

HB

447

FISCAL NOTE

Revision Date: \_\_\_\_\_

REQUEST

Bill/Resolution No.: HB 447  
 Title: "An Act repealing peremptory disqualification of a judge."  
 Sponsor: Repr. Fritz  
 Requestor: House Judiciary  
 Date of Request: 2/3/84

FISCAL DETAIL

Agency Affected: Department of Law  
 Program Category Affected: Admin. of Justice  
 BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	Unk.	Unk.	Unk.	Unk.	Unk.	Unk.
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	Unk.	Unk.	Unk.	Unk.	Unk.	Unk.
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	Unk.	Unk.	Unk.	Unk.	Unk.	Unk.
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Pegues, Director Phone: 465-3672  
 Division: Administrative Services Division Date: 2-3-84  
 Approved by Commissioner: Norman C. Gorsuch Date: 2-3-84  
 Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance  
 Legislative Sponsor  
 Requestor  
 Office of Management and Budget  
 Impacted Agency(ies)

12/1/83

February 3, 1984

Although not quantifiable at this time, this bill has the potential for causing a significant fiscal impact on the Department of Law, the Public Defender and the Court System. A problem will arise as the criminal defense bar, which now disqualifies some judges 30% to 40% of the time, and some even more, begins to seek disqualification for cause. This latter form of disqualification will be the only course left to the bar, to have an action heard before a judge they believe will be more favorable for their case, if the statutory right of peremptory disqualification, granted by AS 22.20.022 is repealed. As a result, a substantial motion practice will develop that could require a significant amount of prosecutor time. Additionally, enactment of this bill will also result in numerous appeals to the State Supreme Court questioning whether or not the repeal of AS 22.20.022 requires a two-thirds majority vote of the legislature because of the bill's effect of repealing Criminal Rule 25.

Without any prior experience to guide us, the department is hesitant to speculate on the actual cost that this bill might cause. The department does believe that this bill will have the effect of hampering its overall ability to prosecute criminal offenses, by diverting already diminished resources from more critical matters currently handled such as violent crimes, sexual assault, child abuse and DWI. Any cost estimate at this time would be speculative. However, if just 5% of our available district attorney time were lost to unnecessary motion practice, at a weighted cost of \$120,000 per attorney, including support costs, the cost would be about \$360,000. This is a very conservative figure and the actual cost may be substantially greater.



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

Pouch Y, State Capitol  
Juneau, Alaska 99811  
(907) 465-3991

February 3, 1984

MEMORANDUM

TO: Representative Ramona Barnes  
FROM: Heidi Borson Paine *HBP*  
Legislative Analyst  
RE: Peremption of Judges  
Research Request 84-026

Jim Wood of your staff requested information on the peremption of judges in Judicial District 3. He specifically asked for a breakdown of total peremptions by judge according to criminal and civil cases. The requested information follows:

District 3 Peremptions by Judge  
Calendar Year 1983

District Court Judges

<u>Judge</u>	<u>Location</u>	<u>Criminal Case</u>	<u>Civil Case</u>
Hornaday	Homer	234	1
Bosshard	Valdez	1	0
Anderson	Anchorage	9	2
Andrews	Anchorage	11	0
Finn	Anchorage	8	1
Fuld	Anchorage	12	1
Mason	Anchorage	4	1
Tucker	Anchorage	<u>121</u>	<u>5</u>
Subtotal--District Court		400	11

Superior Court Judges

<u>Judge</u>	<u>Location</u>	<u>Criminal Case</u>	<u>Civil Case</u>
Cranston	Kenai	0	20
Madsen	Kodiak	19	9
Cutler	Palmer	0	18
Buckalew	Anchorage	3	14
Carlson	Anchorage	22	133
Johnstone	Anchorage	0	79
Moody	Anchorage	46	13
Moore	Anchorage	0	3
Hanson	Anchorage	3	44
Ripley	Anchorage	34	3
Rowland	Anchorage	0	12
Serdahley	Anchorage	0	7
Shortell	Anchorage	0	32
Soutor	Anchorage	<u>1</u>	<u>27</u>
Subtotals--Superior Court		<u>128</u>	<u>289</u>
TOTAL--District & Superior Courts*		528	300

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\*These figures indicate the total peremptions reported to the Administrative Director's Office of the Alaska Court System. The totals also include 16 recusals, cases in which a judge disqualifies himself or herself because of interest or prejudice.



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

Pouch Y, State Capitol  
Juneau, Alaska 99811  
(907) 465-3991

January 24, 1984

MEMORANDUM

TO: Representative Milo Fritz

FROM: Heidi Borson-Paine <sup>HP</sup>  
Legislative Analyst

RE: Peremption of Judges  
Research Request 84-003

To respond to your request for information concerning the incidence and cost of the peremption of judges in Alaska for 1983, we contacted the administration of the Alaska Court System. However, because we found that no central records are kept on peremption rates or costs, we contacted the presiding judges and court administrators in each of Alaska's four judicial districts. Most area court administrators in the individual judicial districts were able to provide us with accurate estimates of the total peremptions for 1983; however, District 2 did not have any records of peremptions and therefore was only able to supply an educated guess.

Review of Peremption Provisions in Alaska

Currently, there are two means by which a party may perempt a judge without proving cause in district and superior courts. First, under Alaska Statute 22.20.022, if a party or a party's attorney files an affidavit alleging under oath that a fair and impartial trial cannot be obtained under the assigned judge, the presiding district court judge, without requiring proof, must assign the case to another judge in that district. If another judge in the appropriate court is not available, then the chief justice of the supreme court will assign a judge to the case. No more than one affidavit each may be filed by the prosecution or defense.

Second, under Alaska Rules of Court, Criminal Rule 25 and Civil Rule 42, both the prosecution and defense are entitled as a matter of right to one change of judge in actions pending in the district and superior courts. This provision applies in both civil and criminal cases. A person wishing to exercise his or her right is required to file a Notice of Change of Judge; however, the party is not required to specify the grounds for changing. A Notice of Change of Judge must be filed before the commencement of the trial and within five days after

notice that the case has been assigned to a specific judge (see attachment A for copies of the statute and specific Rules of Court). The intent of House Bill 447, as you described it, is to reduce the number of peremptions without cause by repealing AS 22.20.022. The impact this legislation would have on the incidence of peremptions is difficult to predict. However, according to attorney Don Bauermeister of the Alaska Court System, people could still perempt an assigned judge without proving cause by filing a Notice of Change of Judge under Rules 25 and 42 of the Alaska Rules of Court. Consequently, to eliminate all provisions for peremption without cause, it would be necessary to repeal AS 22.20.022, as well as rescind Rules 25 and 42 of the Alaska Rules of Court. Because Alaska Rules of Court are promulgated by the Alaska Supreme Court, rescinding the court rules would require a two-thirds vote of the members in both the Senate and the House, under the State Constitution, Article IV, Section 15 (see attachment B).

#### Number of Peremptions

As indicated earlier in this memorandum, Alaska is divided into four judicial districts. District 1 includes judges in Ketchikan, Juneau, Sitka, Wrangell and Petersburg. District 2 includes judges in Nome, Bethel, Barrow and Kotzebue. The superior and district court judges in District 3 are located in Anchorage, Kodiak, Palmer, Kenai, Homer and Valdez. In District 4, the superior and district courts are all located in Fairbanks; however, the Fairbanks judges also cover peremptions in Bethel.

In 1983, there were a total of 1,770 peremptions in Alaska district and superior courts. This total does not include recusals which accounted for an additional 188 changes in case assignments. Recusals refer to instances in which a judge disqualifies himself or herself from hearing a lawsuit because of interest or prejudice. In District 1, 398 peremptions occurred, 331 in District Court and 67 in Superior Court. In District 2, area court administrator Mike Hall estimated that judges were perempted approximately 44 times; however, he was not able to provide a breakdown of the total for superior and district courts. Superior and district judges in District 3 accounted for a total of 937 peremptions, 407 in district court and 530 in superior court. Finally, in District 4, judges were perempted 391 times, 250 in district court and 141 in superior court. This information is also presented in Table 1.

For purposes of comparing the number of cases perempted to the number of total cases, we collected the number of nontraffic case filings from each district. We did not include the traffic filings because they are comprised mainly of traffic tickets, which rarely involve

peremptions. The total filings for fiscal year 1983 in all four judicial districts is 59,854 cases. Therefore, peremptions were involved in approximately three percent of all cases in Alaska in 1983.\*

TABLE 1  
 PEREMPTIONS, RECUSALS & NON-TRAFFIC FILINGS--1983

	<u>District One</u>	<u>District Two</u>	<u>District Three</u>	<u>District Four</u>	<u>Totals</u>
PEREMPTIONS (CY 83)					
District Court	331	N/A	407	250	988*
Superior Court	67	N/A	530	141	738*
Total	<u>398</u>	44	<u>937</u>	<u>391</u>	<u>1,770</u>
RECUSALS (CY 83)					
District Court	17	N/A	4	12	33*
Superior Court	47	N/A	12	71	130*
Total	<u>64</u>	<u>25</u>	<u>16</u>	<u>83</u>	<u>188</u>
NON-TRAFFIC FILINGS (FY 83)					
District Court	6,658	1,638	26,419	6,775	41,490
Superior Court	<u>2,274</u>	<u>776</u>	<u>11,732</u>	<u>3,582</u>	<u>18,364</u>
Total	<u>8,932</u>	<u>2,414</u>	<u>38,151</u>	<u>10,357</u>	<u>59,854</u>

\*Subtotals do not include District 2 information.  
 N/A = not available.

Prepared by House Research Agency, January 1984.

Peremptions are not distributed evenly among districts or among judges within each district. For example, District 1 has five superior court judges and two district court judges; however, in 1983, Judge Williams, a district court judge in Juneau, accounted for 320 of the total 398 peremptions in District 1. Furthermore, six judges accounted for 61 percent of all the peremptions statewide, or a total of 1,086 of the 1,770 peremptions in 1983. Those judges, their locations and number of peremptions are as follows:

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\*Total case filings were recorded on a fiscal year basis, whereas the number and costs of peremptions and recusals were reported on a calendar-year basis. However, we believe the information from the calendar-year roughly parallels that of the fiscal year.

