sections 7 and 8 of the Clayton Act which, respectively, regulate acquisitions and interlocking directorates.* Thus, section 40 states, subject to limited exemptions, that no corporation may acquire the whole or any part of the stock or assets of another corporation (even if acquired before passage of this bill!) if the effect "may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the state." If the court finds that the effect of the acquisition "is substantially to lessen competition or tends to create a monopoly" it shall order divestiture if that is "necessary to eliminate" such effect and if the assets "are reasonably identifiable and separable, and the disposition can be done without causing undue hardship on the economic entity."

No good reason has ever been put forward why a state should have an antimerger provision in the nature of section 7 of the Clayton Act. In the first place, any merger within Alaska that threatened monopoly or an unreasonable restraint of trade, would be cognizable under the general language of section 10. Moreover, in view of the Federal courts' liberal interpretation of what is interstate commerce, it is likely that any merger of this kind would violate Clayton 7 and hence would be subject to the expert and experienced staffs both of the Antitrust Division of the United States Department of Justice and of the Federal Trade Commission. Thus, it seems reasonable to conclude that any merger or acquisition in Alaska not subject to section 10 of this bill or Clayton 7 would have only a de minimis effect on the state's commerce. A provision with no more utility than that would merely burden the courts with trivial claims having no significant bearing on free competition in the state.

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* 15 U.S.C. 18, 19.

Section 50 is equally unnecessary for the proper regulation of a state's commerce. The general provision of section 8 of the Clayton Act forbids any person to be a director in two or more corporations any one of which has capital, surplus and undivided profits aggregating more than $1 million, which are engaged in any interstate commerce, "if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." Proposed section 50 would go beyond what the Federal Government has seen fit to prohibit, by dropping any requirement as to the size of the businesses involved and by covering not only a director but an "officer, partner, or trustee in any two or more firms, partnerships, trusts, associations, or corporations" if they or any combination of them "are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination [of competition?] by agreement between them would constitute a violation of this chapter."

No evidence has ever been presented or is likely to be found that there are interlocking management relationships between entities which threaten the effectiveness of intrastate competition. Thus, at most, section 50 appears to be an unnecessary and even more encompassing imitation of Clayton 8. Here as with the proposed antimerger provision, it is likely that the chief result of section 50 would be to burden the judiciary with trivial claims whose resolution would be of no importance to the free economy of Alaska.

It should be borne in mind in connection with sections 40 and 50 that the antitrust enforcement efforts of the states have been minor compared with those of the Federal government. It seems clear that one reason for this is the typical proliferation of state trade regulation statutes, which must dilute and impede the effective enforcement that could otherwise be given to an appropriate general prohibition against unreasonable restraints of trade.

Section 60 seeks to exempt labor organizations and apparently also agricultural cooperatives from the operation of this antitrust act. At least some of the language appears now to be antiquated (e.g., the requirement that labor organizations not have capital stock) or vague,

and hence these appropriate objectives could be more effectively achieved by using the following language for section 60:

> "(a) This Chapter does not forbid the existence or operation of labor, agricultural or horticultural organizations created for the purpose of mutual help, and not conducted for profit, or forbid or restrain members of such organizations from lawfully carrying out the legitimate objects thereof; nor are those organizations or members illegal combinations or conspiracies in restraint of trade under the provisions of this Chapter.
>
> "(b) Nothing contained in this Chapter shall be construed to forbid actions or arrangements authorized or regulated under those acts of the United States which exempt such actions or arrangements from the antitrust laws of the United States or under the following statutes of this state.
>
> (1) AS 10.15 (3) AS 31.05.100 [*]
>
> (2) AS 21.87 (4) AS 31.05.110."*

Section 100 states that any contract or agreement violating the statute "is void and is not enforceable at law or in equity." In view of the substantial sanctions proposed by S.B. 392 (discussed below), this provision is unnecessary. Moreover, it could lead to undesirable results. For example, the Supreme Court of the United States has held (see, e.g., Kelly v. Kosuga (1959) 358 U.S. 516) that ordinary supply arrangements are not made unenforceable merely because, for example, the goods sold were subject to a combination or conspiracy to affect their price. The Court has reasoned that in view of the adequate and independent antitrust sanctions available to the Government and to private parties, it is not necessary to create an additional sanction at the cost of rendering ordinary commercial transactions unenforceable. Thus, section 100 should be deleted.

Section 110 provides in part that "A person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter" may sue to enjoin the unlawful practice and may recover threefold the

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* Oil or gas drilling units and unitization arrangements authorized under either of these sections should be included. The express exemption provided in AS 31.05.110 (1) might be held not to apply to a later antitrust statute or to drilling units under AS 31.05.100.

damages sustained, along with costs and a reasonable attorney's fee. Even though damages are mandatorily trebled for violations of the Federal antitrust laws, there is reason to believe that the inflexibility of this punitive sanction has in many cases caused severe economic hardship well beyond any appropriate redress of the wrong committed. It would therefore seem desirable to provide for the recovery of actual damages subject to the court's discretion to increase the award up to three times that amount in cases of wilful and substantial violations. This would permit the court to assess the degree of the wrong and to award an appropriate judgment in the light of all circumstances. The damage sanction would remain an adequately strong deterrent, for in cases of wilful and substantial wrongs the court would be expected to increase the damages commensurately. This change could be accomplished by omitting "threefold" in line 24, and by adding after "suit" in line 26 these words: "provided that the court in its discretion may in cases of wilful and substantial violations increase damages to an amount not in excess of 3 times the actual damages sustained."

Subpart (a) (2) of section 110 authorizes private injunctive proceedings. This unduly terse provision should be expanded to make clear that the court will be guided by traditional equitable principles in granting such relief. It is therefore recommended that the following language be substituted for present lines 29 through 2:

> "(2) may bring proceedings for injunctive relief, temporary or permanent, against threatened loss or damage to his property or business by a violation of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. If the court issues a permanent injunction, the plaintiff shall be awarded reasonable attorneys' fees together with the cost of suit."

It would also be desirable to amend section 110 to limit suits for multiple damages to plaintiffs other than the state or its governmental agencies. The purpose of providing multiple damages is to encourage enforcement of the

statute through private suits. No such encouragement is necessary when the plaintiff is the state itself or one of its political subdivisions or agencies. This is particularly true where, as here, the Attorney General is authorized to bring damage actions in behalf of "the state or any of its political subdivisions or governmental entities." This limitation can be achieved by inserting after "person" in the first line of section 110 the following parenthetical statement: "(other than a governmental body, the state, or any of its political subdivisions or public agencies)," and by amending section 120 as noted below.

Section 120. This section would give the state and any of its governmental entities injured by an antitrust violation the same remedy provided in section 110, i.e., to recover threefold the damages sustained. For the reasons stated above, this would be inappropriate and therefore subpart (a) of section 120 should be amended by inserting the words "it may sue for the actual damages by it sustained, and the cost of suit, as determined by the court" in place of the words "it shall have the same remedies provided in sec. 110 of this chapter."

Subpart (b) of section 120 authorizes the Attorney General to sue "on behalf of any citizen or class of citizens of the state if the state or its political subdivision also has a cause of action, to enforce the provisions of this chapter, or any comparable provisions of federal law." A comparison of this provision with Rule 23 of the Federal Rules of Civil Procedure indicates that it is far too brief and general to be workable. In short, no effort should be made to provide antitrust class actions without appropriate criteria to govern when a class action would be appropriate, e.g., whether the members of the class are too numerous to be joined as plaintiffs, whether there are common questions of law or fact that predominate over questions affecting only certain members of the class, whether the plaintiff's interest is such that the interests of the other members of the class will be fairly and adequately protected, etc. But apart from these difficulties, there does not appear to be any reason why there should be recommended to the Attorney General the added burden of prosecuting antitrust class actions in behalf of private parties. Nothing comparable has been done with respect to the Department of Justice or the Federal Trade Commission.

