HB
456

BOARD OF GOVERNORS

ALASKA BAR ASSOCIATION

P.O. BOX 100279
ANCHORAGE, ALASKA 99510
AREA CODE 907/272-7469

RANDALL P. BURNS, EXECUTIVE DIRECTOR

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February 3, 1984

The Honorable Mitch Abood
Chairperson
State Affairs Committee
Alaska House of Representatives
1024 West Sixth Avenue
Anchorage, AK 99501

RE: House Bill 456

Dear Representative Abood:

I understand that the House State Affairs Committee is holding hearings this afternoon on HB 456 which would authorize an advisory vote by the citizens of the State of Alaska concerning the wisdom of electing the State's Attorney General.

In that regard, I request that the attached letter be submitted as a part of the Committee's record of testimony on HB 456. The attached letter, sent by then Alaska Bar President Karen Hunt to Representative Barnes, details the results of an advisory poll conducted by the Bar Association of its members concerning not only the election of the Attorney General, but the election of district attorneys and judges as well.

I ask that the members of your Committee, during its deliberations, consider the findings of that poll and the many reasons given for finding that the election of the Attorney General does not serve the public interest.

Should you have any questions, please do not hesitate to contact me. I have provided you with a sufficient number of copies for each member of your Committee. Let me thank you in advance for your consideration of the attached information.

Respectfully yours,

ALASKA BAR ASSOCIATION

Randall P. Burns

Randall P. Burns
Executive Director

Attachment

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
P.O. BOX 279
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R..DALL P. BURNS, EXECUTIVE DIRECTOR
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RICHARD D. SAVELL
HUGH G. WADE

March 4, 1982

Representative Ramona Barnes
Chairperson
House Judiciary Committee
Pouch V
Juneau, Alaska 99811

Re: Election of Attorney General, District Attorneys and Judges

Dear Mrs. Barnes:

The Board of Governors of the Alaska Bar Association limits its legislative activities to those issues which impact on the administration of justice and the delivery of legal services to the public. One set of such issues is whether the present system should be changed to provide for the election of the Attorney-General, District Attorneys and/or judges. Below is a very brief discussion of the results of a February poll taken of the members of the Alaska Bar Association on those issues. The Board has directed that I communicate these results to you for your information. Thirty-five percent (35%) of the attorneys responded as follows:

1) elect Attorney General : No 71 %, Yes 29 %
2) elect District Attorney: No 79 %, Yes 21 %
3) elect Judges: No 82½%, Yes 17½%

Each respondent was given an opportunity to comment and repeatedly the following concepts were discussed.

The judicial branch of government in Alaska was deliberately not made a representative, elected body. It is an integral part of a three-branch, checks and balance

system of government. Further, judges should not interpret the law because of a temporary, single, explosive political issue: the need for predictibility and uniformity in our laws is too vital to the welfare of Alaskans. Likewise, judges should be able to uphold "unpopular laws" which safeguard the rights of individuals or groups who are not a part of the electorate who supported the people elected.

Of equal concern to the respondents was the realization that special interest groups could unduly influence court decisions and District Attorney prosecutions because of the amount of compaign contributions they could raise or the "party machinery" they could control. Likewise, concern was expressed about the backlog and system slowdown that would occur while judges and district attorneys planned for, solicited funds for and conducted an election campaign. This could be particularly harmful in small communities which have only one judge or District Attorney. Additionally, concern was expressed about the lack of uniformity of law enforcement that would result because district attorneys would be elected on different "platforms".

The concerns expressed about election of the Attorney General included possibility (in Alaska perhaps probability) of the Attorney General and Governor being of two different parties thereby introducing non-productive dissention in the administrative branch. The Attorney General's office becoming primarily a stepping stone to running for Governor was also mentioned as a disruptive possibility.

The confirmation by the legislature was viewed by some respondents as encouraging scrutinty of the Attorney General by elected representatives thereby giving the voters final say about the Governor's selection. Likewise, the retention election of judges provides voter acceptance or rejection of the performance of judges. This process was viewed as a good balance and check on the initial appointment process.

Of particular interest are the uniform comments from attorneys who have practiced law and lived in states where judges and/or district attorneys and/or the Attorney

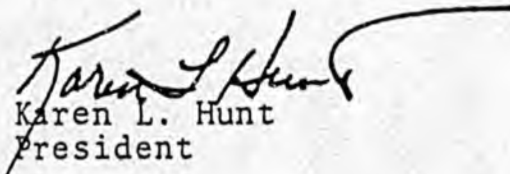
General are elected. Each respondent who so indictated such experience was opposed to changing our present system. The states of California, Illinois, Florida, Idaho and Oregon were specifically mentioned.

One example was emphasized where (in Florida) a new law school graduate entered the race for a judgeship at the last minute raising substantial campaign funds by attacking the judge's decision which had upheld a statute of the state legislature. He won thereby removing a judge with much experience and a solid reputation for fairness and efficiency on the the bench. He was thereby committed to a particular interpretation of a statute regardless of the facts of the case that might come before him. This result is contrary to the genius of our Anglo-Saxon system of justice which begins with the unalterable proposition that each party before the court has an absolute right to have his case decided solely upon the facts before the court.

The most repeated concept expressed by respondents who said judges, district attorneys and the Attorney General should be elected was that governmental decision makers should be elected by the voters.

We will try to provide such additional information or further discussion you may desire to the extent that we know or can ascertain the views of our members.

Yours very truly,



Karen L. Hunt
President

KLH:et

cc: Members of House

FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 456
Title: "...advisory vote...election of the Attorney General
Sponsor: Rep. Ward
Requestor: House State Affairs
Date of Request:

FISCAL DETAIL
Agency Affected: Department of Law
Program Category Affected: Admin. of Justice, Public Protection
BRU, Program or Subprogram(s) Affected: Legal Services, Prosecution Consumer Protection

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

ANALYSIS: Attach a separate page for analysis

Richard I. Pegues
Prepared By: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: 1-18-84
Richard I. Pegues / for
Approved by Commissioner: Norman C. Gorsuch
Date: 1-18-84
Agency: Department of Law

Distribution (by Agency preparing fiscal note):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Fiscal Note
Analysis
HB 456

January 18, 1984

This bill authorizes an advisory vote, at the next general or special election, whether the legislature should propose a constitutional amendment that, if approved by the qualified voters of the state, would permit the election of the attorney general. Because this bill only authorizes an advisory vote, its enactment will not have a fiscal impact on the department's operations.

HOUSE BILL NO. 456

Early last session Representative Uehling and Representative Ward sponsored HJR 7 which proposed amendments to the Constitution of the State of Alaska relating to the election of the Attorney General. The legislation passed the House but failed to pass the Senate.

Subsequently, HB 456 has been introduced which would authorize an advisory vote by the registered voters of the State. This would allow the legislature to gauge the feelings of the public and act accordingly.

HB 456

Grants Pass, Oregon
February 19, 1983

TO MY FRIENDS IN THE ALASKA LEGISLATURE:

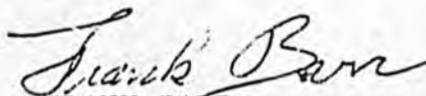
Almost thirty years ago I proposed that the state of Alaska elect its attorney general. Although my proposal was finally rejected by the Constitutional Convention in 1956, I have never abandoned my conviction that the attorney general should be "the people's attorney," elected by and responsible to the citizens of Alaska.

For that reason, I am pleased to support House Joint Resolution 7, which proposes an amendment to the state constitution providing for the election of the attorney general. HJR 7, if approved by both houses, would allow the electorate to determine the nature of the state's highest law enforcement officer.

I urge every legislator to fully consider this important bill. If you decide that your constituents deserve a truly impartial attorney general who is ultimately responsible to the people, then I encourage you to support the passage of HJR 7.