District 1:	Judge Williams, Juneau	320
District 3:	Judge Hornaday, Homer	235
	Judge Carlson, Anchorage	155
	Judge Tucker, Anchorage	126
District 4:	Judge Cline, Fairbanks	150
	Judge Connelly, Fairbanks	100

According to several of the judges we contacted, peremption rates may vary greatly from year to year. For example, Judge Cook of the superior court in Bethel contended that the response of an individual judge to particular kinds of cases has a lot to do with the incidence of peremptions. Consequently, it is not possible to say that the number of peremptions in 1983 will be matched again in 1984. In addition, because of the lack of available data on peremption rates, we are not able to determine if the rate for 1983 was representative of the rates in previous years.

#### Cost of Peremptions

Information on the cost of peremptions in 1983 was extremely difficult to find. First, little information is collected on the cost of travel and per diem for peremptions. Second, many of the costs of peremption, such as lost efficiency, calendaring and other administrative problems are difficult to quantify. In an attempt to provide you with an estimate of the costs of peremptions in 1983, we contacted the area court administrators in each district, and Mr. Robert Fisher, Fiscal Officer for the Alaska Court System.

Chris Carlisle, area court administrator for District 1, had fairly in-depth records on costs of travel and per diem for Judge Gucker in 1983. Judge Gucker is the District Court Judge in Ketchikan; however, he routinely sits in the Juneau District Court one week every month because of the high number of peremptions incurred by Judge Williams of Juneau. As indicated earlier, Judge Williams was perempted 320 times in 1983. In 1983, the costs of per diem for the days Judge Gucker presided in the Juneau District Court amounted to \$6,379. This amount also included the cost of transportation while in Juneau. In addition, the court spent \$2,417 on his travel to and from Juneau. In 1983, the total costs of travel and per diem for Judge Gucker to cover Judge Williams' peremptions amounted to \$8,796.

Al Szal, area court administrator for District 3, estimated the costs of Judge Hornaday's peremptions in the Homer District Court as approximately \$10,000 per year. This figure includes travel and per diem for both the judge who travels from Anchorage to replace Judge Hornaday, and in some instances for Judge Hornaday to travel to Anchorage

to cover his replacement's cases. Judge Hornaday's peremptions usually result in a judge traveling from Anchorage one week out of each month of the year. Mr. Szal estimated that hearing a case in Homer usually involves a three to four-day stay for the substitute judge. Mr. Szal cautioned that the actual costs of peremptions for Judge Hornaday could be more or less than \$10,000 depending on the distances traveled by the replacement judges as well as on their length of stay.

Peremptions are usually more costly in rural locations such as Bethel. Mac Gibson, area court administrator for District 4 which covers peremptions in Bethel, did not have a record of money spent on perempted cases in Bethel. However, he was able to estimate the costs of covering the 20 cases perempted in Bethel in 1983. According to Mr. Gibson, a round trip ticket from Fairbanks to Bethel costs \$436. However, because of the flight schedule, a judge traveling to Bethel must usually overnight in Anchorage, and receives a per diem of \$85 to cover that expense. While in Bethel, the judge pays \$100 per night for a hotel and receives \$40 a day for meals. The average length of stay in Bethel to hear a case is three days. The judge is then able to fly directly back to Fairbanks on the evening of the third day.

Given those figures, Mr. Gibson calculated that it costs approximately \$841 per trip for a Fairbanks judge to preside over cases perempted in Bethel. In some instances this figure is doubled because the Fairbanks judge is required to bring an in-court clerk along. However, to calculate the total costs of covering perempted cases in Bethel for 1983, Mr. Gibson multiplied the cost per trip for an individual judge times the 20 cases perempted in 1983 and arrived at \$16,820.

The estimated costs of travel and per diem for covering the peremptions in Homer, Bethel, and in Juneau's district court for three judges amounted to approximately \$35,616. It should be noted that Judge Williams and Judge Hornaday have the two highest number of peremptions for 1983, and that the costs of peremptions in Bethel are usually the highest in the state because of the distance and cost of living there.

After obtaining the above information from individual districts, we contacted Robert Fisher, Fiscal Officer for the Alaska Court System. Mr. Fischer estimated that \$25,000 was spent per year for peremptions statewide. He explained that the accounting office of the Alaska Court System arrived at that estimate after conducting a study of all travel and per diem claims filed by superior and district court judges between July 1, 1982 and December 31, 1982. The claims which involved peremptions were totalled, and then that amount was doubled to come up with a yearly cost of \$25,000 for FY 83.

Mr. Fisher believes that the estimate is accurate even if it appears low. He notes that the court system avoids greater costs by calendaring

Representative Fritz  
January 24, 1983  
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several perempted cases together in one area, so that a judge traveling to that area may hear several cases per trip. In addition, he maintained that many of the total peremptions occur in Anchorage and Fairbanks, which allows for perempted judges to swap cases at no cost to the State because of the many judges in these locations.

However, according to Judge Tunley, Presiding Judge for District 2, swapping cases is not always feasible because of the 120-day limit within which some cases must be heard. In addition, he points out that individual cases progress at different rates, and that some perempted cases involve several trips for pre-trial, sentencing and other hearings.

Mr. Fisher agreed that the \$25,000 estimate does not reflect all of the costs involved in peremptions. He pointed out that down time for judges, such as the time spent on airplanes and in transit to and from airports, also costs the State money. For example, Mr. Fisher estimated that the State pays a superior court judge approximately \$86.00 per hour. If that judge spends two hours on a round trip flight from Anchorage to Homer and back, plus an additional two hours of the work day preparing to leave, traveling to the airport, and waiting for a plane, the State pays the judge for four hours of foregone court work; this amounts to a total of \$344.00 per trip. Judge Hornaday was perempted 235 times in 1983; however, it is not evident how many trips resulted from those peremptions. But if, for example, those 235 peremptions resulted in 20 trips, down time could have cost the State approximately \$6,880 for one judge's peremptions.

The peremption of judges also results in other costs which are not easily quantified. For example, Judge Schultz, Presiding Judge for District 1, notes that the estimated total cost of peremptions in District 1 for 1983 does not reflect the administrative costs of (1) rescheduling Judge Gucker's cases in his own court when he is hearing cases perempted in Juneau, (2) the costs incurred when the magistrate in Ketchikan leaves his job to cover some of Judge Gucker's caseload while he's gone, or (3) the cost of lost efficiency. Judge Schultz contends that the normal disposition rate for a case in District 1, or the time it takes to reach a final settlement is 90 days. However, he asserted that the disposition rate in Juneau has increased to 140 days because of the high number of peremptions in the district court there, and the time each peremption involves.

We regret that we are unable to supply you with a single estimate of the costs of peremptions for 1983. The data is not available, and we are not in a position to estimate those costs with the information we have to date. If you would like us to attempt to gather additional information about the costs of peremptions, we will do so.

Representative Fritz  
January 24, 1984  
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We hope the information we collected is useful to you. Please contact us if you have any further questions regarding this topic or any other topic of interest to you.

HBP

Attachments

**Rule 25. Judge—Disqualification or Disability.**

(a) **Before Trial.** Where a judge of the superior court is disqualified or for any other reason is unable to sit in the trial or hearing of any pending matter, the presiding judge or the chief justice of the supreme court shall designate another judge of the judicial district in which the matter is pending, or a judge temporarily assigned thereto, to hear the matter.

(b) **During Trial.** If a judge holding superior court be prevented during a trial from continuing to preside therein, the presiding judge or the chief justice of the supreme court shall designate another judge of the superior court to sit in such court to complete such trial, as if such other judge had been present and presiding from the commencement of such trial, provided, however, that from the beginning of the taking of testimony at such trial a stenographic or electronic record of such trial shall have been made so that the judge so continuing may familiarize himself with the previous proceedings at such trial.

(c) **After Verdict.** If by reason of absence from the district, death, sickness or other disability, the judge before whom the action has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(d) **Change of Judge as a Matter of Right.** In all courts of the state, a judge may be peremptorily challenged as follows:

(1) **Entitlement.** In any criminal case in superior or district court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge. When multiple defendants are unable to agree upon the judge to hear the case, the trial judge may, in the interest of justice, give them more than one change as a matter of right; the prosecutor shall be entitled to the same number of changes as all the defendants combined.

(2) *Procedure.* At the time required for filing the omnibus hearing form, or within five days after a judge is assigned the case for the first time, a party may exercise his right to change of judge by noting the request on the omnibus hearing form or by filing a "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. A judge may honor a timely informal request for change of judge, entering upon the record the date of the request and the name of the party requesting it.

(3) *Re-Assignment.* When a request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury before the action can be transferred to another judge. However, if the named judge is the presiding judge, he shall continue to perform the functions of the presiding judge.

(4) *Timeliness.* Failure to file a timely request precludes a change of judge under this rule as a matter of right.

(5) *Waiver.* A party loses his rights under this rule to change a judge when he agrees to the assignment of the case to a particular judge or participates before him in an omnibus hearing, any subsequent pretrial hearing, a hearing under Rule 11, or the commencement of trial. No provision of this rule shall bar a stipulation as to the judge before whom a plea of guilty or of nolo contendere shall be taken under Rule 11. (Amended by Supreme Court Order 185 effective July 1, 1974; and by Supreme Court Order 292 effective February 21, 1978)

(b) CROSS REFERENCE: Crim. Form 34

1. Simplification of the issues.
2. Possibility of obtaining admissions of fact and documents which will avoid unnecessary proof.
3. The number of expert witnesses or character witnesses or other witnesses who are to give testimony of a cumulative nature.
4. Such other matters as may aid in the disposition of the proceeding.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Superior Court Judge

### 34. Order Transferring Case to Another Judge [Cr. R. 25(b)]

The Honorable \_\_\_\_\_, Judge of the Superior Court for the \_\_\_\_\_ Judicial District, having been prevented from presiding further in the trial of this action, it is hereby

ORDERED that pursuant to Criminal Rule 25(b), the Honorable \_\_\_\_\_, Judge of the Superior Court for the \_\_\_\_\_ Judicial District be designated to complete the trial in the same manner as if he had been present and presiding from the commencement of such trial, and it is further

ORDERED that a stenographic or electronic record of such trial from the beginning of the taking of testimony at such trial shall be made available by the clerk of the court to the Honorable \_\_\_\_\_ so that he may familiarize himself with the previous proceedings at such trial.