Section 150 would provide that any person or his agent who violates sections 10, 20, 40 or 50 "is punishable, if a natural person, by a fine not exceeding $10,000 or by imprisonment not exceeding one year, or by both; if the person is not a natural person then by a fine not exceeding $20,000." Under the Federal antitrust laws there are no criminal penalties for violations of section 7 or 8 of the Clayton Act, but only for violations of the Sherman Act. Nor should there be any criminal sanctions for violations of the proposed comparable sections 40 and 50, which as noted above, should be deleted for other reasons. But even if the substantive provisions of this bill were appropriately narrowed to the restraint of trade prohibitions of section 10, there would seem to be no reason to characterize such violations as crimes. Particularly is this true where, as with section 10, the language is broad enough to be applied ex post facto to new developments not defined as violations when the conduct was initiated. This problem has been handled under the Sherman Act by the Antitrust Division's declining to bring criminal proceedings except where clear cut flagrant violations are involved. There can be no assurance, however, that like restraint would be exercised by a state attorney general. The problem can be obviated, while providing a fully adequate deterrent, simply by limiting the sanctions to "civil penalties" in stated amounts to be imposed for "substantial and wilful violations" of section 10. This would also avoid the more cumbersome and formalistic criminal proceeding in favor of a relatively simple and efficient civil action to recover the penalties. It would also seem desirable to reduce the maximum fine for individuals to $5,000 per violation. This should prove an adequate deterrent without the crushing prospect that the larger fine could present for many individual defendants.

The foregoing changes could be effected by substituting for lines 24 through 27 of section 150, page 7, the following language:

> "shall if an individual pay to the state a civil penalty of not more than $5,000, and shall if a corporation, association, firm or partnership pay to the state a civil penalty of not more than $20,000."

Section 160. This section provides that "A final judgment or decree rendered in any civil or criminal proceeding brought by the state under this chapter shall be

prima facie evidence against the defendant in any other action or proceeding brought by any other party under this chapter, or by the state, a city or borough, under sec. 120, as to all matters respecting which the judgment or decree would be an estoppel between the parties in such other action or proceeding." This provision should be amended in several respects for, unlike the comparable Clayton Act provision,* it (1) does not limit the state proceedings to those brought to obtain an injunction or penalties, as distinguished from governmental damage actions, and (2) it is not required that the final judgment or decree be to the effect that the defendant has violated the state's antitrust law.

No reason appears why a state's provision of this kind should be broader than the Federal one. Subpart (a) could be brought into conformity with the comparable provision of the Clayton Act by amending it as follows:

> "A final judgment or decree rendered in any civil proceeding for injunctive relief or civil penalties brought by the state under this chapter to the effect that a defendant has violated this chapter shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under this chapter or by the state, a city or a borough, under sec. 120, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

Subpart (b) of section 160 provides that the prima facie effect provision would not apply to consent judgments or decrees "entered before any complaint has been filed." This provision, like its Federal counterpart, is designed to save the enforcement resources of the government by encouraging compromise and settlement. But you cannot have a "consent judgment or decree" unless a complaint is on file to which it can relate. Therefore, following the Federal provision, the words in line 14 should be changed to read "entered before any testimony has been taken." Under Federal cases judgments upon pleas of nolo contendere have been held to be "consent judgments" within the meaning of the comparable Federal exception.

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* Section 5(a), 15 U.S.C. 16(a).

Subpart (d), however, would provide that judgments rendered upon nolo contendere pleas would be given prima facie effect in subsequent proceedings. While it was recommended above to eliminate the proposed criminal sanctions, it should be noted that if retained, subpart (d) should be eliminated. Judgments upon pleas of nolo contendere serve the same function of compromise in criminal proceedings as consent decrees do in civil proceedings. No reason appears why this useful enforcement method should be vitiated.

Subpart (c) of section 160 should be deleted. It provides that for 60 days after a consent decree is filed any one "interested" under section 110 (private plaintiffs) or section 120 (governmental plaintiffs) may file "exceptions" to the form or substance of the decree which will be resolved by the court after a full hearing. There is no reason to believe that the executive discretion lodged in the Attorney General is inadequate to protect the public interest or should be subjected to review by plaintiffs free themselves to sue if they see fit. Note also that the proposed power of the court, after hearing, to "modify" the consent decree is incongruous. The court could not properly issue an unconsented to decree or judgment except upon the record after a full trial.

Section 170. This would bar any proceeding under the bill "unless commenced within four years after the claim accrues."* But this section goes on to provide that "a claim for a continuing violation is deemed to accrue at any time during the period of the violation."

There are two objections to section 170. The first is that the word "claim" in line 7 is not as clear as the words "cause of action," which are used in the comparable provision in section 4 B of the Clayton Act (15 U.S.C. 15b). The second objection is that if a claim for a continuing violation is deemed to accrue at any time during the period of the violation, it can be argued that if any damage was sustained within

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* Except when the statute is suspended under section 160(c) which, like section 5(b) of the Clayton Act, suspends the statute of limitations during the pendency of civil or criminal government proceedings, and for one year thereafter, as to any private damage action based in whole or in part on any matter complained of in the government proceeding.

four years of commencement of the action then all damages deriving from the same course of conduct could be recovered even if they accrued decades before the action was brought. This would contradict the provision's purpose to prevent litigation over stale claims. The second sentence of section 170 should be deleted. Its apparent purpose is simply to provide that a plaintiff can recover for damages sustained within four years of commencement of his suit even if the continuing unlawful conduct was initiated more than four years prior to such commencement. This same result is reached under the general language of section 4 B of the Clayton Act.

Humble Oil comments 4-24-71

March 22, 1971

Re: 1971 Alaska Legislature
H.B. 154

H.B. 154 would enact a general antitrust statute for Alaska. The scheme of the bill is to adopt some of the general language of the Sherman Act, but to combine with it some particularized prohibitions found in the statutes of other states. This is an illogical combination which will cause much confusion and rob the statute of effectiveness.

Sections 10, 20 and 30. Section 10 adopts the language of Section 1 of the Sherman Act, prohibiting every contract, combination or conspiracy in restraint of trade or commerce. Of course, such a general prohibition cannot be literally applied, because every contract made in the ordinary course of business restrains trade in the strictest sense. For instance, the owner of an article can sell it but once, and when he contracts to sell it to another, the contract restrains him from selling it to any third person. Recognizing this, the federal courts have established the "rule of reason" which is the cornerstone of the great body of antitrust law of the nation. It is this rule which gives the courts the flexibility necessary to apply the principles of the antitrust laws to constantly changing business practices and patterns. To make certain that the fundamental rule of reason will be applied in Alaska, the word "unreasonable" should be inserted in Section 10 before the word "restraint."

Section 20 adds prohibitions against seven specified types of conduct, apparently patterned after California's Cartwright Act (Cal. Bus. & Prof. Code, §16720). There is some need for such provisions in the Cartwright Act because it contains no general prohibitions against restraints of trade like Section 1 of the Sherman Act and Section 10 of H.B. 154. But with this general prohibition in H.B. 154, the particularized prohibitions of Section 20 are unnecessary and can only cause confusion. For instance, Section 20 literally applies to every person "exclusive of members of a single business entity consisting of sole proprietorship, partnership, corporation or other single business entity." Taken literally, this would apply the provisions of Section 20 to the most ordinary relations between a parent and subsidiary corporations, even though these could not possibly involve any objectionable restraint of trade. The language of the various subsections is extremely vague and confusing and could only cause the courts great trouble in applying the act. For instance, no less than four of the seven subsections deal with price-fixing in varying language (subsections 2, 5, 6 and 7). Taken literally, Section 20 would

prohibit even the most ordinary and innocent business transaction. Any contract of sale might be said to "create ... restrictions in trade" (subsection 1) or to "establish or settle the price of any article of trade" (subsection 7).

All of the actually anticompetitive arrangements which Section 20 are designed to deal with would in fact be covered by the general language of Section 10 with the addition of the word "unreasonable" as recommended above. Section 20 should be deleted entirely.

Section 30 is designed to except from the effect of Sections 10 and 20 certain specified transactions, "(u)nless the effect ... shall be to substantially lessen competition or to create a monopoly ...." The exceptions specified would permit the sellers of businesses and withdrawing partners to agree not to compete, would permit leases of business property to contain certain restrictions upon the use of property by the lessee and the lessor (assuming that the word "lessee" in the third line of subsection 3 is a misprint, intended to read "lessor") and would permit an employee to agree not to use his employer's trade secrets in competition with the employer. These exceptions, in themselves, are reasonable, but they fail to include various other arrangements which have been found by the courts not to be anticompetitive in effect, yet which might be held to be condemned by the literal language of Section 20.* It is very undesirable to attempt the specification of exceptions to the literal language of the statute, when the list will undoubtedly be incomplete, thereby raising serious questions about the legality of perfectly innocent conduct. This merely illustrates further how unwise it is to attempt the particularization of prohibited acts such as is found in Section 20. It shows the wisdom of relying, instead, upon a statement of general principle such as Section 1 of the Sherman Act and Section 10 of H.B. 194 (with the addition of the word "unreasonable"), which will much more effectively accomplish the actual purposes of the bill.