Thank you for your attention.

Respectfully,



FRANK BARR
Delegate, Alaska Constitutional
Convention (1955-56)

Extracted from: Powers, Duties and Operations of State Attorneys General (1977) (Study by National Assoc. of A.G.s)

6. SELECTION, TERM AND REMOVAL

This chapter examines the important issues of how the Attorney General is selected, how long he serves, how he can be removed, and how a vacancy in the office can be filled. Some of these issues, particularly that of election or appointment, have been subject to controversy since the first state governments were established. This report discusses existing practices and presents the arguments on both sides of these issues.

Method of Selection

Table 6 shows methods of selecting the Attorney General. He is popularly elected in forty-two states. He is appointed by the Governor in six states (Alaska, Hawaii, New Hampshire, New Jersey, Pennsylvania, and Wyoming), the three territories (Guam, Samoa and the Virgin Islands), and the Commonwealth of Puerto Rico. In Maine, he is selected by the Legislature and in Tennessee, by the Supreme Court. Now elected

The Attorney General is the most prevalent elective official in state governments except for the Governor, who is elected in all jurisdictions. The Treasurer is elected in thirty-nine jurisdictions, the Secretary of State in thirty-eight, the Auditor in twenty-five, and the Superintendent of Public Instruction in nineteen, compared to forty-two states in which the Attorney General is elected.[87] The 1970s witnessed a marked acceleration of the trend toward election of the Governor and Lieutenant Governor on a single ballot and such a practice is now followed in twenty-two jurisdictions. Thus, the Attorney General is actually the most common official who is elected on a single ballot. Where very few, but more than one, state executive officials are elected, the Attorney General is usually included among these few. He is, for example, among the three executive officials elected in Virginia, among the four elected in Maryland, Michigan and New York, and among the five elected in Rhode Island, Colorado, and Utah. However, he is not one of the two elected officers in Alaska, Hawaii, Guam, and the Virgin Islands, the four in Pennsylvania, nor the five in Wyoming.

Historically, the Attorney General has been an appointive, rather than elective, official. In England, he was appointed by the Crown and only incidentally acquired elective status through a seat in Parliament. In Colonial America, Attorneys General were usually appointed by the Governor of the Colony. The Attorney General of the United States still serves at the pleasure of the President with the advice and consent of the Senate.

Most of the first state constitutions specified that the legislature would choose the Attorney General. The concept of universal suffrage had not yet taken hold, nor had the idea of direct election of many officials.

87. Council of State Governments, THE BOOK OF THE STATES, 114-115, 121-122 (1976-77).

TABLE 6: SELECTION AND TERM OF ATTORNEYS GENERAL

	Elected	Appointed by	With Consent Of	Length of Term	May succeed Himself
Alabama	x			4	Yes
Alaska		Governor	Legislature	4	Yes
Arizona	x			4	Yes
Arkansas	x			2	Yes
California	x			4	Yes
Colorado	x			4	Yes
Connecticut	x			4	Yes
Delaware	x			4	Yes
Florida	x			4	Yes
Georgia	x			4	Yes
Guam		Governor	Legislature	Indefinite	Yes
Hawaii		Governor	Senate	4	Yes
Idaho	x			4	Yes
Illinois	x			4	Yes
Indiana	x			4	Yes
Iowa	x			4	Yes
Kansas	x			4	Yes
Kentucky	x			4	No
Louisiana	x			4	Yes
Maine		Legislature		2	Yes
Maryland	x			4	Yes
Massachusetts	x			4	Yes
Michigan	x			4	Yes
Minnesota	x			4	Yes
Mississippi	x			4	Yes
Missouri	x			4	Yes
Montana	x			4	Yes
Nebraska	x			4	Yes
Nevada	x			4	Yes
New Hampshire		Governor	Exec. Council	5	Yes
New Jersey		Governor	Senate	4	Yes
New Mexico	x			4	Yes
New York	x			4	Yes
North Carolina	x			4	Yes
North Dakota	x			4	Yes
Ohi	x			4	Yes
Oklahoma	x			4	Yes
Oregon	x			4	Yes
Pennsylvania	X	~~Governor~~	~~Senate~~	4	Yes
Puerto Rico		Governor	Senate	Indefinite	Yes
Rhode Island	x			2	Yes
Samoa		Governor		Indefinite	Yes
South Carolina	x			4	Yes
South Dakota	x			4	Yes
Tennessee		Sup. Court		8	Yes
Texas	x			4	Yes
Utah	x			4	Yes
Vermont	x			2	Yes
Virgin Islands		Governor	Senate	Indefinite	Yes
Virginia	x			4	Yes
Washington	x			4	Yes
West Virginia	x			4	Yes
Wisconsin	x			4	Yes
Wyoming		Governor	Senate	4	Yes

Andrew Jackson's administration brought a new ethic to American government. The common man was considered competent to vote and to hold office, and direct election of officials became the rule. State constitutions provided for election of numerous officials, usually including the Attorney General.

A study published in the Law Library Journal[88] showed how methods of selecting Attorneys General developed in nineteen states; of these, eight provided for legislative selection prior to 1843, but none finally retained this method. Prior to 1845, twelve states provided by constitution or legislation for the appointment of an Attorney General by the Governor, the legislature, or other authority. The trend then turned toward election. For example, North Carolina's 1776 Constitution provided for appointment by the legislature; its 1868 Constitution provided for election. Louisiana's 1812 Constitution provided for appointment by the Governor; its 1852 Constitution provided for election. Michigan's 1835 Constitution provided for appointment by the Governor; the 1850 Constitution provided for election. Virginia's 1776 Constitution provided for selection by the legislature; its 1902 Constitution provided for election. Kentucky's 1792 Constitution provided that the Governor would appoint the Attorney General, with the consent of the Senate; the 1850 Constitution made the office elective.

Wyoming, in 1899, became the first "new" state to provide for appointment of the Attorney General, thereby ending the trend toward popular election. Alaska's 1959 Constitution and Hawaii's of 1960 provided for Gubernatorial appointment, following the policy set by their territorial conventions in 1950 and 1956.

Strong arguments can be advanced for either system of selection. There is not necessarily a correlation between the selection process and the extent of the Attorney General's actual powers. For example, the Attorney General is elected in Delaware and appointed in Alaska, but in both jurisdictions he has control over all legal and prosecutorial functions. In some states, the Attorney General is independently elected, but he exercises little power at either the state or local level. Thus, a "strong" department of justice can be developed under either system of selection, but is not guaranteed by either.

Proponents of an appointive Attorney General usually base their arguments primarily on the need to strengthen the executive. As one view, the commentary on the Model State Constitution developed by the National Municipal League says that:

> All authorities on executive organization agree with the position embraced by the Model State Constitution for more than 40 years that administrative power and responsibility should be concentrated in a single popularly elected chief executive. There is growing recognition that the governor, as the representative of all the people,

88. Lewis Morse, Historical Outline and Bibliography of Attorneys General Reports and Opinions, 30 LAW LIBRARY JOURNAL 39-245 (1937).

should be equipped with the constitutional status necessary to exercise constructive leadership as the chief lawmaker and political head of his state.[89]

The Model Executive Article for state constitutions recommended by the Committee on Suggested State Legislation of the Council of State Governments limits statewide elective officials to the Governor and Lieutenant Governor, who are elected jointly. This article was developed by the Committee on Constitutional Revision of the National Governor's Conference.[90] Studies on administrative reorganization usually argue that fragmentation leads to irresponsibility, but a single chief executive can be held accountable through the electoral system and, as a consequence, can make the administration more responsive. Proponents of an appointive Attorney General argue that his function is to advise the Governor, who should be permitted to choose his advisors. They believe that the two officials are more likely to maintain the close and harmonious relationship that is necessary for effective liaison if the Attorney General is appointed.