DATED: \_\_\_\_\_

\_\_\_\_\_  
[Chief Justice of the Supreme Court  
or  
Presiding Judge]

### Rule 42. Consolidation—Separate Trials— Change of Judge.

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Alaska Constitution and Statutes of Alaska.

(c) **Change of Judge as a Matter of Right.** In all courts of the state, a judge or master may be peremptorily challenged as follows:

(1) **Nature of Proceedings.** In an action pending in the Superior or District Courts, each side is entitled as a matter of right to a change of one judge and of one master. Two or more parties aligned on the same side of an action, whether or not consolidated, shall be treated as one side for purposes of the right to a change of judge, but the presiding judge may allow an additional change of judge to a party whose interests in the action are hostile or adverse to the interests of another party on the same side. A party wishing to exercise his right to change of judge shall file a pleading entitled "Notice of Change of Judge." The notice may be signed by an attorney, it shall state the name of the judge to be changed, and it shall neither specify grounds nor be accompanied by an affidavit. A judge may honor an informal request for change of judge. When he does so, he shall enter upon the record the date of the request and the name of the party or parties requesting change of judge. Such action shall constitute an exercise of the requesting party's right to change of judge.

(2) **Filing and Service.** The notice of change of judge shall

be filed and copies served on the parties, the presiding judge, and the area court administrator, if any, in accordance with Rule 5, Alaska Rules of Civil Procedure.

(3) *Timeliness.* Failure to file a timely notice precludes change of judge as a matter of right. Notice of change of judge is timely if filed before commencement of trial and within five days after notice that the case has been assigned to a specific judge. In a court location having a single resident judge of the level of court in which the case is filed, the case shall be assigned to that judge when it is at issue upon a question of fact and the clerk shall immediately notify the parties in writing of such assignment. Where a party enters an action after the case has been assigned to a specific judge, a notice of change of judge shall also be timely if filed by the party before the commencement of trial and within five days after he appears or files a pleading in the action.

(4) *Waiver.* A party waives his right to change a particular judge as a matter of right when he knowingly participates before that judge in:

(i) Any judicial proceeding which concerns the merits of the action and involves the consideration of evidence or of affidavits; or

(ii) A pretrial conference; or

(iii) The commencement of trial; or

(iv) If the parties agree upon a judge to whom the case is to be assigned. Such waiver is to apply only to the agreed-upon judge.

(5) *Assignment of Action.* After a notice of change of judge is timely filed, the presiding judge shall immediately assign the matter to a new judge within that judicial district. Should that judge be challenged, the presiding judge shall continue to assign the case to new judges within the judicial district until all parties have exercised or waived their right to change of judge or until all superior court judges, or all district court judges, within the judicial district have been challenged peremptorily or for cause. Should all such judges in the district be disqualified, the presiding judge shall immediately notify the administrative director in writing and request that he obtain from the Chief Justice an order assigning the case to

another judge.

If a judge to whom an action has been assigned later becomes unavailable because of death, illness, or other physical or legal incapacity, the parties shall be restored to their several positions and rights under this rule as they existed immediately before the assignment of the action to such judge. (Amended by Supreme Court Order 186 effective July 1, 1974; by Supreme Court Order 258 effective November 15, 1976; by Supreme Court Order 262 effective December 31, 1976; and by Supreme Court Order 465 effective June 1, 1981)

(a) CROSS REFERENCE: Civ. Form 78

torial role. *Keel v. State*, Sup. Ct. Op. No. 1290 (File No. 2883), 552 P.2d 155 (1976).

**C. Paragraph (a)(6).**

Maintenance of appearance of impartiality. — Paragraph (a)(6) of this section does not provide for disqualification where the sole concern is maintenance of the appearance of impartiality. However, in light of the importance of promoting public confidence in the integrity and impartiality of the judiciary, it would be well to permit disqualification under such circumstances. *Amidon v. State*, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

Review of decisions under paragraph (a)(6). — The supreme court rejected the argument that the disqualification standards under paragraph (a)(6) are wholly subjective and therefore not amenable to appellate review. Clearly, review is contemplated on a challenge for cause grounded in bias. The supreme court's duty to assure that judicial proceedings comply with due process mandates appellate scrutiny of allegations of bias. *Coffey v. State*, Sup. Ct. Op. No. 1732 (File No. 3602), 585 P.2d 514 (1978), modified on rehearing on other grounds, 596 P.2d 10 (1979).

Since the initial determination under paragraph (a)(6) of this section has been placed in the discretion of the trial judge, that judge's decision should be given substantial weight. When the judge does not recuse himself or herself, the decision should be reviewable on appeal only if it amounted to an abuse of discretion. *Amidon v. State*, Sup. Ct. Op. No. 1999 (File No. 3664), 604 P.2d 575 (1979).

Collateral references. — Disqualification of judge by relative's ownership of stock in corporation which is a party to action. 8 ALR 295; 110 ALR 472.

Right of party in course of litigation to challenge title or authority of judge. 114 ALR 1207.

Disqualification of judge in pending case as subject to revocation or removal. 162 ALR 641.

Relationship of judge to one who is party in an official or representative capacity as disqualification. 10 ALR2d 1307.

Mandamus as remedy to compel assertedly disqualified judge to recuse self or to certify his disqualification. 45 ALR2d 937.

Relationship to attorney as disqualifying judge. 50 ALR2d 143.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member. 64 ALR2d 600.

Prior representation or activity as attorney or counsel as disqualifying judge. 72 ALR2d 443.

Time for asserting disqualification. 73 ALR2d 1238.

Intervenor's right to disqualify judge. 92 ALR2d 1110.

Disqualification of judge for bias against counsel for litigant. 23 ALR3d 1416.

Disqualification of original trial judge to sit on retrial after reversal or mistrial. 60 ALR3d 176.

Disqualification of judge by state, in criminal case, for bias or prejudice. 68 ALR3d 509.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge. 75 ALR3d 1021.

**Sec. 22.20.022. Peremptory disqualification of a superior court judge.** (a) If a party or a party's attorney in a district court action or a superior court action, civil or criminal, files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained, the presiding district court or superior court judge, respectively, shall at once, and without requiring proof, assign the action to another judge of the appropriate court in 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.

(b) No judge or court may punish a person for contempt for making, filing or presenting the affidavit provided for in this section, or a motion founded on the affidavit.

... by relative's ... 110 ALR 472. ... of litigation to ... of judge. 114

... pending case ... removal. 162

... who is party ... ve capacity as ... 1307.

... to compel ... to recuse self ... ion. 45 ALR2d

... attorney as ... 2d 143.

... in proceedings ... or involving ... is a member.

... tivity as attor- ... ng judge. 72

... ilification. 73

... alify judge. 92

... r bias against ... d 1416. ... trial judge to ... r mistrial. 60

... by state, in ... prejudice. 68

... or social club ... is ground for ... ALR3d 1021.

... superior ... ourt action ... t alleging ... obtained, ... vely, shall ... ther judge ... the chief ... ng or trial ... s made in

... making, ... ion, or a

(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.

(d) A party or a party's attorney may not file more than one affidavit under this section in an action and no more than two affidavits in an action. (§ 2 ch 48 SLA 1967; am § 6 ch 143 SLA 1968; am § 1 ch 116 SLA 1971)

Cross references. — For the court rules on change of judge as a matter of right, see Civ. R. 42 (c) and Cr. R. 25 (d). Civil R. 42 (c) provides that a notice of change of judge ... "shall neither specify grounds nor be accompanied by an affidavit."

Editor's notes. — This section was

redrafted by the revisor of statutes to remove personal pronouns in conformity with AS 01.05.031(c) and § 4, Chapter 58, SLA 1982.

Legislative history reports. — For report on ch. 48, SLA 1967 (SB 66), see 1967 House Journal, p. 311.

NOTES TO DECISIONS

- I. General Consideration.
- II. Application of Right of Peremptory Challenge.
- III. Procedure.

I. GENERAL CONSIDERATION.

Constitutionality. — A litigant is entitled to a fair hearing before a tribunal which is disinterested, impartial and unbiased, and a statute which affords that right by providing some means for showing bias or lack of impartiality does not offend the principle of separation of powers of government. Channel Flying, Inc. v. Bernhardt, Sup. Ct. Op. No. 530 (File No. 1082), 451 P.2d 570 (1969).

Where no affidavit is necessary, a judge may be disqualified for good cause, bad cause, or no cause at all. But where an affidavit is required, the assertion of bias or prejudice under oath is at least some showing or an imputation of the fact that the judge is disqualified, and this is sufficient to save the statute from successful attack on constitutional grounds. Channel Flying, Inc. v. Bernhardt, Sup. Ct. Op. No. 530 (File No. 1082), 451 P.2d 570 (1969).

This section is not constitutionally invalid as an attempt to usurp the rule-making powers of this court insofar as it provides for a peremptory disqualification of a judge. Channel Flying, Inc. v. Bernhardt, Sup. Ct. Op. No. 530 (File No. 1082), 451 P.2d 570 (1969); Gielfels v. State, Sup. Ct. Op. No. 1295 (File No. 2787), 552 P.2d 661 (1976);

Wamser v. State, Sup. Ct. Op. No. 1768 (File No. 4166), 587 P.2d 232 (1978).

This section does not merely regulate procedure. With or without it the particular action in court takes the same course. The statute rather creates and defines a right — the right to have a fair trial before an unbiased and impartial judge. This is something more than merely prescribing a method of enforcing a right. The main subject matter of the statute is substantive in nature and was within the province of the legislature to deal with. Channel Flying, Inc. v. Bernhardt, Sup. Ct. Op. No. 530 (File No. 1082), 451 P.2d 570 (1969).

Legislative history. — See Peterson v. State, Sup. Ct. Op. No. 1411 (File No. 2642), 562 P.2d 1350 (1977).

This section reflects a fundamental tenet of the Alaska system of justice that every litigant shall have his rights adjudicated by a judge who is disinterested, impartial, and unbiased. In re G.K., Sup. Ct. Op. No. 796 (File Nos. 1627, 1654, 1674), 497 P.2d 914 (1972).