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* See generally United States v. Keystone Pipe & Steel Co. (5 Cir. 1898) 85 Fed. 271, 280-83, affirmed (1899) 175 U. S. 211; 2 Restatement, Contracts, § 516. See also, Snap-On Tools Corporation v. F.T.C. (7 Cir. 1963) 321 F.2d 825, 837; Savon Gas Stations Number Six, Inc. v. Shell Oil Company (4 Cir. 1962) 309 F.2d 305, certiorari denied (1962) 372 U.S. 911.

Section 50. This section provides that no person may at the same time be a director, officer, partner or trustee of two or more corporations or other entities which are competitors. It was patterned after Section 8 of the Clayton Act, but it goes further than the Clayton Act in two respects: No minimum size criterion is provided; and Section 50 applies not only to directors, but also to officers, partners and trustees. It seems doubtful that the state needs any such statute as Section 50, because combinations in unreasonable restraint of trade would be reached by Section 10, and interlocking directorates of any significance would be reached by the federal law. If such provision is to be enacted, it certainly seems reasonable that it should not go beyond the provisions of the Clayton Act, and especially that it should provide some minimum size criterion (although the Clayton Act's standard of $1 million might be too high).

Sections 50 and 70. These sections provide exemptions for labor organizations and certain cooperative associations. It is most important that language be added to include actions or arrangements authorized or regulated under AS 31.05.100 and AS 31.05.110, which authorize oil and gas drilling units and unitization arrangements. AS 31.05.110 contains an antitrust exemption, but this should also be expressed in the antitrust statute itself, to avoid any question about the effect of the later statute and any question about the effect on AS 31.05.100. Cmp. AS 38.05.180

Section 100. This section provides in the most general language that any agreement in violation of any provision of the chapter is void and unenforceable. The literal application of this language would go well beyond the effect of the federal antitrust laws, which are held to avoid contracts only if the enforcement of them would give effect to the illegal provisions themselves. Kelly v. Kosuga, 358 U.S. 516. Section 100 could have two very unfortunate effects: (1) it could give a windfall to guilty parties, for instance, by allowing them to refuse to pay for goods sold and delivered; and (2) it could result in antitrust defenses being raised in a great many ordinary suits arising out of commercial transactions, which would unduly burden the courts and might result in serious distortion of the antitrust laws by forcing the courts to interpret them in cases between private litigants where the public interest is not properly represented by any public official. Section 100 should be deleted, leaving the Alaska courts to follow the federal law on this subject, refusing to enforce provisions of contracts which actually constitute unreasonable restraints of trade under Section 10.

Section 120. Subsection (b) provides that the attorney general not only may bring actions on behalf of the state or any political subdivision but also "on behalf of any citizen or class of citizens of the state" if the state or any political subdivision also has a cause of action. There is no such provision as this in the federal law and no need for it has ever appeared. It would surely burden the attorney general unduly to require him to represent private parties. But the most serious defect in this provision is that it attempts to provide for class actions in the few words quoted above, without providing any criteria whatever to guide the courts in determining whether a class action is appropriate or feasible. Experience under Rule 23 of the Federal Rules of Civil Procedure shows that it is essential that such criteria be provided. The above quoted provision of Subsection (b) should be deleted.

Section 160. This section provides that judgments in proceedings brought by the state shall be prima facie evidence against the same defendant in private actions. It goes beyond Section 5(a) of the Clayton Act in that it is not limited to actions brought by the state for injunction or penalties. It could apply judgments in simple damage suits brought by the state. Subsection (a) should be modified to read "in any criminal proceeding or injunction suit brought by the state."

Subsection (b) provides that the Section shall not apply to consent judgments or decrees entered "before any complaint has been filed." It is not apparent how a judgment could be entered before any complaint is filed. Apparently this language should be changed to read "before any testimony has been taken," like the Clayton Act.

Subsection (c) of Section 160 apparently would authorize the court to modify consent decrees without the consent of the parties. This, of course, should not be done, since no final judgment can be entered without the consent of the parties, except after trial of the case.

Section 170. This Section provides a four-year statute of limitations, but in the provision preserving causes of action for continuing violations, language is used which could be construed to authorize recovery of damages accrued more than four years before commencement of the action, if the violation has continued to a time within the four-year period. This should be changed to accord with 50 U.S.C.A. §15b to make it plain that even though causes of action for continuing violations extending to a time within the statute are preserved, damages accrued more than four years before commencement of the action cannot be recovered.

K. C. Minter

xb

HB 164

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

June 7, 1971

RWMcL:DIB:BG
60-03-13

Mr. Arthur H. Peterson
Revisor of Statutes
The Legislature
State of Alaska
Pouch Y - State Capital
Juneau, Alaska 99801

Dear Mr. Peterson:

This is in response to your letter of March 26, 1971, requesting the Antitrust Division's comments on Alaska House Bill No. 164 (7th Leg., 1st Sess.).

We are pleased to learn that Alaska is considering the enactment of state antitrust legislation. Many forms of anticompetitive conduct, injurious to the economy of a state and the welfare of its citizens, do not clearly affect interstate commerce and may therefore be outside the scope of the federal antitrust laws. This may be particularly true with respect to local service industries, which are a major source of today's inflationary pressures.

We have analyzed the various provisions of House Bill No. 164 and, pursuant to your request, shall indicate below a number of suggestions which we believe would make this particular legislation more effective. Initially, however, a few general comments may be helpful.

The goal of a state antitrust law should be effective enforcement at a low cost. This implies several points. First, excessive detail and complexity should be avoided in draftsmanship. Complex statutes have tended to bog down antitrust enforcement in many states, as the courts have attempted to deal with a maze of overlapping or conflicting statutory provisions of great specificity. Therefore, in view of this experience, we feel that simplicity without omission should be the goal in a statute which attempts to create a basis for effective state antitrust enforcement. Secondly, the substantial existing body of federal case law should be utilized by the states, wherever appropriate. This can be done by use of substantive statutory provisions following closely the federal provisions or by statutory language and legislative history making clear the intent of the Alaskan legislature to adopt this body of federal jurisprudence. This should be of significant assistance to the courts of the state as they attempt to apply the law to specific factual situations. Thirdly, the importance of relief and investigative provisions in an antitrust statute should not be underestimated; state enforcement officers must be provided with effective means by which to discover violations of the statute if vigorous enforcement is to be achieved. Finally, the private sector, properly motivated, can be a significant aid to state enforcement. The theme of these very general comments will reoccur in the ensuing discussion of specific provisions of the proposed statute.

I. Substantive Provisions

Section 45.51.010

Section 10 of the proposed bill declares contracts, combinations and conspiracies in restraint of trade to be illegal in language virtually the same as that used in the first sentence of Section 1 of the Sherman Act (15 U.S.C. 1). The use of such language will probably imply to the

Alaska courts a legislative intent to adopt the body of jurisprudence which has evolved under Section 1 of the Sherman Act. However, the use of a general prohibition in Section 10 and both specific and general prohibitions in Sections 20, 40 and 50 could cause certain confusion with respect to relief and enforcement. Thus, if the major purpose of Section 10 is to indicate a legislative intent to adopt federal antitrust precedent, this intention could be made even more explicit by substituting for the proposed general language more specific language such as that found in New Jersey's recent antitrust law, N.J.S.A. 56: 9-18, which requires that the state statute be interpreted in harmony with federal antitrust precedent.

Therefore, we would suggest that Section 10 read as follows:

> Section 45.51.010 - Construction. This Act shall be construed in harmony with judicial interpretations of comparable Federal antitrust statutes.

Sections 45.51.020. 45.51.040. 45.51.050

The enumerations in these sections which, along with Section 10, comprise the substantive portion of the statute, illustrate the difficulties which have resulted from unnecessary attempts to be overly precise in drafting this kind of legislation. For example, in Section 20, the first of the seven prohibited acts of agreement is to "create or carry out restrictions in trade or commerce." This seems intrinsically as broad as the Sherman Act formulation in Section 10, but brings to the bill none of the accumulated judicial interpretations which have given the Sherman Act certain specific meanings including

the essential "rule of reason" construction and a list of "per se" violations. The third prohibited act, to "prevent competition," is too narrow because antitrust violations restrain competition; they seldom prevent it. The sixth and seventh prohibited acts are confusingly similar definitions of price fixing.