Advocates of appointment also contend that the elective process may not assure professional competence. The pressures of politics and the time involved in campaigning limit an Attorney General's abilities to serve effectively, and many highly competent people would not be willing to undergo the election process. They also argue that the Attorney General's primary function is to interpret the law, which is a technical task and should not involve the political process.

The arguments for an elective Attorney General were cogently summarized by Attorney General Louis J. Lefkowitz in a position paper submitted to the New York Constitutional Convention in 1967. General Lefkowitz reviewed the Attorney General's duties in some detail, pointing out they were predicated upon his role as an independent official, and concluded that:

> To sum it up-- an elected Attorney General has a measure of independence and a sense of personal and direct responsibility to the public. The elected official has a natural and impelling desire to be creative and to exercise broader initiative in the service of the public. He is free of the fear of dismissal by any superior official if he should exercise contrary independent judgment. He is in the best position to render maximum service to the People and <u>impartial</u> advice to the Governor, the Legislature and State departments and agencies. He can appear in Court <u>without</u> <u>fear</u> <u>or</u> <u>favor</u>-- an attorney in the fullest and finest sense of the word.[91]

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89. National Municipal League, MODEL STATE CONSTITUTION (6th ed.) 65-66 (1963).

90. The Council of State Governments, 1970 SUGGESTED STATE LEGISLATION, 3-4.

91. Attorney General Louis J. Lefkowitz, <u>Position Paper of Louis J. Lefkowitz Attorney General, to Constitutional Convention, Committee on the Executive Branch</u>, June 1, 1967, Albany, N. Y.

An equally strong position in favor of election was taken by Attorney General William J. Scott before an Illinois Constitutional Convention; he stressed that the Attorney General's roles of "government watchdog" and "attorney for the people" required independence from the Governor.[92]

The primary argument for an elective Attorney General is that he is an attorney for all the people, and should be chosen by them. He is the Governor's advisor, but not exclusively; the Governor is merely one among many clients. By making the Attorney General directly responsible to the electorate, he remains subject to the ultimate source of power and will be more responsive to public needs. As discussed elsewhere in this report, the courts increasingly recognize that the Attorney General is responsible to the people, not just to the government. It is further argued that the Attorney General has important administrative and legal functions, such as programs in consumer protection and environmental control. In executing these functions, an Attorney General is acting as an advocate for the people, not as agent of the executive branch. His duties usually include prosecution of election violations, collection of debts, and bringing of suits in the name of the people; these responsibilities are outside the scope of the Governor's duties.

Many arguments for election center around the fact that the Attorney General's duties are of the highest order and he should enjoy the same independence as a member of the judiciary. He should not be a creature of the Governor, but should render opinions solely on the basis of law. He should not be the advocate for a particular administration, but should be free to oppose policies which he considers inconsistent with the law and to investigate apparent wrongdoing.[93]

In reference to the argument that an appointed Attorney General is a non-political technician, it should be noted that appointment does not necessarily remove the office from politics. Some appointed Attorneys General have been politically active as potential candidates for other office or on behalf of the Governors they serve. At the federal level, Presidents have frequently named as Attorneys General persons who had been active in their campaigns. This has also been true in some states.

In his remarks to a legislative committee which was considering a constitutional amendment to make the office appointive, former Attorney General Meyer of Nebraska mentioned several arguments in addition to those usually advanced by proponents of election. These included the following points: the Governor can appoint men with legal training to his staff if he feels he needs lawyers of his own choosing. Much of the Attorney General's work is in areas in which the Governor has little or no interest,

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92. News from William J. Scott, Attorney General, State of Illinois, Feb. 16, 1970.

93. See summary of arguments presented to New York's constitutional conventions in Robert H. Gordon, The Relationship Between the Attorney General and Agency Counsels in New York State, (Unpublished Ph.D. Dissertation, Syracuse U.), Ch. 1 (1966).

such as advising county attorneys and handling routine criminal appeals. The Governor is only one of many state officials whom the Attorney General advises.[94]

Confirmation of Appointment

In all six states where the Governor appoints the Attorney General on a regular basis, the appointment is confirmed by either the Senate (Hawaii, New Jersey, Pennsylvania, Wyoming), both houses of the Legislature (Alaska), or by the Council (New Hampshire). Confirmation in Pennsylvania requires a two-thirds vote of all the members of the Senate.

In Puerto Rico and the Virgin Islands confirmation is also by the Senate. In Guam, appointments are made with the "advice and consent" of the legislature, but in Samoa appointment is by the Governor with no requirement for confirmation. Although all Pennsylvania Attorneys General of recent years have been in the same political party as the Governor, the requirement of approval of two-thirds of all elected members of the Senate for confirmation of the Attorney General gives the minority party considerable leverage over appointments. However, there has been no indication that this has caused problems.

The various model constitutional provisions that have been proposed differ on the need for confirmation. The Advisory Commission on Intergovernmental Relations' suggested constitutional provision for a short ballot for state officials provides for Senatorial confirmation of gubernatorial appointments. The Model State Constitution of the National Municipal League does not mention confirmation. There is no extensive literature on the precise manner in which appointments are to be confirmed.

Length of Term and Succession

Forty-four states presently provide a 4-year term for the Attorney General and four states a 2-year term. Tennessee sets the term at 8 years and New Hampshire at 5. In Guam, Puerto Rico, and the Virgin Islands, the Attorney General is appointed for an indefinite term. In Samoa the term is also of an indefinite length, although there is a minimum of 2 years for an initial appointment. Table 6 indicates the length of Attorneys General's terms and the statutory or constitutional rules on succession.

The trend is clearly toward longer terms. Most states initially limited terms of officals to 1 or 2 years, on the theory that frequent elections kept government closer to the people and prevented the accretion of power by elected officials. Many states prohibited successive terms on the grounds that official power must be limited. These arguments may have been cogent at a time when Attorneys General had relatively few duties to

94. Letter from Attorney General Clarence A. H. Meyer to Patton G. Wheeler, November 24, 1970.

perform, and those duties were relatively well-defined. Present Attorneys General, however, cannot effectively operate with a 2-year term, which does not allow time to master the duties and responsibilities of the office. Neither should they be subjected to the continuing campaign requirements imposed by an election every 2 years. For these reasons, NAAG has recommended that the Attorney General should be elected or appointed for a minimum term of 4 years and should be allowed to succeed himself.

The number of Attorneys General serving 2-year terms has declined drastically in recent decades. In 1937 there were twenty-one, but this number fell to nine by 1970, and then to four by 1976. Arizona went from 2 to 4 years in 1970, and Wisconsin and New Mexico in 1971. The 1972-73 legislative biennium saw four more states-- Iowa, Kansas, South Dakota, and Texas-- shift to a 4-year term for the Attorney General. Apparently only one jurisdiction has ever gone from a 4-year to a 2-year term; this occurred under Missouri's 1865 Constitution, which was adopted during Reconstruction; its 1875 Constitution later restored the 4-year term. Voters in Rhode Island, however, rejected a 1972 proposal which would have extended from 2 to 4 years the terms of all executive officers, including the Attorney General.

Succession to Office

There are few restrictions on Attorneys General serving successive terms. There are restrictions on Attorneys General succeeding themselves in only three states: Kentucky, New Mexico, and Alabama. Only Kentucky absolutely prohibits immediate succession by the Attorney General. Until 1968 Alabama allowed only one term, but an amendment that year permitted the limited succession. New Mexico restricts the Attorney General to two terms of 2 years each.