This section codifies a fundamental tenet of the Alaska system of justice, the right to a hearing by a fair and impartial judge. Kvasnikoff v. State, Sup. Ct. Op. No. 1153 (File No. 2363), 535 P.2d 464 (1975).

This section is designed to further the substantive right of a litigant to a fair trial before an unbiased judge. Riley v. State, Sup. Ct. Op. No. 2038 (File No. 4672), 608 P.2d 27 (1980).

officers of the State.

(The amendment to this section was approved by the voters of the state August 27, 1968 and became effective October 11, 1968. The words "and the commission on judicial qualifications" were incorporated in this section.)

Restrictions

SECTION 14. Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, and the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

Rule-making Power

SECTION 15. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Court Administration

SECTION 16. The chief justice of the supreme court shall be the administrative head of all courts. He may assign judges from one court or division thereof to another for temporary service. The chief justice shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the supreme court and to supervise the administrative operations of the judicial system.

(The amendment to this section was approved by the voters of the state August 25, 1970 and became effective October 10, 1970. The amendment substituted "the pleasure of the supreme court" for "his pleasure" in the last sentence.)

ARTICLE V

SUFFRAGE AND ELECTIONS

Qualified Voters

SECTION 1. Every citizen of the United States who is at least eighteen years of age, who meets registration, residency requirements which may be

Disqual

Method Voting: Election Contest

Voting Precinct Register

General Election

Christian Ministers Association of Kachemak Bay  
P.O. Box 2018  
Homer, Alaska 99603

December 9, 1982

Judge Mark C. Rowland  
303 K Street, Courtroom D  
Anchorage, AK 99501

Dear Judge Rowland,

Your office and the judicial system are held in high regard by us and our children. We value justice as one of the key ingredients in our democratic way of life. We regularly instruct our children to respect the law and to deal in a just way with their companions and fellow citizens.

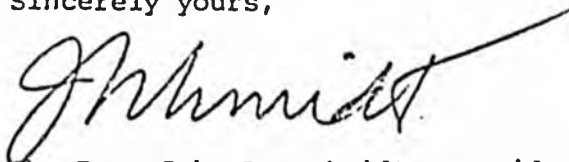
In this context we cannot understand why you should order Homer District Court Judge James Hornaday transferred to Anchorage against his will and against the overwhelming wishes of our community. As we understand, there is no precedence for this.

Therefore, we ask — for justice sake — that Judge Hornaday be retained as our District Court Judge. Secondly, you should know that we wholeheartedly endorse the policies of Judge Hornaday in sentencing DWI offenders. Finally, we request that the whole peremption policy be reviewed in light of these circumstances.

A judge serves his community in an exceptional manner. His policies are supported by the people he serves. He is an outstanding example for our children. Yet, he is transferred against his will. That seems a strange reward — even stranger justice.

Speaking for the Christian Ministers Association, I am

Sincerely yours,



The Rev. John D. Schmidt, President  
235-7600

cc: Chief Justice Edmond Burke

December 6, 1982

Homer  
Chamber  
of  
Commerce

Judge Mark C. Rowland  
303 K Street  
Courtroom D  
Anchorage, AK 99501

Dear Judge Rowland:

The community and surrounding areas of Homer is greatly dismayed to learn of your decision to transfer Judge James C. Hornaday from Homer to Anchorage. We strongly urge your reconsideration in this matter.

Judge Hornaday has been an excellent judicial representative for Homer for many years. His home and family are here. We do not want to lose Judge Hornaday to this area.

This community has steadfastly supported Judge Hornaday's courageous stand against the crime of drunken driving and we wholeheartedly support his sentencing procedures.

Please find attached petitions of support in favor of Hornaday being retained as District Judge in this area.

Sincerely,

HOMER CHAMBER OF COMMERCE

*Jim Daily*  
Jim Daily,  
President

JD:lag  
Enclosures

cc: Governor Bill Sheffield  
Judge Edmond Burke  
Homer City Council  
Kenai Peninsula Borough Assembly  
Rep. Milo Fritz  
Hugh Malone  
Sen. Paul Fischer  
Don Gilman

# COMMUNITY MENTAL HEALTH CENTER

Box 2274  
Homer, Alaska 99603-2274  
(907) 235-7701



## RESOLUTION

SOUTH PENINSULA MENTAL HEALTH ASSOCIATION, INC.

December 11, 1982

Whereas, Judge James Hornaday has proven to be an effective and competent District Court Judge serving the Homer Court, and

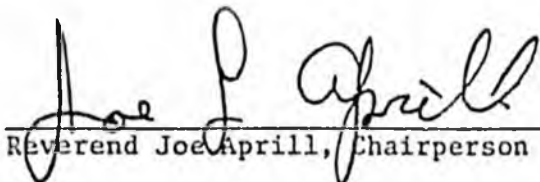
Whereas, Judge Hornaday was overwhelmingly endorsed by the residents of his jurisdiction during the recent election, and

Whereas, the right of the State Judicial system to move a Judge without public hearing or other procedural considerations is currently being questioned,

Be it hereby resolved that the South Peninsula Mental Health Association requests the retention of Judge Hornaday in the Homer District Court, and

Be it further resolved that the judicial pre-emption statutes in Alaska should be thoroughly reviewed and that the procedures for moving a Judge from one jurisdiction to another should be standardized through promulgation of appropriate regulations.

Resolution passed at the Board of Directors meeting on December 11, 1982.

  
Reverend Joe Aprill, Chairperson

C. R. BALDWIN  
ATTORNEY  
P. O. BOX 4210  
KENAI, ALASKA 99611  
TELEPHONE (907) 283-7167

December 23, 1982

Milo H. Fritz  
Box 158  
Anchor Point, Alaska 99556

Dear Milo:

This letter is prompted by the article concerning your position on certain legal reforms you have proposed which appears in the December 20 issue of The Clarion.

You were quoted as indicating that you expected the legal profession to oppose your bill removing the right of peremptory challenges. I know of very few attorneys who have ever exercised their right to file a peremptory challenge against a judge. I, myself, have never filed one and I agree that no such right should exist. I have not made a study of other jurisdictions but would be very surprised if the right exists in very many states. Presumably, the law was originally passed by well meaning individuals who enjoy tinkering with the system. I wish you well in pushing the legislation and offer you my support.

I was surprised that you were quoted as indicating your interest in enacting legislation which would impose a limit on attorney's fees in probate matters. Although I do not do any probate work myself at the present time, it has been my experience in the past that after the passage of the Uniform Probate Act and the institution of simplified probate procedures, many attorneys are now charging fees which are lower than they were in the past. In the case of a large estate I would suggest that a fee based upon the percentage of that estate would be unconscionable. From the attorney standpoint, it generally does not cost any more to probate a large estate than to probate a small one. Prior to the passage of the Uniform Probate Act, that was not the case.

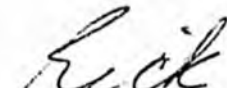
Philosophically, I am opposed, as I am sure you are,

Milo H. Fritz  
December 23, 1982  
Page Two

to the State interfering in contract relationships between professionals and their clients. I would suggest that a legislature which would concern itself with fees charged by an attorney to his client would also not hesitate in interfering with the fees charged by a physician to his patient. As a practical matter, a client who is overcharged by an attorney presently has recourse to the fee arbitration panel which operates under the auspices of the Alaska Bar Association. In light of the foregoing, I would request that you rethink your position on supporting a limit on attorneys fees.

Thank you for your attention to my comments. I wish you well in Juneau this year.

Very truly yours,

  
C. R. BALDWIN

CRB/hs

CITY OF HOMER  
P. O. BOX 335  
HOMER, ALASKA 99603-0335



Box 335  
Homer, Alaska 99603

## CITY OF HOMER

REPLY TO:

- City Hall  
Ph. (907) 235-8121
- Port of Homer  
Ph. (907) 235-8597
- Harbor Master  
Ph. (907) 235-8959
- Public Works Dept.  
Ph. (907) 235-8120
- City Engineer  
Ph. (907) 235-6368

December 6, 1982

The Honorable Mark Rowland  
Presiding Judge of the Superior Court  
303 "K" Street  
Anchorage, AK 99501

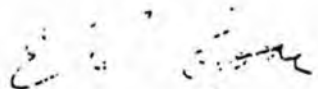
Dear Judge Rowland:

We, as a community, strongly oppose the transfer of Judge James Hornaday. Judge Hornaday's stance on drunk driving is looked upon as a favorable public service in the community. Perhaps the laws of pre-emption should be closely scrutinized and amended out of necessity in administering a trial court system.

Jim Hornaday is an active participant in community affairs, an impeccable family man, and contributes strong support to this rural community. The type of program he advocates serves the individual rights of our citizens to travel the streets of Homer with less probability of being harmed by drunk drivers.

As Mayor of Homer, I petition you to cancel the transfer order removing Judge Hornaday from this community as District Court Judge.

Sincerely,

  
Erle Cooper  
Mayor

EC:lcr

CC: Governor Bill Sheffield  
Judge Edmond Burke  
District 5, Legislative Delegation

CITY OF HOMER  
HOMER, ALASKA

RESOLUTION 82-20(S)

A RESOLUTION SUPPORTING A STIFF SENTENCING  
POLICY FOR DRIVING WHILE INTOXICATED (DWI).

WHEREAS, the absence of sidewalks in Homer requires pedestrians to walk along the traveled ways, subjecting themselves to potential vehicle associated accidents; and,

WHEREAS, studies which have been conducted show that the higher the blood alcohol level, the greater the likelihood of an accident; and,

WHEREAS, there has been an increase in D.W.I. cases of some seventy-seven percent (77%) between 1980 and 1981 in the Homer District Court; and,

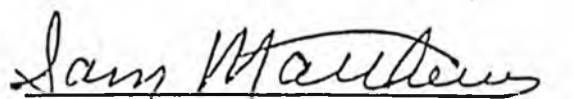
WHEREAS, the City Council of the City of Homer wishes to have life, liberty and property protected from potential injury by person(s) who drive while under the influence of alcohol;

NOW THEREFORE, BE IT RESOLVED that the Common Council of the City of Homer, Alaska, supports a stiff sentencing policy for Driving While Intoxicated (DWI).