Sections 40 and 50 are modeled after provisions of the federal antitrust laws and, like those laws, contain imprecise terms and significant weaknesses. Section 40 would be applicable only to corporations, and thus might be too narrow in scope. Section 50 contains some confusing provisions concerning designees.

Section 20 could, in our opinion, be usefully employed to both broadly prohibit participation in anticompetitive agreements and the agreements themselves, and to enumerate, in plain language specific anticompetitive acts. Section 20 could also be used to incorporate the substance of Section 3 of the Clayton Act (15 U.S.C. 14) which is directed at tie-in sales, exclusive dealing, requirements contracts, and "full line forcing." Each of these is a serious anti-competitive practice not now covered by the bill except as it may constitute a generalized restraint of trade. Finally, Section 20 could incorporate the anti-merger provisions and the interlock provisions of the bill now contained in Sections 40 and 50. The remedial provisions of Sections 40 and 50 could more clearly be stated in a general relief section. Section 20 could, therefore, read as follows:

Section 45.51.020 - Prohibited Acts

(A) It shall be a misdemeanor for two or more persons to enter into an agreement with each other for the purpose of restraining trade or lessening competition by establishing, determining, or substantially influencing, as to any commodity or service,

(1) the price or other consideration which any person shall cha·ge or pay;

(2) the quantity which any person shall produce, sell or buy, or in which such person shall deal;

(3) the portion or share of the total supply or demand in any transaction to be produced, sold, bought, dealt in or accounted for by any person;

(4) the geographical area in which any person may produce, sell, buy, deal or conduct transactions; or

(5) the person or persons to whom sales may be made, or from which purchases may be made, or with whom dealings may be had or transactions conducted.

(B) It shall be a misdemeanor for any person to monopolize or attempt or conspire to monopolize trade in any commodity or service.

(C) It shall be a violation of this Act:

(1) for any person to do anything prohibited by subsections (A) or (B);

(2) for any person to enter into any agreement with the purpose, or with the effect, of unreasonably restraining trade or lessening competition in any commodity or service;

(3) for any person to sell, purchase or lease any commodity or service on the condition, express or implied, that the other party to the transaction, or any other person,

(a) purchase, sell, or lease any additional commodity or service from or to such person, or any person designated by him; or

(b) not purchase, sell, or lease any commodity from or to any other person;

where the effect may be to substantially lessen competition in any line of commerce in the State of Alaska or any part thereof;

(4) for any person to, at the same time, be a director, officer, partner, manager or trustee in (a) any two or more firms if such firms are or shall have been theretofore, by virtue of their business and location or operation, competitors, or (b) in any two or more firms where the effect may be to substantially lessen competition or tend to create a monopoly; or

(5) for any person to acquire, directly or indirectly, an asset from any person if the effect may be to substantially lessen competition in any line of commerce in the State of Alaska or any part thereof.

Section 20 as proposed above would be divided into three subsections. The first, 45.51.020(A), is basically limited to those actions which are per se violations of federal antitrust statutes. Thus, it prohibits price fixing, output limitations, production and territorial sharing, and group boycotts. The anticompetitive effects of these practices are most serious and their illegality under federal antitrust law is clearly established; therefore criminal prosecution is appropriate.

The second subsection, 45.51.020(B), is based upon Section 2 of the Sherman Act and would make criminal monopolization, and attempts or conspiracies to monopolize.

The third subsection, 45.51.020(C), contains the remainder of the substantive provisions of the statute. It is contemplated that violations of this subsection would be subject to civil remedies -- injunctive relief or actions for damages -- since the legality of the practices prohibited therein and not covered in subsections (A) or (B) may turn upon an analysis of their competitive effect under particular market conditions. It should be noted that subsection (C) includes all the acts enumerated in subsection (A) or (B). Thus, violations of subsections (A) or (B) could be proceeded against by criminal and/or civil process. Subsection (C)(3) covers tie-ins, reciprocity, exclusive dealing arrangements and negative covenants. Subsection (C)(4) covers interlocks, making interlocks illegal, irrespective of proof of anticompetitive effect if the firms are or could be direct competitors, and applying the Clayton Act competitive effect standard to all other interlocks. This permits the dissolution of interlocks, and thus increases the possibility of competition, between potential competitors. Finally, subsection (C)(5) covers acquisitions, but unlike Clayton Act §7 (15 U.S.C. 18), it is not limited to acquisitions by and from a corporation. Any acquisition made by a person, as defined infra, is subject to the law, whether the vendor or purchaser is a corporation or not.

Section 45.51.030

Section 30 sets forth four kinds of acts which will be presumptively lawful unless the effect "shall be to substantially lessen competition or to create a monopoly." Since most of these practices have traditionally been found to be legal with respect to the federal antitrust laws, it seems unnecessary and perhaps unwise to single them out from other legal practices.

II. Enforcement Provisions

Section 45.51.100

Section 100 would render void and unenforceable agreements violative of the Act. As currently worded, Section 100 could allow businessmen to use the antitrust laws as a means of avoiding normal contract responsibilities, i.e., payment for goods already received, where it was to their advantage to do so. Thus, we feel that the provision is overly broad and might result in courts refusing to find a violation in order to avoid an inequitable decision between the private litigants. On the other hand, the provision has some obvious usefulness as a deterrent. Therefore, we would suggest altering this provision so that a party could not refuse to pay for goods already received, but could refuse to continue performing under a contract which violated this Act. Cf. Kelly v. Kosuga, 358 U.S. 512 (1959). Such a provision might read as follows:

> Section 45.51.100 - Contracts Voidable. A contract or agreement in violation of any provision of this chapter is voidable by either party as to any future performance by either party, except for payment for goods already received, and such future performance, except for payment for goods already received, may not be enforced at law or in equity.

Section 45.51.120

Section 120 provides the state and its subdivisions the same injunctive and treble damage remedies provided private litigants under Section 110. This is a departure from federal law (15 U.S.C. 12a) which limits the United States' recovery to single damages for its injuries.

Section 45.51.130

Section 130 provides that the Attorney General may bring proceedings to enjoin violation of this Act. Consideration might be given to providing borough attorneys with concurrent enforcement jurisdiction. Such a measure might create a mechanism for effective enforcement. Under a system of dual enforcement responsibility, however, the Attorney General should be allowed to assume control of any litigation initiated by borough officials. We would suggest the following language:

> Section 45.51.130 - Enforcement. Jurisdiction to enforce this Act, in addition to that noted in Section 110, is vested concurrently in the Attorney General and borough attorneys. When a borough attorney brings an action under this Act, however, the Attorney General may assume full control of the investigation and litigation by giving appropriate notice to the borough attorney.

Section 45.51.150

Section 150 provides the penalties for violation of the Act. As drafted, it does not seem to us to take into account the differences between the actions which would violate this statute. There has also been a belief in some quarters that inflexibly harsh penalties discourage effective enforcement of state antitrust statutes. We

feel that criminal penalties should be limited to the clearly illegal activities of violators, and that injunctive relief should be flexible and left to the discretion of the court. We would suggest the following language:

> Section 45.51.150 - Penalties for Violation
>
> (A) A violation of Section 20(A) or (B) of this Act shall constitute a misdemeanor, and shall be punishable by fine of up to $50,000, or by imprisonment for up to one year, or both.
>
> (B) A finding of a violation of Section 20(A),(B) or (C) of this Act shall empower the superior court to issue such judgment or decree as it considers necessary to remove the effects of any violation which it finds, and to prevent such violation from continuing or from being renewed in the future. The court may, at its discretion, exercise all equitable powers necessary for this purpose, including, but not limited to, injunction, divestiture of property, termination of business relationships, divorcement of business units, dissolution of corporations or associations, and suspension or termination of a license, franchise, or charter issued under the authority of this state.

In view of the size of many potential violators, we have suggested making the maximum fine $50,000 rather than $20,000 in order to provide a more meaningful deterrent.