The Model State Constitution permits succession in the office of Governor because:

> The main argument favoring restriction in the term of the governor is fear of bossism or perpetuation through use of the powers of the office. This is always a possibility but the better argument seems against any form of restriction. Limitations of this kind restrict the right of the people to pass judgment upon the quality of the gubernatorial service performed for them and thus eliminates from the field the one candidate about whom the voters usually know the most. From a program policy point of view, a restriction on service in office affects the governor's ability to develop and implement a long-range plan.[95]

These arguments apply with equal validity to the office of Attorney General.

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95. National Municipal League, MODEL STATE CONSTITUTION (6th ed.) 66 (1963).

Removal from Office

There are several mechanisms for removing Attorneys General: impeachment, recall, or removal by the Governor, the legislature, or the courts. Information is not available on how often these methods have been used or how well they operated.

Of the fifty-four jurisdictions, thirty-six provide for impeachment. It is the only method of removal provided in twenty-one of these jurisdictions. Impeachment processes vary, but proceedings are usually instituted by the lower house and, if it votes to impeach, the charges are tried by the upper house. In New York, the judges of the court of appeals, the state's highest court, sit with the members of the Senate as a court of impeachment. In Nebraska, impeachment charges are proferred by the unicameral Legislature and tried before the state supreme court. In Missouri, impeachments are tried before the supreme court after charges are filed by the House of Representatives.

An impeachment proceeding is rare, and is used only under the most extraordinary circumstances. Apparently, the last impeachment trial of an Attorney General was Kansas in 1934. That action resulted in an acquittal.[96] Whatever grounds are prescribed grounds for impeachment, the method is not a common means of removing officials. It can be utilized only when the legislature is in session and is quite time-consuming.

Fifteen states which provide for impeachment also provide alternative removal processes. In the ten jurisdictions where the Governor appoints the Attorney General, he may also remove him. In Hawaii, the Senate must consent to such removal. In New Jersey, the Attorney General can be removed by the Governor for cause only after an opportunity to be heard has been granted. In New Hampshire, the Governor and the Council may remove the Attorney General on address of both branches of the legislature. Five other states provide for Gubernatorial removal of the Attorney General. In Maine, the Governor and Council may remove on address of both branches of the legislature. In New York, removal is by the Governor and the Senate. The Governor of Arkansas, upon address of two-thirds of the members of each house of the legislature, may for good cause remove the Attorney General. In Michigan and West Virginia, the Governor may remove him without the consent of another authority.

The legislature stands alone as a removing authority in proceedings other than impeachment in seven states. Recall may be used to remove the Attorney General in Arizona, Colorado, Louisiana, North Dakota, Oregon, Washington, and Wisconsin; he is an elective officer in all of these states. Louisiana reports that the district court may remove the Attorney General, and Maryland indicates that removal is attendant to any conviction in a court of law.

As a result of a court decision, an Arizona Attorney General was removed from office in 1947, having been adjudged guilty of conspiring to violate the gambling laws of the state. The Governor considered the office

96. New York Times, February 7, 1942, at 17.

vacant and appointed a new Attorney General. The former Attorney General, however, refused to vacate his office. Subsequent court action affirmed the validity of an act which provided that an office would be vacant if its incumbent was convicted of a felony. The court reasoned that the powers of impeachment were an added protection for the public, not the sole protection.[97]

Filling Vacancies

Vacancies in the office of Attorney General may be filled by appointment of the Governor, the legislature, or the supreme court. An overwhelming majority of the jurisdictions indicate that the Governor fills vacancies as soon as they occur. In Maine, Massachusetts, New York and Virginia, the legislature fills vacancies; however, if it is not in session, the Governor makes the appointment. In Maine, he must have the approval of the Council. Tennessee provides that the Supreme Court will fill vacancies, since it normally appoints the Attorney General. In two states, Louisiana and New Jersey, the First Assistant or Deputy Attorney General becomes Attorney General until a successor is elected or appointed.

Where the Attorney General is appointed, it would seem proper that the appointing agent also fill vacancies, as is the case in all such jurisdictions. The rationale for filling vacancies when the office is elective is less clear. All but four of the states which have an elective Attorney General permit the Governor to make appointments. Three permit the legislature to name an Attorney General, and in one the deputy is promoted. Allowing the Governor to fill vacancies in an elective office seems contrary to the chief arguments for election, those concerning independence from the executive. It is also questionable whether a Governor of one party should be allowed to fill a vacancy in an office which was held by a member of the opposite party.

An Assistant or Deputy Attorney General is often promoted to fill a vacancy, even if this is not required by law. If the Deputy Attorney General is promoted to fill a vacancy, the chances of continuity in office programs are greater; however, the Attorney General may select his chief deputy according to different criteria from those he would use in selecting his own replacement.

Vacancy appointments for elective offices usually are valid only until the next general or next biennial election. At that time, if the original term has not elapsed, a short-term Attorney General is elected. This point was litigated in Oregon.[98] The statute creating the Oregon office in 1891 provided that the Attorney General would be elected for a full 4-year

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97. State ex rel. De Concini v. Sullivan, 66 Ariz. 348, 188 P.2d 592 (1948).

98. State ex rel. Baker v. Payne, County Clerk, 22 Ore. 335, 29 Pac. 787 (1892).

term in 1894. Further, it mentioned that vacancies would be filled by Gubernatorial appointment until the next general election, when an Attorney General would be chosen to fill out the term or commence a new term. The Governor appointed an Attorney General in 1891. The question of the case was whether there was to be an election to fill out the first "quasi-term" in the general election of 1892. The court ruled that there was to be such an election.

The Supreme Court of Georgia reached the opposite conclusion in a 1939 case.[99] It held that the office of Attorney General was created under the judicial article, hence the rule that provisions for elections to fill vacancies in executive positions did not apply to it. The Gubernatorial appointee to fill a vacancy created by a resignation was to serve out the full 4-year term of office without standing for election.

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99. Wood v. Arnall, 189 Ga. 362, 6 S.E.2d 722 (1939).

POSITION PAPER

of

LOUIS J. LEFKOWITZ

ATTORNEY GENERAL

to

CONSTITUTIONAL CONVENTION,

COMMITTEE ON THE

EXECUTIVE BRANCH

in support of

PROPOSITION THAT THE PRESENT

CONSTITUTIONAL PROVISION FOR

THE ELECTION OF THE ATTORNEY

GENERAL SHOULD BE RETAINED

POSITION PAPER

Submitted to the Constitutional Convention,
Committee on the Executive Branch,
at hearing hald on June 1, 1967
at the State Capitol, Albany, New York

PROPOSITION

THE PRESENT CONSTITUTIONAL PROVISION FOR THE ELECTION OF THE ATTORNEY GENERAL SHOULD BE RETAINED.

HISTORICAL BACKGROUND AND COMPARATIVE ANALYSIS

In the early years of the Colony of New York (17t' century), the Attorney General was an appointee of the Royal Governor who was, himself, an appointee of the English Crown. About 1700 the intermediary was dropped and appointment of the Attorney General was vested directly in the Crown.

In 1777 the first Constitutional Convention established the State of New York, appointed all the State officers deemed necessary in the establishment of the new state, and provided for a Council of Appointment to make future appointments. Under this system, appointment of State officers was the rule rather than the exception. The Attorney General could be removed at any time and frequently was removed. There was neither difficulty nor hesitancy in removing him when a majority of the Council was of the opposite political faith. The fact of the matter is that under this system the average tenure was less than 2-1/2 years.

At the Constitutional Convention of 1821 a proposal was made that the Attorney General be appointed by the Governor with the consent of the Senate. This was rejected by the Convention and, instead, provision was made that the Attorney General, together with other important State officials, be elected by the Legislature.

By 1846 there was an overwhelming demand for the popular election of the Attorney General. This was recognized by the Constitutional Convention of 1846 and made a part of our Constitution.

