SB 104

STATE OF ALASKA
THE LEGISLATURE

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LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM August 21, 1979

SUBJECT: Distinction between a "legislative court" and a "constitutional court" (Work Order 7307)

TO: Charles Parr, Chairman
House Judiciary Committee

FROM: Richard A. Bradley
Legislative Counsel

The Judiciary Committee has asked that I explain the difference, if any, between a "legislative court" and a "constitutional court". The Committee is concerned with the question whether a legislative court possesses the same inherent powers as a constitutional court. Finally, the Committee asked that the various existing courts be characterized as either constitutional or legislative. [These questions may be asked in the context of SB 104, the "court of appeals" bill, but they do not depend upon the content of that bill for their meaning.]

I. The Differences.

The constitutional frameworks present in the United States and in the States of the Nation typically establish courts; the constitutions also typically grant to the legislature the authority to establish other courts.

Under the Federal Constitution, judges of constitutional courts, who exercise "the judicial Power of United States", are appointed under Art. III, §1. Judges of legislative courts are appointed under the power granted to Congress by Art I, §8, ¶9 to constitute tribunals inferior to the Supreme Court. On limited occasions Congress blends its authority and the "judicial power of the United States" is conveyed to courts established under Art I. 1/ The Territorial courts

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1/ Since the "judicial power of the United States" is not granted to courts established under Art. I, the full logic of Federal cases does not apply to the Alaska situation. Compare Art. IV, §1 of the Alaska Constitution.

in Alaska prior to Statehood were courts of this blended character. American Insurance Company v. Canter, 1 Pet. (U.S.) 511 (1828).

The Alaska Constitution contains similar though different concepts. Thus, Art. IV, §1 of the Alaska Constitution provides:

> The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. 2/

A constitutional court is, then, a court established in the constitution in specific particulars; a legislative court is one where its establishment and responsibilities are discretionary with the legislature. An implied corollary of this principle recognizes that the constitutional courts very likely will enjoy constitutional protections which may or may not be extended to other courts not established in the Constitution. Art. IV has a number of provisions reflecting this principle.

Thus, Supreme Court justices and Superior Court judges shall be

> "citizens of the United States and of the State, [and] licensed to practice law in the State.

Judges of the constitutional courts [the Supreme and Superior Courts] must be nominated by the judicial council and appointed from those nominees by the governor. Art. IV, §5. These judges are subject to electoral confirmation on a nonpartisan ballot under §6. They are retired under the provisions of §11 and they may be removed only by impeachment under §12 [or by rejection under §6]. Their compensation is protected under §11. They are restricted in their activities during the time they hold office by §14.

2/ Notwithstanding this suggestion that the jurisdiction of courts shall be prescribed "by law", it seems that in a broad sense, the constitution of the state establishes the jurisdiction of the Supreme court ["the highest court of the State, with final appellate jurisdiction." Art. IV, §2(a)] and of the Superior court ["the trial court of general jurisdiction." Art. IV, §3].

In opposition to all this judges of legislatively established courts [all courts except for the Supreme and Superior Courts]

> shall be selected in a manner, for terms, and with qualifications prescribed by law. Art. IV, §4.

I think it is significant to note that the determination whether the constitutional protections are extended to judges not specified in the constitution is, in the constitutional framework, not accidental. The constitution could well have extended these listed protections to any member of the judiciary, whether or not the court on which the member sits is constitutionally defined. 3/

The history of the District Court since Statehood is perhaps the best example of this principle at work. The court was established in 1959 by Ch. 184. Initially it was described as the "district magistrate court". Ch. 24, SLA 1966 shortened the name to its present form. Initially, a district magistrate was appointed by a superior court judge, served at the judge's pleasure, and was not required to be an attorney. Under present law, a district judge is appointed under a legislative formulation that follows the constitutional formula of Art. IV, §5 for judges of the supreme and superior courts. And the procedure has received constitutional review and approval in Delahay v. State, 476 P.2d 908 (1970). The judge is subject to retention elections which parallels the provisions of Art. IV, §6.

And while the question is presently academic, it is likely that the legislature could in its discretion abolish the present scheme for the district judges without constitutional problems. While the legislature may embellish, clarify, and interpret the general framework established in the constitution for the Supreme and the Superior courts, it seems clear

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3/ Another way of stating this conclusion is that I resist the suggestion implied, perhaps, in your request, that there is any general doctrine of law applicable to constitutional courts. Rather, any discussion of the implications of these terms simply raises questions of constitutional interpretation which are unique to each jurisdiction. If the matter is covered in the constitution, its statements establish the law. If the matter is not stated in the constitution, the legislature may prescribe the law.

that these courts themselves may not have their character altered in a fashion inconsistent with the constitutional provisions.

These then are the differences between the two kinds of courts. For a constitutional court, the legislature is limited in its ability to experiment by the character of the framework established in the constitution.