Section 45.51.160

Section 160 contains the prima facie provisions, giving such effect in subsequent cases to final judgments obtained by the state. These provisions parallel §5 of

the Clayton Act (15 U.S.C. 16). Unlike the Clayton Act, the state itself would be able to rely on its final judgment in a subsequent damage action. Section 160(b) makes the basic provision inapplicable to "consent judgments or decrees entered before any complaint has been filed." We doubt that the state would submit, or a court accept, a consent judgment without an accompanying or previously filed complaint. Indeed, a court might lack jurisdiction under those circumstances. We therefore suggest a return to the Clayton Act language, "consent judgments or decrees entered before any testimony has been taken." We would favor rewording these provisions as follows:

> Section 45.51.160 - Judgment in Favor of the State as Evidence in Action. The final judgment or decree rendered in any action brought by the State of Alaska under Section 20, to the effect that defendant has violated Section 20, shall be prima facie evidence against such defendants in any action brought by any party against said defendants under Sections 110 or 120, as to all matters respecting which said judgment would be an estoppel as between the parties thereto. This Section shall not apply to consent judgments or decrees entered both before any testimony has been taken and before any finding of illegality by the court, but shall apply to judgments or decrees entered on pleas of nolo contendere.

III. Investigatory Provisions

Effective enforcement requires comprehensive investigation before civil or criminal proceedings are initiated. Enforcement officers should have the power to obtain information necessary to make a responsible

decision as to whether to initiate formal proceedings. H.B. 164 does not confer any specific discovery powers upon the Attorney General. If the proposed law is to be effective, this omission must be rectified.

Since 1962, the Antitrust Civil Process Act (15 U.S.C. 1311-1314) has allowed the Department of Justice, prior to the institution of an action, to serve a civil investigative demand upon any legal entity, requiring it to produce documents for examination. Several states have such provisions, but they vary widely in scope. Some are similar to the federal statute, e.g., N.C. Gen. Stats. §75-10, and some are broader, e.g., N.Y. Gen. Bus. Law §343.

The federal statute has some significant limitations. It applies only to documents, and only to persons under investigation. This obviously limits the effectiveness of the provision in compiling adequate investigatory records from which decisions on the initiation of formal proceedings must be made. In contrast, the recently-enacted New Jersey Antitrust Act contains a very broad investigatory provision, giving the Attorney General discretionary power to institute investigation, subpoena witnesses and compel the production of documents. N.J.S.A. 56:93 (1970).

We believe that the appropriate provision for a state antitrust statute would be somewhere in between these two examples. The enforcing officer should not be limited to compelling the production of documents but should also be permitted to depose individuals for relevant information. With the proper safeguards, the enforcing officer should also be able to compel documents and testimony from individuals who are not themselves being investigated but who have information necessary to a properly instituted investigation. Therefore, we would suggest that any statute finally adopted include the following provisions:

(A) The Attorney General shall have the power to investigate alleged or suspected violations of this Act and to (1) compel the appearance and examination under oath of any person under such investigation, including the officers and directors of any corporation under such investigation, and (2) to compel the production of, and to inspect and copy, any or all tangible documents or recordings in the possession of or under the control of any person under such investigation, or any officer or director of any organization under such investigation.

(B) Upon a showing to the superior court that such is reasonably necessary to an investigation under subsection (A) of this Section, the Attorney General shall have the power to (1) compel the appearance and examination under oath of any person, and (2) to compel the production of, and to inspect and copy, any and all tangible documents or recordings.

The statute should also contain provisions for the enforcement of these discovery powers, as well as provisions which would take into account the possibility of the privilege against self-incrimination being raised as a bar to production of documents or testimony. See, e.g., 38 Ill. Rev. Stats. §§60-7.6, 60-7.7.

IV. Definitions

If the above suggestions were to be adopted, the bill should include the following definitions in an appropriate section:

"Person" shall mean any natural person, or any corporation, partnership or association of persons.

"Asset" shall include any property, tangible, real, personal, or mixed, and wherever situate, and any other thing of value.

"Commodity" shall mean any kind of real or personal property.

"Service" shall mean any activity not covered by the definition of "commodity" which is performed in whole or part for the purpose of financial gain.

We hope that our comments have been responsive to your request. If we can be of any further assistance to you in this or other matters related to our experience, you can count on our continued cooperation.

Sincerely yours,

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

By: Donald I. Baker
Acting Director of Policy Planning

HB-164

RE: Proposed Antitrust Legislation

My general feeling is that the antitrust bill which has passed the House is unduly vague for an area of the law which has as much history as antitrust. I am thoroughly in agreement with the recommendations of the U. S. Department of Justice which were mailed to Arthur H. Peterson, Revisor of Statutes, in connection with this bill. However, if we wish to continue with this existing bill which has passed the House I would want to recommend the following amendments:

1. A provision utilizing the juris prudence which is involved under the Sherman Act should be inserted. An example is provided by the U. S. Department of Justice: "This act shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes."

2. HB 164 states:

> Sec. 45.51.010(c) In deciding whether conduct unreasonably restrains, monopolizes or attempts to monopolize trade or commerce, the determination of the relevant market or effective area of competition shall not be limited by the boundaries of this state.

It would seem to be understood that where the relevant market goes beyond the State of Alaska that relevant market should be considered. Thus, this paragraph would seem to be

unnecessary, unless the promoters are seeking to use it for the purpose of reading in a legislative intent not to prosecute multi-state companies located in Alaska.

For example, the oil companies have operations in the other northwest states. In those other states there is a competitive oil and gas distribution situation. In Alaska, however, there are only a few competitors of which Standard Oil of California is clearly dominant. Normally one would interpret the relevant market for gasoline and oil products to be a market in which the consumer has the opportunity to choose from which to purchase. However, by adding this provision those companies could argue, assuming they were accused of monopolization, that since their total market is competitive they are exempt from the Alaska antitrust law.

Reasoning such as this could destroy the usefulness of the antitrust law in the case of multi-state corporations but retain its usefulness for corporations which operate only in Alaska. Such discrimination does not seem reasonable and thus the provision, paragraph (c), would be better left out.

3. AS 45.51.020 refers to contracts voidable. This provision has a danger of allowing businessmen to use antitrust laws as a means of avoiding normal contract responsibilities. Thus, where such a provision is included, it should be very specific. Here again I suggest the Justice Department provision:

> A contract or agreement in violation of any provision of this chapter is voidable by either party as to any future performance by either party, except for payment for goods already received, and such future performance, except for payment already received, may not be enforced at law or in equity.

OKH:agm

BB 164

RE: Antitrust Legislation

The United States Department of Justice, Antitrust Division, made some comments on Alaska's proposed antitrust bill. Their revisions were based on the following premises:

> The goal of a state antitrust law should be effective enforcement at a low cost. This implies several points. First, excessive detail and complexity should be avoided in draftsmanship. Complex statutes have tended to bog down antitrust enforcement in many states, as the courts have attempted to deal with a maze of overlapping or conflicting statutory provisions of great specificity. Therefore, in view of this experience, we feel that simplicity without omission should be the goal in a statute which attempts to create a basis for effective state antitrust enforcement. Secondly, the substantial existing body of federal case law should be utilized by the states, wherever appropriate. This can be done by use of substantive statutory provisions following closely the federal provisions or by statutory language and legislative history making clear the intent of the Alaskan legislature to adopt this body of federal jurisprudence. This

should be of significant assistance to the courts of the state as they attempt to apply the law to specific factual situations. Thirdly, the importance of relief and investigative provisions in an antitrust statute should not be underestimated; state enforcement officers must be provided with effective means by which to discover violations of the statute if vigorous enforcement is to be achieved. Finally, the private sector, properly motivated, can be a significant aid to state enforcement. The theme of these very general comments will reoccur in the ensuing discussion of specific provisions of the proposed statute.

This principles are sound and are given to us by an organization with much more expertise than we can find within the state.

Attached is a draft of an antitrust bill using provisions they have suggested plus a few additions especially pertinent to Alaska.

OKH:agm

Attachment

PROPOSED AMENDMENTS TO HOUSE BILL NO. 164, entitled
"An Act prohibiting monopolies and combinations in
restraint of trade."

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

Section 1. AS 45 is amended by adding a new chapter to read:

CHAPTER 51. MONOPOLIES: RESTRAINT OF TRADE.

ARTICLE 1. SUBSTANTIVE PROVISIONS.

[Amend section 10 as follows:]

Sec. 45.51.010. UNREASONABLE RESTRAINTS OF TRADE OR COMMERCE, MONOPOLIES PROHIBITED. (a) Every contract, combination in the form of trust or otherwise, or conspiracy, in unreasonable restraint of trade or commerce is unlawful.