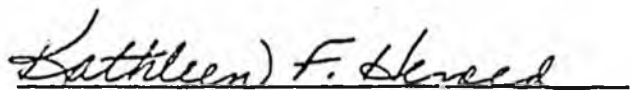
BE IT FURTHER RESOLVED that copies of this resolution be directed to the State legislators of Alaska.

DATED in Homer, Alaska this 14th day of June, 1982.

CITY OF HOMER

  
Sam Matthews, Mayor Pro tem

ATTEST:

  
Kathleen F. Herold, City Clerk

TESTIMONY OF JUDGE JAMES D. HORNADAY, HOMER  
February 2, 1983

Mr. Chairman and ladies and gentlemen of the Committee, thank you for holding this hearing and inviting me to address the Committee. I hope I am not the monster judge that everyone has been talking about. My name is James D. Hornaday and from a perspective of nearly 20 years in Alaska I am speaking to you today as a judge. The judicial cannons permit and even require that judges speak out for the improvement of the administration of justice. And with all of the comments by many of my lawyer friends I feel a little like David when he went up against Goliath. The men and women of good will can and do differ in their opinions, and it does remind a little of the old Alaska adage that if the lawyers are against something it must be worthwhile. I wish it were someone else who was on the line rather than me, frankly I would rather be playing basketball or working on a legal history project. But the question of the peremptory challenge is involved with the independence of the judiciary and the decreasing respect for the judiciary. First of all, the peremptory challenge is not a fundamental constitutional right; it does not even exist anywhere in the Federal system, and there are Federal judges in every state and territory. Apparently it does not even exist in the vast majority, about two-thirds of the states. Alaska is in the extreme minority. It did not exist in Alaska until a few years ago when some lawyers pushed it through the Legislature. The Federal system and the majority of states get along just fine without it. Now as one example, drunk driving cases are the most serious problem facing the Alaska Court System. Over half of all the jury trials in the entire Court System are drunk driving cases. Drinking was involved in over 80% of the traffic fatalities; over 200 thousand are killed or injured annually on our nation's highways. Let's make clear what the Legislature has already done; the Legislature has passed legislation providing for up to one year in jail and \$5,000 fine, revocation of licenses and community work. Now the statutes specifically states that for the first offense a defendant is to receive not less than 72 consecutive hours. It is too serious a problem to leave in the hands of the attorneys and that is the none effect of the peremptory challenge without cause. Judges are concerned about the peremptory challenge; it is affecting sentences. The Chief Justice has stated publicly that the peremptory challenge moderates sentences and that a judge has to walk a fine line and if they get too far over they will be removed by the peremption. I was told by the presiding judge that I had to take peremptions into consideration when I sentence. It is the most frequent topic of conversation at the Annual Judicial Conference. The leading authority on court delay called the Alaska peremptory challenge an absolute abomination, those were his words. Representatives of the Nacional Center of State Courts were amazed at the existence of the removal without cause. I have heard judges tell the Chief Justice they are concerned about the peremption. It is a problem state-wide, not just in Homer. You have heard the lawyer in Bethel and the problems there. You've heard the judges in Fairbanks. It exists in Kodiak, Ketchikan, Juneau and all over the state, even in multi-judge areas. Now we announced a pattern of sentencing in drunk driving cases in Homer about a year ago which was effective, but sentences were clearly within the sentences permitted by the Legislature. Fifteen days is less than 5% of the maximum penalty. Although the announced pattern is no longer in effect and was rescinded when the higher court ruled that it could not be applied. There are sentencing patterns in Alaska, attorneys keep records of the sentences of judges. So there are patterns but known only to the judges and the lawyers. The public, including the potential defenders, do not know the patterns. It is time to open up the System and bring it out from behind the closed doors of the

legal profession. Now I was a lawyer for 10 years and you are never going to satisfy the lawyers on sentencing. About 6 years ago we initiated the first work program, alternate work program, for drunk drivers in Alaska. Some lawyers supported, but other complained that work was a cruel and unusual punishment. Now the program has been reinstated pursuant to the community work which the Legislature has made a sentencing tool. Now the lawyers are complaining that we are giving too much community work. Also the argument that the System would be flooded with time consuming challenges for cause is questionable, as several attorneys have indicated that they would not use challenges for cause. Further the presiding judge denied a challenge because against me on hearing a DWI case after the announced policy was rescinded. The hearing took all of 10 minutes. The Court System and the people of Alaska should not be held held hostage by attorneys threatening to plug the System with challenges for cause. Further judges will disqualify themselves if for some reason they should not hear a case. There is already a procedure for this approach that is in effect. However, again note that a judge has to give a reason why they are disqualifying themselves. Related to the peremptory challenge is another deep concern which I have as a 20 year Alaskan and as a lawyer and a judge and a citizen, and that is the growing lack of respect for the Alaska Judiciary among the members of the public. Reportedly, concern over the Justice System trailed only the capitol move and subsistence in intensity in the recent election. Almost half of the voters in the Third District voted not to retain the trial judges last November. This negative vote is up nearly 10% in only 4 years. How many years will it be before all judges are defeated? Some of the longer serving judges remember when they received 85% approval ratings. For the first time in nearly 20 years in the legal profession, so many people told me they were voting against all of the judges that I lost count. And note that, at least to-date, that most of the people, most of the lay people, testifying to you are against the peremption, only the lawyers are testifying before you in favor of it. That should tell you something. We pride ourselves in Alaska on the merit selection appointment procedure for judges. The Judicial Council recommends, the Governor appoints and the people vote, and yet the present situation with the peremptory challenge is worse than the most partisan political election of judges, and that a very few attorneys can remove a judge and hold the System hostage. The cost to the public and the wasted expense and time is high. The selection process of which we are so proud and the public vote means absolutely nothing. Just as an example, I was required to move to Homer to take the judgeship in Homer. The Judicial Council recommended me for Homer and the Governor specifically appointed me to Homer. The family moved here and has put down deep roots; we have children in school of all ages. I received good ratings from the lawyers and the highest rating from the Alaska Peace Officers and was retained overwhelmingly by the voters in the November election in my home area by a 2 to 1 margin. And although I appreciate Mrs. Barnes' invitation to Anchorage, I would prefer frankly to remain in Homer. I did live in Anchorage for a couple years and I have, we have, a lot of friends up there, however we are pretty deeply rooted in Homer at the present time. Two weeks after the election I was asked to transfer to Anchorage because of the peremptions. I have been assured that there is no other reasons for my transfer, only the peremptions. None of my sentences have ever been reversed as excessive. Now there are checks and balances that are far more appropriate than peremptions without cause, and they are numerous. If a judge is doing something improper turn them over to the Judicial Qualifications Commission, or challenge the judge for cause, or test the judge in the retention elections, or appeal the judge's decision, or ask the judge to voluntarily disqualify himself. The message is going out loud and clear to the judges in Alaska, to the attorneys and to the public that inspite of the vote of thousands that vote means nothing, and a handful of attorneys can accomplish the transfer

of a judge, and threaten other judges through peremptions for which they do not even have to give a reason. All the attorneys have talked about before you, are the rights of their clients, and these are important rights, no one would say that they are not. But what about the rights of the victims? What about the rights of society? The Constitution clearly requires a judge to sentence to protect society and reformation. No where in the Constitution, in the statutes or in the case law is there any indication that a judge is to sentence in order to avoid peremptions. And yet the Chief Justice of the Alaska Supreme Court has stated publicly that this is happening, and any judge who will level with you will tell you the same. The tail is wagging the dog at the present time as the attorneys are in effect controlling sentencing, and are now even controlling the transfer of judges. Thank you.

TESTIMONY OF ATTORNEY HENRY CAMAROT, ANCHORAGE  
February 3, 1983

Gentlemen and (unable to hear the period of 4 log numbers due to static in the teleconference) except for a short period when I left Alaska I practiced in the State of Oregon. I presently represent District Judge James Hornaday in respect to an order that was issued by the Honorable Mark Rowland, presiding Superior Court Judge for the Third Judicial District. In that order, Judge Hornaday had been directed to move from Homer, Alaska, his place of residence for some seven years, to Anchorage, Alaska to permanently fill the office of District Judge in the Anchorage area. I come in favor of repealing the perempt statute. Alternatively I wish to make several other comments and I think they can be interpreted as clear recommendations. The consideration of the perempt statute repeal perhaps can be invaluatated against the framework of the true factual situation that currently exists; infact, I got the impression as I was listening to some of the witnesses testify, that this law seems to be directed all towards Judge Hornaday, when I believe the issue is far greater than Judge Hornaday.

Some eight years ago more or less Judge Hornaday gave up a successful 10 year law practice to accept an appointment as the acting district judge in Homer. The condition of his employment at thr time that he moved to Homer. He moved to Homer. The Legislature established a Homer District Judge position. He applied to the judicial council for that office in Homer. His name was forwarded to the Governor for that office and that office began in Homer. He was appointed by the Governor for that specific office. The Judicial council twice recommended him for retention and he has twice been overwhelming retained by the vote in the election of the Third District. More recently, in the election of 1982, more people turned out to testify on his behalf before the judicial council meetings held in Homer than for any other judge in the state. He also passed with the lawyers in the bar poll and received the highest rating of any judge with the Alaska Peace Officers Association.

Judge Hornaday has established deep roots in Homer. His wife, Karen, teaches violin to many children and serves as chairperson on the Homer Parks and Recreation Commission. She serves on many church and civic activities and just recently helped passed the bond issue of the building of the new high school in Homer. His daughter, Mary, is a sophomore in college and his son, Dan, is a high school sophomore who worked his way up to the staring quarterback on the football team. He also plays on the basketball team. Dan is usually on the honor roll. Their son, Joshua, is in the third grade and is into music, Little League and Cub Scouts. Five year old Matthew has just started kindergarten. The Judge is active in Little League matters, Chamber of Commerce matters and plenty of other activities. When he left the private practice and accepted the appointment as the district judge in Homer, he made substantial financial sacrifices. He was required to sell his home and a commercial building that had been partially set aside as a retirement income. When he moved to Homer, he bought a home there. That was to be his home and that was to be his community for years to come.