For a legislative court, the legislature may follow a constitutional pattern in its establishment of legislative courts, but it is under no obligation to do so. Thus, the legislature may establish a court and provide that the members of the court serve for life, at the pleasure of the governor, are confirmed by the legislature, are elected on partisan, competitive ballots, may have their compensation reduced during tenure. Judges can be attorneys or non-attorneys; can be full-time or part-time.

In short, the legislature may exercise broad discretion in its establishment of legislative courts. Lopez v. Anchorage, ___P.2d___ (No. 1863, Alaska, June 22, 1979).

II. Inherent powers.

The Committee asked whether a legislative court would possess the same inherent powers as a constitutional court.

The answer to the question must be viewed as somewhat tentative because of certain ambiguities in the constitution as well as in the question itself.

The constitution is somewhat ambiguous. It provides that "the jurisdiction of [all] courts shall be prescribed by law". Art. IV, §1. This phrase would otherwise suggest that the powers of the court, inherent or otherwise, derive from legislative enactment.

At the same time, the constitution establishes the larger part of the Supreme and Superior court jurisdiction: "The supreme court shall be the highest court of the State, with final appellate jurisdiction." [Art. IV, §2(a)]. "The superior court shall be the trial court of general jurisdiction...." [Art. IV, §5].

AS 22.05 and AS 22.10 contain very few provisions not directly implied in the constitutional provisions relating to the Supreme and Superior Court. As a result, the Alaska Constitution is the primary source of the jurisdiction of the two courts.

The question itself is ambiguous because many of the powers of a court that are viewed by attorneys as inherent to a court's basic operation are the result of statute. Thus the power of the courts to issue writs in aid of their jurisdiction would logically be implied if it did not exist by statute. However, it does exist by statute [AS 22.05.010(a); 22.10.020(a)] and is therefore arguably not an inherent power.

There are a number of concerns of a court that may be viewed as inherent.

1. Finality of judgement. In Hayburn's Case, 2 Dall. 409 (1792), the Federal courts refused to act on a petition for a pension since the Act of Congress granting the responsibility to the district courts allowed the Secretary of War and the Congress to review the decision. This review function was viewed as making the administration of the law non-judicial in nature and therefore not within the "judicial power of the United States".

To a large extent the question of granting non-judicial powers to courts is politically moot; I am unaware of any law invalidated or left unenforced by the Alaska courts because of this requirement.

Note that Art. IV, §1 grants the judicial power not only to the Supreme and Superior courts, but also to courts established by the legislature. I assume that a legislative court would therefore possess this requirement.

2. The contempt power. It seems that it is unarguable that all courts in Alaska possess by their nature the power to sanction contempts. Civil Rule 90 suggests this conclusion.

And if there is any doubt on the question, venerable language of the U.S. Supreme Court is instructive:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Ex parte Robinson, 19 Wall. (U.S) 505 (1874). 4/

3. Issuance of writs. In Federal courts, the power to issue writs has historically been granted by Congress. Section 13 of the 1789 Judiciary Act was the original source. While the Act gave the power to issue writs under common law principles, the Federal courts have traditionally concurred in the view that an act of Congress is necessary to confer the judicial power to issue writs.

Note that the Supreme court and the Superior court are specifically granted the power to issue writs. AS 22.05.010(5) and 22.10.020(a) both authorize the issuance of "all writs" necessary to the courts' jurisdiction. The district court is implicitly denied the authority to issue writs by the denial to it of equitable jurisdiction. AS 22.15.050(2).

4. Admission and discipline of attorneys. The generally recognized principle of the common law holds that "it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." Chief Justice Taney in Ex parte Secombe, 19 How. (U.S.) 9, 13 (1857).

In Alaska, the Supreme Court has the "inherent and final power and authority to determine standards for admission to the practive of law in this State". In re Stephenson, 511 P.2d 136 (Alaska 1973). Only that court has the power to suspend an attorney from the practice of law. Weaver v. Superior

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4/ The power of contempt in the Federal system has had statutory derivation since §17 of the Judiciary Act of 1789, 1 Stat. 73, 83. In Michaelson v. United States, 266 U.S. 42 (1924), Justice Sutherland questioned the authority of the Congress to qualify the contempt power: "the attributes which inhere in that power and are inseparable from it can neither be abrogated [by Congress] nor rendered [by it] practically inoperative." (Bracketed material added.)

Court, 572 P.2d 425 (Alaska 1977); Esch v. Superior Court 577 P.2d 1039, 1043-1044 (Alaska 1978). The control that the Supreme Court and other courts in Alaska have over those appearing before them is the power of contempt. There is no question whether any state court possesses this power, *supra*.

III. Status of present courts.

The Supreme Court and the Superior Court in Alaska are constitutional courts as that phrase has been used in this memorandum.

They are the only two courts that can ever claim that designation under the present provisions of Art. IV of the Constitution.

Any other court presently in existence or hereafter created in the context of existing constitutional provisions will necessarily be a legislative court. The district court established under AS 22.15 is a legislative court and the proposal for an intermediate appellate court -- the court of appeals -- will be a legislative court.

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