Historically, traditionally, and as a matter of basic constitutional mandate, we have continued to elect our Attorneys General in New York State for the past 121 years. This is not to say that the question has not been raised or the problem re-assessed from time to time in the light of vastly changed conditions. As a matter of fact, at every Constitutional Convention since 1846 the question was reconsidered and in each instance the Convention adhered to the elective system.

Comparatively considered, and without going into the historical background of each case, it may be noted that in forty-two of the fifty States the Attorneys General are elected by the people. Interestingly, included among the States which follow the elective system are many of the most populous states in the Union (for examples: New York, California, Illinois, Ohio, Michigan and Massachusetts).

POINTS IN SUPPORT OF AN ELECTED ATTORNEY GENERAL

1. Independence.

While the history of the office of the Attorney General of New York includes efforts to make the Attorney General an appointed officer, it is significant that for upwards of one hundred years without interruption that office has survived as one to be filled by the elective process. Thus, retaining the Attorney General as an independent constitutional officer to be elected by the People of the State not only reserves to the People their traditional right to select a candidate of their choice as the State's highest ranking legal official, but has the added advantage characteristic of a democratic government of greater assurance that the laws of the State will be construed and applied objectively and without favor.

Exactly 100 years ago, at the Constitutional Convention of 1867, when that issue was considered, the report of the discussion states in part:

"The Attorney General holds a dignified position; he has important functions and acts on his own judgment and responsibility" and further, "It was not the Governor alone, but the people who wanted an Attorney General. He was to look after the interest of the people in the State and take care of their money so far as action in the courts was concerned * * *," and again, "If he (the Attorney General) does his duty it matters little to the people whether he is

in accord with the Governor or not." "Indeed," observed a delegate, "it may be to the interest of the people that the Attorney General should not always be in accord with the Governor," and more, "that he should be a man who could not be ordered by anybody. His opinions should be above any fear of the loss of his office. His duties are of the highest order * * * as high as those of any judicial officer; and he should be as independent as any judge. The Governor should have no more power to remove the Attorney General than he has to remove the Chief Judge of the Court of Appeals. His opinions are upon great questions, affecting the great questions of the State. He ought not be a mere creature of the Governor to supervise his vetoes and obey his dictation."

This independence of action and expression is particularly significant with respect to opinions of the Attorney General concerning the construction of statutes and the validity and propriety of acts thereunder by other departments and agencies of the State.

All of the various departments and agencies of government turn to the Attorney General for legal advice and for the rendering of Official Opinions. Such opinions are acted upon daily and a great deal of the operation of the State government depends upon the nature of the advice that is so rendered. These Opinions are rendered to all departments of the State government, those under the direction

and supervision of the Governor and those under the direction of other elected officials. It is important to note that the Opinions have a direct and significant impact upon the People in their daily life. Here is a compelling reason why the Attorney General should continue to be independently elected. If the Attorney General is appointed by the Governor, then of necessity his opinions must reflect the philosophy of that Governor or the relationship would not be a compatible one.

An Attorney General does not give partisan advice; he gives legal advice. There is no such thing as "Democratic" law, "Republican" law, "Conservative" law or "Liberal" law. There is simply "law" — and the Attorney General, with the same degree of impartiality and objectivity as a Judge, calls it as he sees it.

The independent status of the Attorney General — the fact that he is the People's choice and is accountable to no one else — is implicit in the wide range of his official activities and duties which are based on the concept of his independence. Thus, he is, ex officio, a member of several boards and commissions, the other members of which are usually representatives of the administration. Thus, it is his duty to defend in Court the constitutionality of an act of the Legislature regardless of whether the current administration, as a matter of policy, supports it or not. And thus, with regard to proposed legislation, it is his duty impartially

to consider its constitutional validity and statutory interpretation and advise the Governor accordingly, regardless of the latter's policy consideration of such bills. If the Attorney General were an appointee of the Governor such functions may be rendered anomalous because the objectivity and impartiality inherent in his independence would necessarily fall with the destruction of his independence.

Furthermore, the responsibility for the effective protection of the consumer and the investor entrusted to the Attorney General (the prototype for similar authority in the Attorney General in many states in the Union) is predicated upon the existence of an independently elected Attorney General who will not be deterred (as during my tenure) in taking the initiative for affirmative action by the opposition of other governmental departments or agencies, the heads of which are appointed by the Executive. My own experience in the past ten years as Attorney General is illustrative of this fact. Thus, the creation in 1957 of the Consumer Frauds and Protection Bureau in the Department of Law was resisted on the ground that there would be duplication of some of the functions of the Banking Department. Similarly, the establishment of the Real Estate Syndication Bureau in the Department of Law was effected despite executive resistance on the ground that the Attorney General would thereby be performing a function in an area presumably

policed by the State Division of Housing. The creation of the Civil Rights Bureau in 1957 was opposed on the ground that it overlapped and duplicated existing functions of the State Commission Against Discrimination. These three bureaus were created by an elected Attorney General who acted on his own initiative in behalf of the people The important fact is that they were created without clearance from the Executive.

The basic statutes (Executive Law § 63[12] and Business Corporations Law §§ 109 and 1101) confer authority upon the Attorney General to investigate and secure judicial disposition restraining any illegal and fraudulent acts. This power is not circumscribed or qualified by the existence of concurrent jurisdiction in a limited area by other government officials. Such authority of the Attorney General obviously bespeaks an independent Attorney General.

Similar independence is called for in the invocation and enforcement of the State's anti-trust law. The vigorous enforcement in the last ten years of this statute, aided by the expanded powers authorized by the Legislature, has been so singularly impressive as to receive national attention and commendation. The intensity of such activity should not, as is the case elsewhere, be made subject to the decision of a Governor who may be influenced by many factors alien to proper anti-trust considerations. Such enforcement must be left to an independent Attorney General responsible only to

the People for the implementation of the State's anti-trust policy.

My views are based on ten years of close affiliation with all branches of State Government — with the Governor and his Counsel, with the Legislature and its Committees, leaders and members, with the executive departments and agencies and their counsel, with the Judiciary, and with Authorities and local subdivisions and their officers and counsel. The activities of the State are so vast in magnitude, so varied and complex in character — the actions of its constituent elements being occasionally at cross-purposes — that, in the best interests of the People of the State there must necessarily be premised as greater assurance of independence, impartiality and objectivity, an Attorney General who is elected.

In West Virginia, where the Attorney General is elected, the incumbent Attorney General said:

> "I've been an elected Attorney General for two terms, and in the exercise of my duties I could not have fairly represented the agencies of government or the citizens of this State had I been subject to the whims of the executive or subject to political pressures other than the voters.
>
> "* * * In every occasion wherein one would have the authority of appointment, he also would have the 'hammer' on tough questions of policy. No Attorney General should be forced to operate under such an

arrangement. The mere fact that it would
be possible should be precluded."*

The overwhelming weight of opinion in favor of the elective process, predicated on the concept of the independence of the office, is exemplified by expressions of official views throughout the United States. Thus, at the Constitutional Convention of the State of Michigan, held as recently as 1963, in adhering to the elective process, it was said:

> "We favor election of the attorney general, the chief law enforcement officer of the state. In a representative government, appointment of the chief law enforcement officer would place him in a position of obligation which would make his duties more difficult. If the attorney general were appointed, he could be subjected to the influences of the appointing authority. Presently, he is able to make an independent legal judgment which might differ from the political decisions of other members of the executive branch. * * * [T]he governor has to make many decisions. Many of them are political decisions. I don't think that the best interests of the state can be served if the attorney general is appointed so that he must confirm the political decision of the governor. I think that the people of the state of Michigan have a right to the service of an attorney general who can say no, when the law and the interpretation of the law demands that he say no."