(b) It is unlawful for any person to monopolize or attempt to monopolize trade or commerce in the relevant market for the specific purpose of excluding competition or controlling, fixing or maintaining prices.

(c) In deciding whether conduct unreasonably restrains, monopolizes or attempts to monopolize trade or commerce, the determination of the relevant market or effective area of competition shall not be limited by the boundaries of this state.

[Delete present sections 20 through 50.
Renumber as section 20 and amend present
sections 60, 70 and 80 as follows:]

Sec. 45.51.020. EXEMPTION OF LABOR ORGANIZATIONS, CERTAIN COOPERATIVE ORGANIZATIONS, CERTAIN SPECIALLY REGULATED INDUSTRIES AND COMMERCIAL FISHING. (a) This chapter does not forbid the existence or operation of labor, agricultural or horticultural organizations created for the purpose of mutual help, and not conducted for profit, or forbid or restrain members of such organizations from lawfully carrying out the legitimate objects thereof; nor are those organizations or members illegal combinations or conspiracies in restraint of trade under the provisions of this chapter.

(b) Nothing contained in this chapter shall be construed to forbid actions or arrangements authorized or regulated under those acts of the United States which exempt such actions or arrangements from the antitrust laws of the United States or under the following statutes of this state.

(1) AS 10.15
(2) AS 21.87
(3) AS 31.05.100
(4) AS 31.05.110

(c) Persons engaged in the business of commercial fishing may act together in associations, corporate or otherwise, with or without capital stock, in collectively handling and marketing fish without violating the provisions of this chapter. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes.

ARTICLE 2. ENFORCEMENT PROVISIONS.

[Delete present section 100. Renumber and amend present section 110 as follows:]

Sec. 45.51.100. SUITS BY PERSONS INJURED. (a) A person (other than a governmental body, the state, or any of its political subdivisions or public agencies) injured in its business or property by reason of a violation of the provisions of this chapter

(1) may recover actual damages sustained, and reasonable attorneys' fees and the costs of the suit. The court in its discretion may in cases of wilful and substantial violations increase damages to an amount not in excess of three times the actual damages sustained; and

(2) may bring proceedings for injunctive relief, temporary or permanent, against threatened loss or damage to his property or business by a violation of this chapter, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings; and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate,

a preliminary injunction may issue. If the court issues a permanent injunction, the plaintiff shall be awarded reasonable attorneys' fees together with the costs of suit.

(b) The remedies provided in this section are cumulative and may be sought in one action.

[Renumber as section 110 present sections 120 and 130, and amend as follows:]

Sec. 45.51.110. SUITS BY STATE OR LOCAL GOVERNMENT. (a) The attorney general may institute proceedings to prevent and restrain violations of this chapter. In addition to granting prohibitory injunctions and other restraints for a period and upon terms and conditions necessary to deter the defendant from, and insure against, the committing of a future violation of this chapter, the court may grant mandatory injunctions reasonably necessary to restore and preserve competition in the trade or commerce affected by the violation. The court may issue temporary restraining orders or prohibitions. The court may enter consent decrees.

(b) A governmental body, the state, or any of its political subdivisions or public agencies injured in its business or property by reason of anything forbidden in this chapter may recover the actual damages by it sustained and the cost of

suit, as determined by the court. The attorney general on behalf of the state or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of, or with the permission of the attorney general, may institute this action or damage action for a violation of comparable federal law.

[Renumber present section 140 as 120.]

Sec. 45.51.120. JURISDICTION OF COURT. Actions allowed by this chapter shall be brought in the superior court.

[Renumber as section 130 present section 150, and amend as follows:]

Sec. 45.51.130. PENALTY FOR VIOLATION. (a) A person who violates section 10 of this chapter, including any principal, manager, director, officer, agent, servant or employee, who has engaged in or has participated in the determination to engage in an activity that has been engaged in by any association, firm, partnership, trust or corporation, which is in violation of section 10 of this chapter, shall if an individual pay to the state a civil penalty of not more than $5,000, and shall if an association, firm, partnership, trust or corporation pay to the state a civil penalty of not more than $20,000.

(b) Whenever a corporation violates section 10 of this chapter, the violation shall be deemed to be also that of the individual director, officer or agent of the corporation who has authorised, ordered or done any of the acts constituting in whole or in part such violation.

[Renumber as section 140 present section 160, and amend as follows:]

Sec. 45.51.140. JUDGMENT IN FAVOR OF THE STATE AS EVIDENCE IN ACTION: SUSPENSION OF LIMITATION. (a) A final judgment for injunctive relief or civil penalties brought by the state under this chapter to the effect that a defendant has violated this chapter shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under this chapter or by the state, a city or a borough under sec. 110(b), as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

(b) This section does not apply to consent judgments or decrees entered before any testimony has been taken.

(c) Whenever a proceeding is instituted by the state to prevent or restrain violations of this chapter, or to recover civil penalties therefor, the running of the statute of limitations in respect of each private right of action arising under sec. 100 (a) (1) of this chapter, and based in whole or in part on any matter complained of in the proceeding, shall be suspended during the pendency thereof, including any appeal, and for one year thereafter; provided, however, that whenever the running of the statute of limitations in respect of a cause of action arising under sec. 100(a) (1) of this chapter is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

[Renumber as section 150 present section 170, and amend as follows:]

Sec. 45.51.150. LIMITATION OF ACTIONS. An action under this chapter is barred unless commenced within four years after the cause of action accrued, except as otherwise provided in sec. 140 of this chapter. No cause of action barred on the effective date of this chapter is revived by this chapter.

ARTICLE 3. GENERAL PROVISIONS.

Sec. 45.51.200. DEFINITIONS. In this chapter

(1) "article of trade" includes, but is not limited to, goods, merchandise, natural resources, whether or not severed, extracted, harvested or produced, agricultural products, produce, choses in action, commodities, and any other article of commerce; it includes trade or business in service trades, transportation, insurance, banking, lending, advertising, bonding and any other business whether or not that business furnishes a personal service;

(2) "purchase" or "buy" includes "contract to buy," "lease" and "contract to lease";

(3) "sale" or "sell" includes "contract to sell," "lease" and "contract to lease."

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / POUCH K — STATE CAPITOL
JUNEAU 99801

April 6, 1971

The Honorable Walter M. Hickel, Chairman
House Commerce Committee
Alaska State Legislature
Rm. Y, Capitol Building
Juneau, Alaska

Re: House Bill No. 104, Your Letter of March 26, 1971 Requesting Comments

Dear Representative Hickel:

I regret that our shorthanded staff and the many requirements on this Department have prevented me from answering this letter earlier and from answering it in the detail which we would prefer. However, there is some question whether much time need be spent lingering over those provisions which are taken from the historic body of federal anti-trust law. The objections made have been made in one form or another since 1890 and have been discussed more adequately on many previous occasions than I could do here. The basic opposition to anti-trust legislation comes not from individuals or corporations who feel that a particular section is onerous, unwieldy or unworkable, but from those who feel that no anti-trust legislation should be adopted.

With regard to the specific points raised:

1. "Passage of HB 104 can only unreasonably stifle economic growth and development of the resources in Alaska."

This criticism is based on the premise that the opportunity to engage in combinations in restraint of trade tend to monopolize industry in the State of Alaska have contributed to the economic growth and development of

the State. Nothing could be further from the truth. [illegible] is a predatory, non-free enterprise system enactment. It is based on the assumption that economic growth and development will take place at the optimum rate if the State acts to inhibit the activity of those who prefer not to trust in the workings of the laissez-faire system, but wish to establish new ground rules.

2. "S 104 makes every combine operating on the North Slope illegal. The same is true for the Alaskan pipeline."

I am sure this is not true, otherwise, the federal authorities would have moved in by now. They will certainly be so later as the product of this effort moves into interstate commerce. Needless to say, I could not rule on the legality of any arrangement on the North Slope in the absence of it being specifically brought to my attention. However, from my existing status familiarity with operations in that area, I know of no obvious violations. The actual [illegible] operators on the North Slope and Alyeska Pipeline Service Company make it all but impossible for [illegible] to avoid the impact of federal anti-trust. I would submit that these major companies are quite careful to conduct themselves with circumspection in the vicinity of the subject of these laws.