We have all heard about how in early 1982, the first part of 1982, Judge Hornaday decided to do something about the drunk driving. He was deeply concerned about this continuing highway travesty, which he was aware resulted in the killing and maiming of over 200,000 Americans a year. It was frustrating to him. Apparently, drunk driving cases constitute over 50% of all the jury trials in the Alaska court system. For many reasons, and because he also serves at times as a coroner and probate judge, because of times when he has come in direct contact with auto crash results, leaving maimed bodies and grieved families or person who have suffered injuries, thereby, felt he had to do

something. He wanted to do it, not by legislative action, but what he wanted to do was in a true effort to be fair, give notice beforehand that persons convicted of a drunk driving in his court would receive a 60 day sentence with 45 suspended and 15 days actually having to be served. Now at the outstead let me point out this is not the maximum sentence, as some people have suggested. The maximum sentence under AS28.35.030 is \$1000 or by imprisonment for not more than one year or by both. Now it is not the minimum sentence, which is 72 consecutive hours in the first instance. But what he was really doing, was, he was really giving fair warning beforehand to attorneys and drivers, particularly those consuming alcohol and driving under the influence, that this is what he would do. Now that resulted in an increase in Judge Hornaday being perempted. This is not to say that Judge Hornaday had not been perempted on prior occasions, but this announced policy seemed to have resulted in a definite increase in the peremptions that he experienced prior to the spring of 1982. Let me stop here and note that he was not legislating at that time. He was not attempting to. But what he was doing again just simply identifying the symptom patterns. Now when it was called to his attention that the public statement could not be followed, that he had to consider matters on a case to case basis, he acknowledged that. He publicly recinded the policy and he did sentence on a case-by-case basis. And he did not give 15 days in every insistence. He did go back to the 72 hours, frequently. But the peremptions continued. Continued to the point that Presiding Judge Mark Rowland determined, as he put it, it became administratively a nightmare and was costly to the system. And the system is one of the things I want to talk about.

Now the statistics put together by the court administrator regarding Judge Hornaday and our statistics will be at odds. Truthfully speaking, we don't think that there is comparable statistics that show that one District Judge or Superior Court Judge, particularly in areas where there is only one judge, that experience any more or less peremptions than Judge Hornaday had been experiencing. We don't know to what degree the peremptions compare. But we do know that there are problems and there are serious problems and the problems are going to continue in our opinion with the peremption statute in other areas as they have happened in the past in Wrangell, Petersburg, Ketchikan, Juneau and Kodiak. In any event, Judge Rowland believes that Judge Hornaday's peremptions in Homer were occurring to such a degree that he determined that he had to move Judge Hornaday out of Homer. I don't suggest that Judge Rowland is not acting in good faith. He was very candid when he said that it is the exercising of the peremption by counsel out of the current statute and the resulting costs of bringing in another judge from Anchorage, which is causing him to issue his order. Judge Rowland is attempting to follow obligations imposed on him as the presiding judge to properly administer the court system. And also to be concerned about the costs endowed in his responsibility.

In that regard, as I understand it from Judge Hornaday, Judge Hornaday was advised that he should consider peremptory challenges in sentencing persons before him as a particular consideration. I am sure this is done to avoid having the expense of the cost of having to send another District Judge to Homer when Judge Hornaday was perempted. Chief Justice Burke in a public hearing in Homer indicated perempts had to be considered in sentencing. So, I think we ought to recognize the issue that peremptions affect sentencing, that with the statute as it exists, the system should accept that the consequences and cost and, threaten, the independence of the judiciary. So it's understood, are we challenging Judge Rowland's order on Judge Hornaday's behalf because I believe that there are serious constitutional and legal arguments on whether he has the authority to take the action he did. But aside from that, and if it be found that Judge Rowland does have the power and authority to remove a District Judge

from his place of residence and the office to which he is assigned, then the problem will still remain. Let's turn for a moment to the defense attorneys or primarily to the ones that are utilizing the perempt statutes.

I have talked with defense attorneys, quite a few of them, and I recognize what they are saying. They can not claim that Judge Hornaday has been more stern in his sentencing practices than other judges. They contend they are under ethical duties to advise the client that he or she has a right to perempt Judge Hornaday. I hear what those defense counselors are saying. But I also know that this constitutes and is just as clear an act as judge-shopping as any other act would be if not for the perempt statute. Even if the attorney contended that he had a ethical responsibility, it's judge shopping. In other instances in my opinion, they are using the perempt for purposes of delay in coming to trial. The delay is always an act that has to do with the defendant because anything can happen between the time of the charge and the actual time of the trial. But what is truly more troubling is, and what must be troubling to an elected official, be he legislator or otherwise, be he judge or otherwise, regarding what the justification might be claimed in respect to the perempt statute, the bottom line is not withstanding thousands of voters particularly those voters in the Homer area voting in favor of the man, Judge Hornaday. There will still be a few members of the bar who are mainly able to sufficiently prevail upon the presiding judge so as to require Judge Hornaday to be removed from one area to another. I don't say they are making personal contact, I say they are doing that through the perempt statute. In my mind as it has already been indicated, the perempt statute and peremption rule interferes with the judicial process under the Constitution and the court responsibility to perform the duties endowed upon them. It also destroys the independence of the judge and to a degree I believe it interferes with the oath of office that each judge takes that he will support the state and federal constitution and will faithfully discharge the duties of his office as a judge of the court to which he is appointed, to the best of his ability. It destroys the independence of the judge. I sincerely believe that it is very wrong to remove a judge who is regarded as judicially competent and I would like to make a note that the major incidents that I have heard in respect to Judge Hornaday has nothing to do with his ability in a civil case, nothing to do with his ability during the course of a trial, presumably it has to do with his sentencing in DUIL cases and some pretrial motions, other than that attorney after attorney have told me he is a very competent, capable judge. But the clutch of the issue comes down to this, if the peremption statutes are to stay in existance and Judge Rowland's order is to remain in effect, then every judge appointed to a district judge area is subject to be reassigned depending on how his rulings and sentencing practices are viewed by the attorneys. I suggest that the precedent being established here is extreme for the reasons already stated. It should be a matter of a state-wide concern. What happens to the next District Judge that goes to Homer. He accepts that office in the wake of Judge Hornaday's reassignment, if that occurs. He knows that the presiding judge doesn't want to have make another reassignment. He does know that he has to avoid peremptions and to avoid peremptions he obviously must not follow the practices followed by Judge Hornaday. Peremption has an effect on sentencing without a question. The matter of degree perhaps in Homer is a matter of degree anywhere. I know that there are many judges today in Alaska who are very concerned about this order. I think it is a matter for new judicial candidates to consider as part of the input as to whether or not they want to become judges. They are invited to place themselves, as now, in front of the judicial council for particular judicial office. They have to realize they maybe reassigned. Against this background I wish to make the following recommendations. I thought a lot about

the perempt statute and I believe that it has one part of it that makes me feel that it should be repealed and its the view of it being unfair.

I submit to you that whether its the filing of an affidavit or a simple notice of a change of judge of Criminal Rule 25 and Civil Rule 43, the accusation is that litigants can not receive a fair and impartial trial. If the judge has no opportunity to defend himself against that charge, although it clearly imputes his integrity. In my opinion the judge, whether it's Judge Hornaday or any other judge is denied due process, he cannot defend his integrity which is so important to a judge. I would suggest in the first inistance, therefore, that the particular AS22.20.022 be repealed.

Then I have an alternative suggestion. I have a lot of respect for my brethren. I see the attorneys here in mass. I've heard them. Accordingly, realistically speaking, that perempt statute cannot be repealed. I would like to give you perhaps a compromise. I would suggest that there would be a statute passed or present statute amended, rejecting the reassignment of any Superior Court or District Judge from the area of his residence to any other location. It is not say that a judge cannot be temporarily assigned, as the Constitution recognizes, and it takes place periodically, so long as there is a time limit on each assignment each year. I think the wholesome affect of this type of law is that if the perempt statute is to be continue as part of the Alaska Judicial processes that it be recognized as part of the overall system, including the cost of reassigning a judge to the area where the peremption right is imposed. It will also reassure other members of the judiciary or future potential members, that have to give that fact their consideration. They are weighing the pros and cons of continuing or becoming a judge.

Another alternative, the second alternative, I would suggest would be given serious consideration, would be to limit the perempt statute to those areas that have more than one judge serving a community, such as Anchorage and Fairbanks, and deny the invoking of the peremptory challenge for no cause where there are single judges, whether they be Superior or District Court Judges in other areas.

I realize that this would not be as popular and be subject to constitutional attack. However, I believe that it could withstand that constitutional attack.

I wish to thank the committee for allowing me to make this presentation. I sincerely hope that reservation in supporting this and that the recommendations maybe of some assistance to the committee. Needless to say, in the final analysis, in the case of Judge Hornaday, that any action taken by the legislature, I sincerely hope, will allow him to stay in Homer. Thank you.

HB 79---PEREMPTORY CHALLENGE OF JUDGES REPEAL--  
REMARKS BY REPRESENTATIVE JOHN LISKA

THANK YOU MR. SPEAKER:

I RISE TO SPEAK IN FAVOR OF HB 79. I PARTICIPATED, AS A MEMBER OF THE JUDICIARY COMMITTEE, IN HEARING THE MANY WITNESSES TESTIFY BOTH IN FAVOR AND AGAINST THE BILL ON THE TWO DAYS THE HEARINGS WERE HELD.

I ESPECIALLY NOTED THAT JUDGES WERE ALMOST UNIVERSALLY FAVOR OF THE BILL. ONE JUDGE STATED THAT AS AN ATTORNEY SHE WOULD BE OPPOSED, BUT THAT AS A JUDGE IT CERTAINLY MADE HER ROLE MORE DIFFICULT.

NOT ALL THE ATTORNEYS WERE OPPOSED TO THE BILL EITHER. IN PARTICULAR, ONE ATTORNEY FROM BETHEL, ONE OF THE VERY FIRST WITNESSES, SPOKE QUITE STRONGLY IN FAVOR OF PASSAGE OF HB 79. IT APPEARED SIGNIFICANT TO ME THAT SO MANY ATTORNEYS WERE OPPOSED TO THE BILL, AND SO MANY JUDGES AND LAYMEN WERE IN FAVOR OF IT, THAT IT APPEARS TO ME THAT THE ATTORNEYS MUST HAVE SOME DECIDED ADVANTAGE WHICH THEY ARE JEALOUSLY GUARDING AND DON'T WANT TO BE TAKEN AWAY FROM THEM.