The Attorney General of Maine, who is appointed by the Legislature, said:

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* At my invitation the Attorneys General of virtually all of the States have stated their positions on the proposal here under discussion. Copies of their replies have been submitted to your Committee.

"[I]f the Attorney General is appointed by the Governor, there is always the question of whether or not he becomes in the nature of a legal rubber stamp and convenient oracle of the law for the Governor's purposes."

Oregon's Attorney General states that "the elected Attorney General is the people's best guarantee of vigorous and impartial interpretation and administration of state law."

Perhaps the most forthright statement of all has come from the Attorney General of Nevada:

"When you place the chief legal office of the state under the appointing power of the Governor you rob him of the complete independence that is his when elected by the people.

"It is this very independence which results in the fearless and efficient administration of justice."

Although no elective Attorney General has favored an appointive process, it is interesting to note that two appointive Attorneys General are in favor of the elective system. Maine's Attorney General, appointed by the Legislature, has said:

"I think I am of those who would like to see the Attorney General in Maine elected at large by the people * * *."

And the Attorney General of Alaska, who is appointed by the Governor, has said:

"Again, from my own experience, if I were given the choice I would be inclined to favor the elective position over the appointive for the simple reason that I believe that a lawyer can function more

effectively if he has freedom of action
in his own specialized field."

It has been argued that the elective process may result in a Governor of one political party and an Attorney General of another, with possible resultant disharmony and friction in the running of the State government. Of course, as a matter of abstract theory, implicit in the concept of independence is the concept of potential disagreement. And it is always possible that incumbents who are influenced solely by political motivations are capable of disruptive tactics. But experience has shown that men who have the knowledge, experience, character and maturity to have attained the high office of Attorney General can be relied on to have a sufficient sense of responsibility and responsiveness to the public need to make such accommodations as the law will permit.

It should be noted that in those jurisdictions in which the Attorney General is appointed, because it is believed that the Governor and the Attorney General should be of the same political faith, the Attorney General is <u>merely</u> a part of the Executive branch of the state. An elected Attorney General, as in New York, is more than merely a part of the Executive branch.

While harmonious relations between the Governor and the Attorney General are unquestionably desirable, it seems that harmony merely for its own sake is too high a price to pay for the loss of the independence which gives greater assurance of effective government in the public interest.

It has been said that the Governor should at all times have an Attorney General with whom confidential matters can be transacted; that the Governor should not be compelled to retain his own counsel. But this is based on the erroneous concept that the Attorney General is the Governor's counsel. He is not the Governor's counsel in the normal sense of the term; he is the People's counsel. This is recognized even in States, like New Jersey, where there is Counsel to the Governor despite the fact that the Attorney General is appointed by the Governor.

The diverse functions of the Attorney General and the Governor's counsel may be succinctly summarized as follows:

(a) <u>Attorney General</u>

1. Litigation in all courts.

   (a) Court of Claims - Representing the State and its agencies and officials in all claims based on contracts, torts and appropriations.

   (b) All other Courts - Representing the State, the Governor, State Departments, Agencies and Authorities, the Judiciary, and the Legislature.

   (c) Defending the validity of statutes which are attacked as unconstitutional.

   (d) Habeas corpus matters - criminal and civil.

   (e) Affirmative actions in all courts on behalf of the People in such matters as consumer frauds, anti-trust, civil rights, security frauds, realty investment frauds, and theatrical financing and charity frauds.

2. Renders opinions and advises the State, the Governor, the Legislature, and all State departments, agencies and officials.

3. Submits memoranda to the Governor on bills passed by the Legislature.

4. Renders advice on an informal basis to political subdivisions of the State.

5. Exercises criminal jurisdiction under the Executive Law and other statutes.

6. Supersedes District Attorneys when directed by the Governor.

7. (a) Administers registration of brokers, dealers and salesmen who deal in securities, and exercises enforcement powers.

   (b) Supervises public offerings of real estate (syndication, investment trusts condominiums, and cooperatives) and theatrical financing, and exercises enforcement powers.

   (c) Administers registration of theatre box office ticket-selling personnel, and exercises enforcement powers.

   (d) Administers registration of charitable foundations and trusts, and exercises enforcement powers.

   (e) In dealing, in court or otherwise, with estates and trusts in which the People are possible beneficiaries, he appears on behalf of the People.

(b) Counsel to the Governor

1. Advisor to the Governor.
2. Prepares annual message and special messages of the Governor.
3. Prepares Governor's legislative program.
4. Assists in the preparation of the departmental legislative programs.
5. Handles complaints against officials.
6. Extradition.
7. Clemency.

A further distinction in function between the Attorney General and Governor's counsel resides in the affirmative work of the Attorney General on behalf of the People which is constitutionally and statutorily imposed upon him. Thus, to name but a few of his functions, some of which have been mentioned, he acts affirmatively in matters of consumer protection, civil rights, anti-trust matters and charity frauds. Constitutionally, he acts under Article I § 6 of the Constitution against public officers and employees who refuse to waive immunity or testify in grand jury investigations. There are other statutory provisions, too numerous to mention, under which the Attorney General is required to take affirmative action. The most recent of those provisions, as an example, is the new Public Employees' Fair Employment Act (Laws of 1967, Chap. 392) under

which the Attorney General is now placed in the highly important field of public labor relations.

Obviously, because of the overriding primary allegiance of the Attorney General to the People, rather than to the Governor, the basis of the independence which is the hallmark of the office of the Attorney General, it is perfectly proper that the Governor have his own counsel. There is no antipathy between the two offices. Despite some unavoidable duality of operation, they complement each other.

That the existence of both positions does not create a problem of unavoidable friction is attested to by actual experience in our own State when we had a Democratic Governor with Counsel of his political persuasion and a Republican Attorney General. Dean Daniel Gutman, former Counsel to Governor Harriman, wrote to me as follows:

> "During the four years in which I served as Counsel to the Governor, I enjoyed a compatible and co-operative relationship with the Attorneys General, - first, the present Senator Javits and then yourself.
>
> "On occasions we found ourselves in disagreement. This occurred very rarely, and it served to reinforce my opinions on the more numerous occasions when we were in complete accord.
>
> * * *
>
> "In my [illegible]nion the broad scope of the Attorney [illegible]eneral's activity, his

> great and varied responsibilities and the volume of business, particularly in a State such as ours, requires that this official be elected rather than appointed. I see nothing worthwhile that can come from a change in the present system that has been in existence here as in most other States, for so many years."

Judge Samuel I. Rosenman, who was counsel to Governor Roosevelt, observed that perhaps ten per cent of his time was devoted to legal matters. He added:

> "Neither the Counsel to the Governor nor Counsel to the President can render any official opinion. Official opinions can come only from the Attorney General; so it is not quite accurate to say that the Counsel takes the place of the Attorney General in serving the Chief Executive."

Although Judge Rosenman leaned toward the appointive method, he conceded:

> "Having said all the above, presenting the pros and cons, I don't think I am completely convinced on either side. It is as Oscar Hammerstein said in THE KING AND I a 'puzzlement.'"

Governor Poletti, who was counsel to Governor Lehman, observed:

> "I do not favor the discontinuance of the Attorney General as an elected official and his appointment by the Governor."

Pointing out that, since the Governor and the Lieutenant Governor are elected as one, the only two remaining statewide officials who are elected are the Attorney General

and the Comptroller. With perspicacity born of a lifetime of experience Governor Poletti added:

> "The people are smart enough to vote for each of these officials, and there is serious danger in reducing the scope of participation by the people in their government.
>
> * * *
>
> "* * * In all events, I believe the State greatly benefits from the independence of the Attorney General and Comptroller."