3. "S 104 exempts commercial fishing from the [illegible] of the act. For economic and growth reasons, it would seem sound to exempt the [illegible] industry."

I am sure that the commercial fishermen of Alaska [illegible] this analogy with [illegible]. The reason the commercial fishing industry is exempted is that commercial fishing in Alaska is [illegible] of thousands of very small operations. The commercial fisherman is much more analogous in his relations to [illegible] to the individual workman who, in effect is selling his own labor. At the same time, his prosperity [illegible] upon his ability to bargain with far larger economic units [illegible] the fish processing industry. The exemption for the fishermen is put in the act for much the same reason labor unions are exempt under the federal act.

4. As to S.1.010 should improve on the Sherman Act by inserting, the word "unreasonable" before "restraint of trade."

As the commentator points out, for [illegible] years the [illegible] Court of the United States has been holding that this is generally what the 1890 Legislature intended. [illegible] is an enormous advantage in adopting the wording of a measure from another jurisdiction in toto. With that wording, the patina of interpretation of the courts grown up over a period of years is adopted. When that language is altered, it opens the door to new arguments about what the new legislative enactment might be. All anti-trust lawyers know what the Sherman Act prohibition means. We would have a whole new line of litigation testing the meaning of the new act if this wording was changed.

5. "The specific enumeration of prohibited acts under proposed AS 45.51.020 adds nothing and may be subject to misconstruction by the courts."

The absence of these provisions might also be [illegible] by the courts. Again, these are provisions [illegible] from federal anti-trust law and our courts might [illegible] some negative implication from their absence.

Any act of this nature, which is now part of the [illegible] common law on anti-trust, represents some kind of [illegible] between general terms and specific terms. The [illegible] of the former is really restricted to lawyers since [illegible] lawyer, knowing how the courts have interpreted the [illegible], would have much [illegible] of the nature of their [illegible]. Specific prohibitions can be addressed [illegible] [illegible]. They are warnings to industrialists [illegible] as well, as well as lawyers, as to specific [illegible] which the general proposition contemplates.

In addition, the courts give additional [illegible] [illegible] to the specific provisions which also [illegible] [illegible] what might be referred to as the common law [illegible] [illegible]. To now strike all the specific [illegible] [illegible] [illegible] and speculation [illegible] [illegible] which are based on provisions [illegible] [illegible] are intended to apply in Alaska.

[illegible]. "Proposed AS 45.51.[illegible] is ambiguous. [illegible] [illegible] that it may be intended to exclude [illegible] [illegible] conspiracies from coverage. This is [illegible] [illegible] under federal law, parents and their subsidiaries

...have been found to have conspired. The provision should be deleted and rewritten to exclude from the act's coverage single business entities and their subsidiaries.

A careful reading of the provision does not find the exclusion anywhere near so broadly. The provision is intended to exclude from the impact of the section agreement between partners in the same business entity, corporate officers, etc. The provision grants no exclusion to "single business entities and their subsidiaries." The author of the provision obviously wants to expand the scope of the exemption.

7. "Proposed AS 45.51.040 contradicts itself by ... certain types of conduct while at the same ti... ...the effects of the permission with the proviso that ... conduct is lawful 'unless the effect shall be to substantially lessen competition or create a monopoly.'"

There is a substantial difference between declaring certain conduct per se legal and declaring that it is not per se legal. The purpose of the proviso is to prevent people from stretching covenants not to compete, etc., beyond their legitimate purposes as instruments of monopoly.

8. "Proposed AS 45.51.040 is an ex post facto law."

This provision merely recognizes that the ... of a monopoly position or the maintenance of ... ...on which substantially lessens competition may be ... to the act of acquisition which pre-dates the effective ... of the act. The maintenance of the monopoly or the ...ination on trade must be subsequent to the effective ... of the act for the act to be effective on it.

9. "The effect of proposed AS 45.51.040 ... ...an acquisition of a single jobber, single dealer, or ... single service station may well be illegal in some ... village, or hamlet."

First, the court will have to define the relevant ... through interpreting "in any section of the state." ... a specific set of circumstances, where the market ... ascertainable only as the particular town or village, ... acquisition may be in violation of the act. However, ... the years a number of doctrines have grown up aroun...

the anti-trust laws which preserve the public interest in the application of Section 7 of the Clayton Act, from which it is taken, and it is obvious that a number of these doctrines will be applied to local Alaska conditions. Perhaps new doctrines will be promulgated following the rule of reasonableness. One of the most obvious exceptions is the "failing business doctrine" which allows an acquisition even though it may result in a monopoly or lessening of competition when the business being acquired is in poor shape. Other cases have held that where the convenience and needs of a community to be served by a merger clearly outweigh any anti-competitive effects, the proposed merger may be made.

16. "Subsection (a) of proposed AS 45.51.060 prohibits mergers the effect of which 'may be substantially to lessen competition'. Yet, under (b), the court is to order divestiture if the court finds that the effect of an acquisition is substantially to lessen competition.' Thus, in one case, the test of illegality concerns probabilities whereas the other depends upon a finding of actual substantial lessening of competition."

Statutes frequently distinguish between what is prohibited before action by injunction and what a court will authorize to be undone after the act has been done. There is no necessary inconsistency here between subsection (a) which allows injunction where the effect of the acquisition may be to lessen competition, but subsection (b) will only undo the merger which has already taken place where there is a finding that the merger has in fact substantially lessened competition, etc.

17. "Proposed AS 45.51.050 is broader than the federal enactment."

The application of the principles of Section 8 of the federal Act from which this is taken, obviously will have to be modified to apply to conditions prevailing in Alaska. Presently interlocking commercial ventures of almost any description are outside of the limitation on the conduct of "directors" and the conduct of officers, partners, or trustees only recognizes the corporate reality. A dual officer is far more influential in obtaining the elimination of competition by agreement than an interlocking director. Even in the wider Alaska conditions of today, the application of this section to multi-million dollar

...orations. A limitation of convenience under the federal ... the effects of conduct limiting competition can be as severe in the smaller, isolated markets of Alaska with corporations under the million dollar line.

12. "Proposed AS 45.51.050(b) would prevent a representative of a distributor from being represented on the board of a retail subsidiary."

This would sometimes be true if the subsidiary and the distributor were in competition and if agreement between them would eliminate that competition. We see nothing offensive about such a provision. I would gather that the criticism of the attorney that his chart does ... with its own retailers.

13. "The statute should provide that a successful defendant is entitled to costs or attorney's fees ... these spurious lawsuits and legal blackmail will be discouraged." (directed at proposed AS 45.51.110.)

This criticism is evidently based on ignorance of ... Alaska law which entitles the prevailing party to recover his costs including an attorney's fee, whether ... plaintiff or defendant.

14. "AS 45.... allows the State to recover ... damages under it ... state although the federal ... can only recover actual damages under the federal ... here can recover treble damages under the ... statute under existing law.)"

This is a policy question for the legislature. ... damages provisions are intended to be an additional deterrent against violations of the act which would ... others. If the legislature believes that ... damages would be a sufficient deterrent, then it ... amend this law to suit the criticism raised.

15. "Proposed AS 45.51.120(b) will frighten ... States out of Alaska because it gives the Attorney General the authority to undertake class actions."

I believe that much of this authority, as applied ... anti-trust, is available to an Attorney General ... The purpose of this kind of provision is to avoid a ... of suits which clog the courts and to join

...e causes of action of a number of plaintiffs whose individual damages may be too small to justify the expense of a ...wyer so that they will recover the damages done to them. ...e see no policy reason why this authority should be stricken. ...s unlikely, to say the least, that any business is going to be so intimidated by this section that it will refrain ...om doing business in Alaska. Of course, any Attorney General can go on a rampage under any existing law in such a manner as to do damage to the business climate. The political system acts as an effective restraint on this type of conduct.

16. "The penalty provision is broader than the Sherman Act since it provides for criminal penalties for the full range of violations."

This is necessary because, through the Federal Trade Commission, the federal anti-trust laws provide for a wide range of administrative enforcement techniques including criminal penalties for the violation of administrative orders. As a practical matter, no Attorney General would find it feasible to bring a proceeding for the enforcement of the criminal penalty in an 040 or 050 situation and no court is going to enforce criminal sanctions in such cases without proof of specific intent.

17. "The use of consent judgments in evidence in ...ivil actions is more onerous than the equivalent federal ...rovision."