WE WERE ESPECIALLY APPRECIATIVE OF THE REMARKS BY MS. KAREN HUNT OF ANCHORAGE, FORMERLY PRESIDENT OF THE BAR ASSOCIATION. NEAR THE CONCLUSION OF HER TESTIMONY I ASKED HER IF THE SITUATION AT HOMER, ALASKA WAS SUCH THAT SO MANY PEOPLE ARE IN FAVOR OF THE BILL AND SHOWED SUCH SUPPORT FOR IT, COULD THE PEOPLE BE WRONG OR COULD THE LAW BE WRONG? SHE PROMPTLY REPLIED THAT THE LAW IS WRONG!!

TESTIMONY FROM WITNESSES, MR. SPEAKER, WAS ALMOST EVENLY DIVIDED, FOR AND AGAINST THE BILL. I FAVOR PASSAGE OF THIS BILL BECAUSE I FEEL A JUDGE SHOULD BE ALLOWED TO FOLLOW THE DICTATES OF HIS CONSCIENCE IN UPHOLDING THE LAW AND DISCHARGING THE DUTIES OF THE OFFICE, WITHOUT FEAR OF BEING TOSSED OFF THE BENCH BECAUSE A NUMBER OF ATTORNEYS WISH TO HAVE A CHANGE OF JUDGE WITHOUT HAVING TO BE RESPONSIBLE FOR GIVING THE REASONS FOR THAT CHANGE. WE HEARD TESTIMONY, MR. SPEAKER, THAT THE FACT THAT CHALLENGES TO A JUDGE ARE POSSIBLE HAS A DECIDED IMPACT ON DECISIONS THE

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THE JUDGE IS, BY LAW, REQUIRED TO MAKE. IT IS ATROCIOUS TO ME, MR. SPEAKER,  
TO HAVE A SITUATION IN OUR STATE WHERE OUR JUDGES ARE HAMPERED BY HAVING TO  
CONSIDER WHETHER OR NOT THEIR SENTENCING PRACTICES WILL LEAD TO CHALLENGES OR  
EVEN TO REMOVAL FROM ONE LOCATION TO ANOTHER. IT IS CLEAR THAT THE CHIEF JUSTICE  
HAS INDICATED THAT JUDGES HAVE TO BEAR THIS IN MIND. WITH THE PASSAGE OF THIS  
BILL, SUCH WOULD NO LONGER BE THE CASE AND JUSTICE WOULD BE BETTER SERVED.  
THANK YOU, MR. SPEAKER.

TESTIMONY IN FAVOR OF PASSAGE OF HB 79

THANK YOU, MR. CHAIRMAN.

I AM REP. MILO FRITZ FROM ANCHOR POINT, NEAR HOMER ALASKA.

THE FIRST COURT OF JUSTICE IN ALASKA WAS ESTABLISHED BY THE U.S. IN 1900 UNDER JUDGE JAMES WICKERSHAM IN EAGLE ON THE YUKON RIVER. SINCE THEN, THE COURT SYSTEM HAS GROWN IN SIZE AND COMPLEXITY TO MEET THE CHANGING NEEDS OF THE TIMES AND THE INCREASE IN POPULATION.

GENERALLY SPEAKING, THE LEGAL NEEDS OF THE PEOPLE OF ALASKA, EXCEPTING THE DISSIDENTS AND ECCENTRICS PRESENT IN ANY AGE, WERE ADEQUATELY MET. UNTIL 1967, PEREMPTORY DISQUALIFICATION OF A JUDGE COULD ONLY BE INVOKED FOR CAUSE, THAT IS, FOR A GOOD, TRENCHANT REASON. AND I BELIEVE, MR. CHAIRMAN, THAT NO REASONABLE PERSON CAN OBJECT TO THAT.

IN 1967, ACCORDING TO THE SESSION LAWS OF ALASKA FOR THAT YEAR AND APPEARING IN ALASKA STATUTES, THAT IS THE LAWS OF ALASKA KNOWN AS ~~AS~~<sup>AS</sup> 22.20.022, AN ADDITION WAS MADE, MAKING IT POSSIBLE FOR THE PETITIONER, THAT IS THE LAWYER OR THE CLIENT TO DISQUALIFY A JUDGE WITHOUT PROVIDING ANY REASON WHATSOEVER. AND IT IS THE PURPOSE OF HB 79 TO STRIKE THIS 1967 AMENDMENT TO ALASKA LAW FROM THE BOOKS MAKING PEREMPTORY CHALLENGE OF A JUDGE POSSIBLE ONLY FOR CAUSE, THAT IS, FOR A VALID REASON.

IN THE ELECTION OF NOVEMBER 2, 1982, THE VOTERS IN THE THIRD JUDICIAL DISTRICT VOTED 57,000 TO 38,000 TO RETAIN JUDGE JAMES C. HORNADAY ON THE BENCH. ON THE KENAI PENINSULA, WHERE

JUDGE HORNADAY RESIDES AND HOLDS COURT IN THE SMALL CITY OF HOMER, THE VOTE WAS 6000 TO 3000 IN FAVOR--AN IMPRESSIVE VOTE.

NOW IT HAPPENS THAT JUDGE HORNADAY HANDS OUT TOUGH SENTENCES TO THOSE CONVICTED OF DRUNK DRIVING. SO QUITE NATURALLY, THE TRANSGRESSOR AND HIS LAWYER, QUITE LOGICALLY AND WITHOUT HAVING TO GIVE A REASON, PEREMPTORILY CHALLENGED JUDGE HORNADAY ASKING THAT THE CASE BE HEARD BEFORE ANOTHER JUDGE SINCE, OF COURSE, THE SENTENCE <sup>IS NOT GENERALLY</sup> ~~CAN'T LEGALLY BE~~ MADE ANY MORE SEVERE AND MIGHT QUITE POSSIBLY BE LIGHTER. ANY GOOD LAWYER WHO DOES THIS IS QUITE WITHIN HIS RIGHTS, SINCE IT HIS DUTY TO OBTAIN FOR HIS CLIENT THE LIGHTEST POSSIBLE SENTENCE. IN OTHER WORDS, THE LAWYER IS NOT AT FAULT, THE LAW IS, AND THAT IS WHY I ASK YOU AND YOUR COMMITTEE TO REMEDY THIS DEFECT BY FAVORABLY PASSING OUT HB 79.

NOW, IN A STATEMENT AT A HEARING REGARDING JUDGE HORNADAY HELD IN HOMER ON JANUARY 5, 1983, SUP. COURT JUDGE MARK ROWLAND TESTIFIED THAT JUDGE HORNADAY WAS PEREMPTORILY CHALLENGED IN ABOUT 80% OF THE CASES COMING BEFORE HIM, ONLY A SMALL PERCENTAGE OF WHICH HAD TO DO WITH DRUNKEN DRIVING. IN OTHER WORDS, BY ACCIDENT OR DESIGN, MOST OF THE LAWYERS ON THE KENAI PENINSULA INDULGED IN A VENDETTA AGAINST JUDGE HORNADAY PEREMPTORILY DISQUALIFYING HIM. IN EFFECT, THESE LAWYERS SAID, "OKAY, SO YOU ARE GOING TO HAND OUT MAXIMUM SENTENCES AGAINST OUR DRUNK DRIVING CLIENTS. THEREFORE, WE WILL PEREMPTORILY DISQUALIFY YOU FOR ALL OUR CASES." OF COURSE, THIS LEFT JUDGE HORNADAY WITH LITTLE TO DO AND MADE IT NECESSARY FOR SUP. COURT JUDGE

MARK ROWLAND TO DISPATCH A JUDGE FROM ANCHORAGE AT NEEDLESS EXPENSE TO HOMER TO HEAR JUDGE HORNADAY'S CASES. AND SINCE HORNADAY HAS BEEN RENDERED INEFFECTIVE, ROWLAND HAS TRANSFERRED HIM TO ANCHORAGE AS OF JUNE 1, THUS QUITE LEGALLY TRANSGRESSING THE WILL OF THE PEOPLE OF THE KENAI PENINSULA. JUDGE ROWLAND IS NOT WRONG; THE LAWYERS ARE NOT WRONG; THE LAW IS WRONG AND HB 79 RECTIFIES THE SITUATION.

IN ANCHORAGE, PEREMPTORY DISQUALIFICATION OF JUDGE HORNADAY WOULD COST NOTHING SINCE THERE ARE SEVERAL JUDGES OF JUDGE HORNADAY'S RANK AVAILABLE.

THEREFORE, IT SEEMS THAT PEREMPTORY CHALLENGE OF A JUDGE WITHOUT CAUSE SHOULD BE STRICKEN FROM THE BOOKS SINCE IT SERVES LAWYERS AND TRANSGRESSORS AND NOT THE ADMINISTRATION OF JUSTICE. REM ACU TETIGISTI.

IF, MR. CHAIRMAN, THIS 13TH STATE LEGISLATURE PROMPTLY PASSES OUT HB 79 WHICH WOULD ELIMINATE PEREMPTORY DISQUALIFICATION WITHOUT CAUSE, THE PEOPLE OF THE KENAI PENINSULA WILL KEEP THE JUDGE WHOSE ACTIONS THEY APPLAUDED BY VOTING FOR HIS RETENTION 2 TO 1.

PASSAGE OF THIS MEASURE WILL ALSO PREVENT THIS FROM OCCURRING IN OTHER <sup>one -</sup> JUDGE JURISDICTIONS WHERE, FOR FRIVOLOUS REASONS OR NO REASON AT ALL, A JUDGE MAY BE PEREMPTORILY DISQUALIFIED. THE JUDGES ARE NOT WRONG, THE LAWYERS ARE NOT WRONG, THE PEOPLE ARE NOT WRONG--THE LAW IS WRONG. LET US REPEAL IT BY PASSING HB 79.

I THANK YOU, MR. CHAIRMAN.



Anchorage Daily  
News  
Anchorage, AK

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74  
16  
**Hunting charge dropped**  
FAIRBANKS — A felony charge alleging a man defrauded Belgian hunters by setting up illegal hunts in Alaska has been dismissed. Assistant Attorney General Tom Wickwire said the charge against Melville Morris, 58, was dropped because it would have been too expensive to fly the hunters to Alaska on three occasions to testify against him. Charges of guiding without a license and 13 other misdemeanor hunting and fishing violations still are pending against Morris. District Court Judge Jane Kauvar reduced his bail from \$25,000 to \$12,000 following dismissal of the felony charge.