2. <u>Separation of Powers - Checks and Balances.</u>

As a corollary to the concept of the independence of the office is the fundamental concept of a democracy respecting the separation of powers--the system of checks and balances. "Appointment" of the Attorney General is incompatible with the doctrine of the separation of powers. There is nothing intrinsically wrong with the concept of a Governor of one political party and an Attorney General from another. They can and do often act as a "check" upon one another and if, as a result, there is occasional friction, this is a healthy phenomenon which a viable and dynamic political society can survive and, indeed, probably be the better for it. In certain situations, given a weak or ineffectual Legislature and a strong and forceful Governor, the only effective balancing and checking power may come

from an Attorney General who publicly espouses a responsible opposing point of view.

The Attorney General of Kansas expressed the point well:

> "[T]he elected attorney general is a further extension of the system of checks and balances which was incorporated into the form of government initiated by our founding fathers and which has flourished in the United States since its beginning."

To the same effect is the statement of the Attorney General of Minnesota:

> "[T]he office of Attorney General has developed in state government in a unique way. State legislatures do not have the broad investigative power that the Federal Congress has. In most states one of the most important statewide investigative officials is the Attorney General. If an Attorney General was to be appointed by the administration he then becomes solely dependent upon it and tends to overlook problems which develop within that administration.
>
> * * *
>
> "* * * [U]ntil there is some alternative form of check and balance on state government, a broadly based elected Attorney General is preferable to one appointed by the Governor."

The Attorney General of the State of Washington, an elected official, has said:

> "The reason I would like to see the Auditor and Attorney General elected by the people is because I believe in

government there are two necessary ingredients--money and law. These are so important that I think an official personally responsible to the electorate should be chosen by the people to provide the necessary check and balance.

* * *

"The law is the whole touchstone of our Democratic form of government. The man or woman who says the law is or is not being followed should be, in my belief, directly responsible to the people."

Vermont's Attorney General has stated:

"Having an independent Attorney General, elected by the people of the state as a whole, is but another check and balance in state government that in the all important realm of legal and constitutional interpretations is essential to the sound functioning of state government, * * *."

The Ohio Attorney General believes that the elective status of the office "constitutes one of the more effective balances of the Executive Department of the State." He adds:

"The Attorney General's office should be run as a law office, with a completely objective approach to the legal problems of an administration, and should not be relegated to a position of house counsel finding ways and means to support executive policy. By being elected the Attorney General is responsible only to the people of the state and this, to my way of thinking, is as it should be."

Maryland's Attorney General summarized the situation very succinctly:

> "From a historical point of view Maryland's system of electing both the Governor and the Attorney General appears to have effectively served the best interests of the people of this State. That system is but another example of the checks and balances so carefully written in the Constitution of Maryland. It is my opinion that to take away from our citizens the right to elect the Chief Legal Officer of the State is to lessen their direct participation in affairs of government, and I vigorously oppose any such change in our traditional practices."

Election results, both on the State level and in the City of New York, reveal that our sophisticated electorate does not always choose a straight party ticket. At the level of Governor and Attorney General, the people should have the right to split their ticket and choose the best candidates even though they are not necessarily of the same political party. Indeed, the split ballot is proof positive that the people, themselves, are not concerned with whether the Attorney General is of the same political persuasion as the Governor.

3. <u>The elected Attorney General has a direct responsibility to the People</u>.

Also as a facet of the "checks and balances" concept and a further corollary of the "independent" status of the

office is the underlying premise, which has historical, traditional and logical validity, that only the People should be in a position to command the Attorney General's undeviating allegiance and loyalty. The correlative of this concept is that the Attorney General's prime and direct responsibility is to the People.

An elected Attorney General is imbued with a deeper sense of direct responsibility to the public from whom he has received a mandate than is the appointed official whose authority springs singularly from one individual. The elected official innately senses this strong personal and direct responsibility to the People and is thereby inspired to a greater degree of creativity, a broadened initiative and an increased desire to innovate in their behalf. The reaction is almost intuitive. As a result, he is free to act without clearing a matter with the executive hierarchy or obtaining the Governor's approval. I have already detailed my experience in this regard when I established the Consumer Frauds and Protection Bureau, the Real Estate Syndication Bureau and the Civil Rights Bureau in the Department of Law. Also, in this connection, I wish to point out that the Department of Law prepared and had introduced during my tenure, without executive clearance, our own legislative program, in the public interest, to protect

the consumer, the investor and the legitimate business man, as well as bills to reinforce civil rights.

The Attorney General of Wisconsin expressed the concept well:

> "An Attorney General also performs numerous functions independently of any state agency. I refer particularly to his activity in such fields as consumer protection and anti-trust enforcement. I believe that an Attorney General who is responsive to the needs of the people can better fulfill these duties which have been entrusted to him by the people.
>
> "It is my firm opinion that a State Attorney General should be an elected official. He should represent and be responsive to all of the people of the state. I believe that the activity of the Attorney General in the field of consumer protection alone is an outstanding example of the way in which elected Attorneys General respond to the needs of their constituents. Appointed officials who are not directly responsible to the voters are not nearly as sensitive nor as responsive to their needs."

Virtually all of the Attorneys General stress "accountability" to the People, rather than to the appointing officer; that the Attorney General should be clothed with an independency of action in protecting the public interest; that, even at the expense of potential lack of harmony, he should enjoy a freedom that is unfettered by any domination whatsoever; and that as a lawyer he should not be an employee, but rather should be allowed freely to exercise his proper

functions both as an officer of the court and as an attorney, bound only by the ethics of his profession and his oath of office.

4. People's right of recall.

Because of the fact that an elected Attorney General bears the burden of direct responsibility to the electorate which give him their mandate, he is subject to the "recall" prerogatives of the electorate. If they are dissatisfied with the performance of their elected Attorney General, they can replace him at the ensuing election. An appointed Attorney General would deprive the electorate of this substantial and salutary power.

The correlative of the right to recall an incompetent incumbent is the right to retain a competent incumbent. This is lost in the case of an appointed Attorney General because, no matter how efficient, competent or successful an appointed Attorney General may be, upon a change of administration he is usually turned out of office.

CONCEPT OF A "DEPARTMENT OF JUSTICE"

I am aware of Proposition No. 49 (introduced by Mr. Hull) which provides for the appointment of the Attorney General by the Governor and for a Department of Justice to be headed by the Attorney General and which further provides that "the legislature shall pass appropriate legislation for the implementation of this department." I am also aware of Resolution No. 24 (introduced by Mr. Sand) to direct the Committee on the Executive Branch to prepare and present a proposition to establish a Department of Justice, "into which shall be consolidated all of the functions, powers, duties and responsibilities of state government in connection with or relating to law enforcement, including, but not limited to, the prevention and investigation of crime, and the detection, identification, apprehension, prosecution, custody and rehabilitation of persons accused or convicted of crime."

Proposition No. 49 is too general and, therefore, difficult for present comment because it leaves everything to legislative implementation. Resolution No. 24 seems to indicate that all police departments, local as well as State, all Sheriffs and District Attorneys, all Correctional, Reform and Prison facilities, as well as the State Division of Parole, shall be under the jurisdiction of the proposed Department of

Justice. It does not define the projected department with sufficient particularity nor reflect the magnitude or complexity of the proposal. Nothing is said of the existing broad civil jurisdiction of the Department of Law.

However, I do have some recommendations which are more appropriate for legislative action:

(1) I am in favor of the greatest coordination and cooperation in the field of law enforcement — in a program such as is conceived under the recently created Crime Control Council (Laws of 1967, Chap. 167), under which Governor Rockefeller has provided an impressive and extensive program. Ex officio, the Attorney General or his designee should be a member of the Crime Control Council.