True, the state law is stricter. As the letter suggests, this aspect of federal law has been quite controversial but the argument has had two sides. There has been criticism of the federal provision as giving the Attorney General too much leeway to excuse violations at the expense of injured parties.

18. Proposed AS 45.51.180 is not included in the ...rrent draft and the criticism is therefore irrelevant.

I hope this information is of some service to you.

Sincerely,

John E. Havelock
Attorney General

...ajt

HB-164

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / POUCH K — STATE CAPITOL JUNEAU 99801

April 23, 1971

The Honorable William J. Moran
State House of Representatives
Capitol Building
Juneau, Alaska 99801

Re: Anti-Trust Legislation

Dear Representative Moran:

We have reviewed the proposed change in HB 164 and the statement of James Waters to the House Judiciary Committee on April 7, 1971 and have the following comments:

In Section 10, of the proposed amendment to the legislation, an attempt is made to define the marketing area to determine the reasonableness or unreasonableness of the restraint of trade. In this connection, it is suggested that in deciding whether conduct reasonably restrains trade or commerce determination of the relevant market or effective area of competition should not be limited by the boundaries of this state.

It would be the position of the Department of Law, that the legislation should not contain an express invite to enlarge marketing areas beyond the State of Alaska. Alaska is geographically separate from the rest of the continental United States and has shown unique marketing problems. The area can best be developed through the use of case law and if the defendants are able to persuade the court that the actual marketing area is indeed broader than the State of Alaska, it should be handled through the judicial process on a case by case basis. It is therefore our recommendation that no definition of marketing area be included in the legislation.

The comments relative to sections 20, 30, 40, and 50, can be summarized by stating: that these sections set forth certain types of prohibited activity. Anti-trust laws require judicial interpretation which sets

forth the specific and basic guidelines for construction. It must be presumed that the courts will follow and interpret the legislation in the light of economic and practical realities. This fact is noted in the statement of Mr. Waters wherein he indicates that the Supreme Court has placed the word "unreasonable" in front of all violations.

It is also suggested in the proposed amendments to these sections, that the State of Alaska not adopt the legislation, as there is federal legislation and the matter should be left to the staff of the Federal Government. The primary purpose of a state adopting its own anti-trust laws is to regulate those activities which are not large enough in scope for the federal intervention, or which do not involve inter-state commerce. In addition, some cognizance must be given to the fact that Alaska's geographical location and economic base which may result in cases not sufficiently large to interest the justice department, or which are not within the Clayton Act, because of the lack of assets. However, these cases would nevertheless under Sections 20-50 of proposed legislation, be actionable under the proposed State Anti-trust law.

The remainder of the comments in Mr. Waters' bill go to the remedies available, which include section 100 and subsequent sections. It should be noted in here that again an obscure example is cited for the unenforceability of contracts made in violation of the State's proposed anti-trust law. If these and the subsequent suggestions for modification were adopted, the act in summary would provide for the following remedies:

> The contract, although made in violation of the proposed State Anti-trust law, would still be enforceable.
> The treble damage provision, except for wilful and substantial wrongs, would be eliminated and actual damages awarded.

Under these provisions it would appear that there is little, if any, incentive to comply with anti-trust laws as the violation only requires the return of those actual damages sustained with the contract still enforceable.

Section 120 of the Act, contains various authority by the Attorney General to bring suit on behalf of others. Such a provision could be desirable in that the Attorney

General would have the information available, which may not be available to other parties or they may not even be aware of the action. However, this should be a matter of legislative determination on whether or not they wish the Attorney General to exercise such authority. It should be noted that in the basic area of consumer protection, such as the legislation last session on the consumer protection act, clearance by the Attorney General is required prior to a class action also the act recognizes the Governments duty to protect its private citizens from certain wrongdoing.

From the foregoing it is the Department of Law's position that:

1. The legislation should not set forth the proposed market areas, but they should be left to a matter of judicial determination on whether or not a market area exceeds the physical boundaries of the State of Alaska.

2. Sections 20,30,40, and 50 should be retained in the Act as a legitimate State function within the State of Alaska as pointed out many corporations which for one reason or another are not subject to sanction by the Federal Trade Commission or the Anti-trust Division of the Justice Department, because of geographical and economical problems, would be subject to the State of Alaska jurisdiction.

3. Contracts made in violation of the Act should be unenforceable and the treble damage provision should be maintained in order to insure adequate penalty for violation of the Act.

Very truly yours,

JOHN E. HAVELOCK
ATTORNEY GENERAL

By
Donald J. Beighle
Assistant Attorney General

JEH:DJB:dmt

HB-164

FAULKNER, BANFIELD, BOOGREVER & DOOGAN
ROOM 201, 311 FRANKLIN STREET
PHONE 586-2210
JUNEAU, ALASKA 99801

March 12, 1971

The Honorable Jalmar M. Kerttula
Chairman, Commerce Committee
House of Representatives
Juneau, Alaska 99801

Dear Mr. Chairman:

Re: H.B. No. 164, Anti-Trust Bill

I previously wrote to you on February 23, as a representative of American Mutual Insurance Alliance, stating I would investigate the impact which H.B. No. 164 would have on the insurance industry in Alaska and report to you.

Congress has the right to regulate the insurance industry by reason of the fact that it is engaged in interstate commerce. In 1945, it passed the McCarran-Ferguson Act (15 USCA 1011, et seq), which provides that the business of insurance shall be subject to the laws of the several states which relate to the regulation and taxation of the industry. It also provided that the Sherman Anti-Trust Act, the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Anti-Discrimination Act would not apply to the business of insurance until June 30, 1948, and after that date said Acts shall be applicable to the business of insurance "to the extent that such business is not regulated by state law." Therefore, the states have the right to regulate monopolies and combinations in restraint of trade in the insurance industry. Many states have anti-trust statutes such as proposed by H.B. 164, but New York is the only state which did not exempt the insurance industry. However, when New York did enact such a law on January 1, 1970, it specifically exempted the setting of rates through rating bureaus. The reason various states other than New York have not attempted such regulation is that the Insurance Departments have complete control over discrimination, unfair trade practices, etc., under the Insurance Code. The Insurance Departments, therefore, have control insofar as they care to exercise it, but they recognize that rating bureaus are an absolute necessity. There are other practices in the industry which might be said to be combinations in restraint of trade, such as formulating and adhering to standard insurance policies, the content of which are, in turn, under the control of the State Commissioners. The State Commissioners have their own

association to which the industry goes for guidance with the result that the standard fire insurance policy is used everywhere and any deviations from it can be used only with the approval of the State Director of Insurance. You can understand what a chaotic situation would be created, especially for the consumers, if you had 200 different types of insurance policies in Alaska and how difficult it would be for the Director to regulate the industry.

The reason the companies use rating bureaus to recommend how much they should charge and the State Commissioners use the same bureaus to ascertain what they should allow to be charged, is because the loss experience of all the companies in an area especially under standard policies, is more reliable for rate making than individual loss experience. Therefore, our Director is a subscriber to and pays to support the various bureaus which specialize in rate making for particular purposes. These must be continued, but H.B. No.164 would prohibit such use of, rating bureaus.

From the foregoing, I think it is evident that the industry should be exempt from H.B. No. 164 since it is completely regulated in the same respects by the Insurance Code. If the state should decide to do like New York and prohibit monopolies and regulate the insurance industry under a bill of this type, then it is necessary to work out some specific exemptions such as has been done in New York. Whereas New York is the state in which most of the big companies are incorporated and it is the insurance center of the Western Hemisphere, Alaska is at the opposite end of the spectrum and is in no position to competently regulate the insurance industry except through its Director of Insurance. Therefore, unless the industry is exempt from the provisions of this bill there is a need for specific amendments which can be patterned after the recent New York law. I am furnishing to your staff and particularly Mr. Rhode, a copy of a report made by Mr. Edwin M. Zimmerman, of Washington, D.C., who talked on "Insurance Underwriting Under Antitrust" at a meeting of the 1970 Mutual Insur-

ance Technical Conference at Philadelphia, last November. It will give him some idea of the complexity of the subject of trying to regulate insurance companies under limited exemptions such as are contained in the New York Act.

Yours very truly,

N. C. Banfield

c.c. Mr. Charles A. Brown
Mr. Kenneth H. Nails
Mr. F. O. Eastaugh
Mr. W. W. Fritz
NCB:k