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Anchorage Daily  
News  
Anchorage, AK  
FEB 7 1982

# Judge gives 15 days minimum for DWI (6)

By JAN O'MEARA  
Special to The Daily News

HOMER — A Homer District Court judge last week announced a new sentencing policy that will increase to 15 the minimum number of days first offenders, convicted of drunken driving must serve in jail.

"The situation has become so serious in Homer that something must be done immediately," said Judge James Hornaday in reveal-

ing the new policy.

Hornaday said that in addition to the minimum jail term, persons convicted of drunken driving will be fined, be required to work 10 days in a community service program, lose their driving privileges except for limited uses, and be required to enroll in an alcoholism screening and rehabilitation program.

The previous minimum jail term required for first offenders was three days.

The judge said if a convicted drunken driver refuses to participate in the community service program or the alcohol screening program, "they'll sit in jail 60 days."

Hornaday said drunken driving cases in Homer increased 70 percent in January over the same month in 1981. "Drunk drivers kill people," he said. "This (new sentencing policy) is not a war on alcohol. It's an attempt to solve a very serious problem in Homer."

Increased jail time has been

linked to an 80 percent reduction in moose poaching on the Kenai Peninsula, Hornaday said.

Hornaday said he decided to increase the minimum jail term for drunken drivers after consulting with other judges, law enforcement officers, attorneys and alcoholism counselors.

"I certainly do not like to put people in jail, but hopefully the word will get out that driving under the influence will no longer be tolerated in Homer," he said.

# Judge blames lawyers for high disc

Empire - 2-3-83

## Lawyers counter that challenges are needed to guarantee fairness

By CHRIS JARVIS  
Empire Staff Reporter

Lawyers, not judges, are to blame for the high frequency with which some judges are disqualified from cases, Juneau District Court Judge Gerald O. Williams

said today.

Williams is frequently disqualified from hearing cases because, in his opinion, "Alaska is the most lawyer-whipped state in a lawyer-whipped country."

Williams and Juneau Superior Court

Judge Rodger Pegues have been named as two of six Alaska trial judges most frequently disqualified from cases. Pegues is on vacation and was unavailable for comment.

Alaska Court Administrator Art Snowden said the peremptory challenges, which allow lawyers to ask for a different judge without stating a reason, are an "administrative nightmare," noting it costs the state an estimated \$20,000 a year to put judges into a jurisdiction to hear a case.

Williams, a former Alaska State Trooper and member of the bench should not be named.

Williams said it is his responsibility to make sure a person accused of a crime brought to trial within 120 days of arrest, he said. He thinks peremptory challenges are often used to prolong the time before trial.

Lawyers generally disagree.

"I don't know of any attorney" who uses peremptory challenges only to prolo;

## qualification rate

cases, said lawyer Richard Burnham.

According to current rules, an attorney on either side of a case can request a judge be disqualified without giving a reason.

Requiring attorneys to say why a judge should be disqualified would present problems if a judge is not disqualified and the attorney must then argue a case before him, Burnham said.

Although acknowledging it costs money to fly a judge to hear the cases of a disqualified judge, Burnham said there are

other solutions to the problem. For example, he said, a superior court judge could hear district court cases or, if that is not possible, another district judge could be hired.

"It doesn't seem to me the goal of the judicial system is to run cheaply. It's to give people their day in court," Burnham said.

Williams, however, said if a case is prolonged long enough, eventually a case

Continued on Page 2

## Judge...

Continued from Page 1

could be dismissed because the time limit for trial has been passed.

Admitting he is sometimes curt when on the bench, Williams said he finds it difficult to "put someone in jail in a nice way."

He defended his record, saying he treats everyone who is convicted in his court in the same way.

"I've still got friends who are mad at me (for sentencing them to jail), but it goes with the turf," he said.

"I admit I'm old-fashioned," Williams said. He seldom likes to grant delays in

court proceedings because cases often end up dismissed when delayed too long, he said.

Peremptory challenges are often used by attorneys in a "tactical and strategic" manner, Williams said.

Of defense attorneys, Williams said, "It is in their interest to prolong to avoid a trial."

However, it is not always in the best interest of the defendant, Williams said. Peremptory challenges and continuances might result in an attorney's client staying in jail, if not able to make bail, he said.

It is the court's responsibility to assure efficiency in the system especially with criminal case loads in Juneau almost

doubling in four years, he said.

Sometimes 30 to 60 days will have elapsed days since a person's arrest before making the first court appearance. That leaves as few as 60 days before the case may go to trial, Williams said, noting motions for continuances, if granted, could extend beyond the 120 day limit.

Although some people who see Williams on the bench for the first time might see him as "a combination of Attila the Hun and Genghis Kahn," he said it is because his experience has taught him he must be absolute when passing judgment.

"I may appear curt in court but I've learned through experience that you've got to do it," he said.

# Tough new drunk driving sentence raise flap; Homer judge stands firm

by Jan O'Meara  
Staff Writer

Homer District Court Judge James Hornaday was disqualified from presiding over a drunk driving trial this week because of his newly adopted 15-day mandatory sentence policy.

Anchorage Judge Mark Rowland, presiding judge for the Superior Court, Third Judicial District, dis-

qualified Judge Hornaday on Monday, based upon the motion and contention of Alan Beiswenger, attorney for defendant Stephen Seelye, that the 15-day sentence indicated a bias on the part of Judge Hornaday.

Mr. Beiswenger had originally filed a motion asking Judge Hornaday to disqualify himself for bias, but the judge denied the motion.

Under Alaska law, Judge Hornaday was then required to submit the motion to the presiding superior court judge.

Court procedure gives every defendant the right to challenge a judge, once only, so long as the challenge is made within five days of the judge's assignment to the case. Mr. Beiswenger made such a motion, but the five days had lapsed, Mr. Beiswenger said, and Judge Hornaday denied that motion also.

Mr. Beiswenger said that his challenge was based on the theory that in establishing his own mandatory sentencing policy, Judge Hornaday was focusing solely on deterrence rather than reform or any other consideration as re-

quired by state statute.

Judge Rowland declined comment Tuesday.

His law clerk, Richard Foley, speaking of the decision, said, "The legislature sets policy and has set a presumptive sentence of three days minimum. It's not up to a judge to change that policy." A judge must weigh each case on its own

Judge Hornaday said Tuesday that he intends to file a motion for reconsideration of Judge Rowland's decision within the week. If the disqualification holds, another judge will be sent to Homer to hear Mr. Seelye's case.

Even if he is disqualified on this case, Judge Hornaday said he intends to continue the policy he adopted last week. "I will stand on the procedure that's been initiated."

Alaska law contains no provision for forcing a judge to change a sentencing policy so long as it is within the range established by statute. Alaska statutes provide for a mandatory minimum sentence of three days and a maximum of one year.

If a judge is challenged, the court system must provide another, which in the case of Homer would mean bringing a judge in from

Fairbanks  
News Miner  
Fairbanks, AK

## Bill would give \$750 in cash to Alaskans

JUNEAU (AP)—Every Alaskan would get about \$750 in cash under a bill introduced by House Majority Leader Rick Halford and Rep. Vern Hurlbert to take effect if the U.S. Supreme Court outlaws Alaska's permanent fund dividend program.

Under the bill proposed by Halford, R-Chugiak, and Hurlbert, D-Sleetmute, every resident would be eligible for the one-time payment. A person would be considered a resident if he or she has lived in Alaska for at least 30 days as of the date the court issues a ruling.

The bill (HB743) calls for the \$300 million already set aside for dividend payments to be paid out

Kenai or Anchorage. That has led some court system observers to speculate that Judge Rowland, as chief administrator for the judicial district, may rebel at the time, travel, scheduling and expense involved in continually supplying alternate judges to Homer for DWI cases.

Fairbanks  
News Miner  
Fairbanks, AK

## Cold Storage dock permit upheld

ANCHORAGE—A Superior Court judge has upheld the dock permit issued to Cold Storage to use the Port of Anchorage to unload barges carrying beverages.

Judge Brian Shortell dismissed a lawsuit by Independent Longshoremen of the Anchorage Port and Port Director Bill McKinnon.

The union maintained that the permit was illegal because it was secretly last October by the municipality's chief instead of the by the port.

The city agreed that the permit was unusual, but said it was necessary. The city said it was necessary because the barge was out of port and there was no way to get it through normal channels.

When the barge finally docked, it provoked a longshoremen and teamsters strike against Cold Storage.

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## SHOW

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THE LEGISLATURE OF THE STATE OF ALASKA  
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. HB 79  
Title "An Act repealing peremptory disqualification of a judge..."  
Requested by House Judiciary Committee Date 1/26/83

II. FISCAL DETAIL

Agency Affected Department of Law  
Program Category Affected Administration of Justice  
BRU, Program, Or Subprogram(s) Affected Prosecution  
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		X	X	X		

Costs that will occur cannot be determined at this time. See analysis below.

FUNDING (Thousands of Dollars)

General Funds costs that will occur cannot be determined at this time.  
Please see analysis below.

GENERAL FUND		X	X	X		
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Although not quantifiable at this time, this bill has the potential for causing a significant fiscal impact on the Department of Law, the Public Defender and the Court System. The department rarely uses peremptory disqualification and the department's Criminal Division probably does so only 10 or 12 times each year. The problem will arise from the private criminal defense bar which disqualifies some judges 30% or 40% of the time. If the private bar continues to seek this same level disqualification, based on cause, our prosecutors will then have to devote substantial portions of their time participating in a two-tier disqualification hearing process. Without any prior experience to guide us, the department is hesitant to speculate on the actual cost that this bill might cause. The department does believe that this bill will have the effect of hampering its

IV. DATE January 28, 1983 PREPARED BY Richard I. Pegues, Dir. Adm. Svcs.

AGENCY Department of Law

Original: Legislative Finance PHONE 465-3672

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

CMB review by Guy Bell

Fiscal Note  
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overall ability to prosecute criminal offenses, by diverting already diminished resources from other matters currently being addressed.