(2) Another area of interest is the relationship of the Attorney General and the District Attorneys. I am not in favor of appointed District Attorneys under the jurisdiction of the Attorney General. I believe that the District Attorneys should continue to be elected public officials.

However, I am of the opinion that there is room for a closer relationship between the Attorney General and the District Attorneys; this would result in better enforcement of the criminal laws. The Attorney General could be authorized to provide a forum for inter-county cooperation between District Attorneys. Periodic meetings could be mandated at

which attendance by District Attorneys or their representatives would be required. The Attorney General could prepare and disseminate information of common interest and bring law enforcement to new peaks of efficiency and excellence.

(3) Some local prosecutors are ill-equipped to handle complex criminal appeals because of a limited staff. The prosecutors should be permitted to call on the Attorney General for advice, cooperation and aid in appellate matters. To this end, provision could be made for the handling of criminal appeals by the Attorney General if requested to do so by the District Attorneys.

When specific and concrete provisions defining the jurisdiction and powers of a "Department of Justice" are presented, I shall be pleased to submit another Position Paper in which I shall make comments on the proposals.

CONCLUSION

In the interest of uniformity and consistency, the Attorney General should be constitutionally designated as the sole and exclusive representative of his public clients in all courts. In this connection I strongly support Proposition No. 365 (introduced by Mr. Reidy), which provides that -

"The attorney-general shall be required and it shall be his duty to represent and appear for the state and all branches of the state government and all state departments, agencies, bureaus, officers and authorities in all litigation in which they shall be involved in all courts, and they shall be represented in the courts by no other persons than the attorney-general or a member of his staff."

The basic duties and powers of the Attorney General should remain intact with the addition set forth in Proposition No. 365. The Attorney General's activities as the State's chief legal officer are vital to the Legislature, to the various departments and agencies of State Government and, above all, to the People of the State of New York.

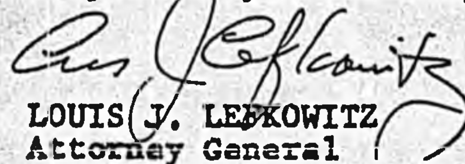
All can be accomplished, however, only if the Attorney General has the independence of an elected public official. That the elective status is productive of the best results is attested to by my immediate predecessors in the office of Attorney General. Our tenure covers the period of the past thirty-five years, during which we have experienced the deepest economic recession in our history as well as the longest period of economic well-being, during which we have had global conflicts, and during which we have come into the nuclear and the space age. Attendant upon these vast and fundamental changes have come a myriad of novel problems with which the Attorneys General have had to cope and for the most part they have successfully and vigorously responded

to the challenges. During these past thirty-five years, the Attorneys General of New York State have been John J. Bennett, Nathaniel L. Goldstein, Jacob K. Javits and I. My three immediate predecessors have authorized me to state that they favor the retention of the office on an elective basis. And so do I.

To sum it up - an elected Attorney General has a measure of independence and a sense of personal and direct responsibility to the public. The elected official has a natural and impelling desire to be creative and to exercise broader initiative in the service of the public. He is free of the fear of dismissal by any superior official if he should exercise contrary independent judgment. He is in the best position to render maximum service to the People and impartial advice to the Governor, the Legislature and State departments and agencies. He can appear in Court without fear or favor - an attorney in the fullest and finest sense of the word.

Dated: Albany, New York, June 1, 1967

Respectfully submitted,



LOUIS J. LEFKOWITZ
Attorney General

ADDENDUM

Former Attorney General Nathaniel L. Goldstein, after declaring that he is for an elective Attorney General, stated:

> "During my tenure as Attorney General, I did render opinions in opposition to the wishes of the Administration when, in due conscience, I felt that my interpretation was the legal and proper one. Had I been subject to the Governor's appointive and removal powers, I might have found myself in a very difficult and awkward position."

EDITORIAL PAGE

The Anchorage Times

ROBERT B. ATWOOD
Editor and Publisher

WILLIAM J. TOBIN
Associate Editor
And General Manager

FRED DICKEY
Executive Editor

Page A-6 Friday, January 30, 1981

Another good reason

ONE WAY for Alaska to avoid having legislative lawyers sue administration lawyers is to elect an attorney general who is beholden to neither.

Add that to a long list of reasons to make the attorney general one of the very limited number of elected officials in the State of Alaska. As a matter of fact, there are only two — the governor and the lieutenant governor. Commissioners who head the various administrative departments are appointed by the governor.

This extremely restricted opportunity for the people to elect the public officials who presumably serve them is a unique provision of the Alaska Constitution. It was deliberately adopted, for the reason that those who were here at the time the new state was created wanted a powerful chief executive.

They wanted leadership and accountability. When it came to steering this new ship of state, those Alaskans back in the middle '50s wanted a single captain on the bridge.

IT WAS a good idea. There was need for a powerful hand at the helm of a state with little income, a small population and a million needs. The governor had marching orders to assemble a team and get the show on the road — with the concurrence, of course, of the legislative branch.

It had a fine beginning. For the most part, the executive and legislative branches worked in concert toward a common goal during years of economic struggle.

But not even the visionary constitutional delegates, and the voters who applauded their work in those dimming last days of the territory, could have perceived the day when Alaska would be rolling in money and a single field could produce a trillion dollars worth of oil.

The coming of that wealth produced a Mount St. Helens eruption in the Juneau bureaucracy. Not only did executive agencies swell in size and number, the legislature ballooned as well. It added offices and staffs and interim agencies and even went so far as to hire its own legal counsel, separate from the attorney general's office.

OVER THE YEARS, the attorney general became more the lawyer of the governor than of the state government as a whole. That produced an adversary situation with the legislators who often wanted a different legal opinion than they could expect from the Department of Law.

Their answer was to hire lawyers who would provide opinions supporting the legislature's interests. The result is that public funds are used to finance one set of state lawyers doing battle with another set.

An independent attorney general's office, headed by an elected chief not beholden either to the governor or the legislature, could provide both with unbiased and unfettered legal guidance. The people, as well as state officials, would be better served.

EDITORIAL PAGE
The Anchorage Times
ROBERT B. ATWOOD
Editor and Publisher
WILLIAM J. TOBIN
Associate Editor
and General Manager
FRED DICKEY
Executive Editor
ge A-10 Sunday, March 29, 1981

Let the voters decide

IN FORTY of the 50 states, the attorney general is elected to his post.

It is a system that obviously works well, because the people are the ones who decide who should fill this high office. And an attorney general answerable to the people is one who is responsive and responsible.

It's strange, therefore, to see the burning vigor that marks the opposition to letting the people of Alaska choose their attorney general. Yet there are those who apparently fear the people.

For example:

"I can think of no single change that would be more damaging, more harmful, more dangerous to the character of government."

THAT'S THE astonishing view of Superior Court Judge Thomas Stewart of Juneau, who testified the other day before a legislative hearing on a proposed constitutional amendment that would require the election of Alaska's attorney general, who is now an appointee of the governor and answerable only to him.

More damaging? More harmful? More dangerous?

How can this be? What is being proposed is part and parcel of the democratic form of government in which the people have the right to elect their leaders. Are elections damaging, harmful and dangerous to the character of our government?

We confess to lacking the judicial wisdom that graces members of Alaska's Superior Court. But all along we thought the character of our government was rooted in the elective process.

There are many Alaskans — and we're among them — who believe the present system of having the attorney general appointed, rather than elected, has proved less than satisfactory.

We don't buy the argument of former Attorney General Norm Gorsuch that "legal competence and electablity are not necessarily equal." The statement is incomplete. The rest of it is that "legal competence and appointability are not necessarily equal, either."

IT'S QUITE POSSIBLE that an incompetent lawyer might be elected attorney general. But his shortcomings would be readily evident and it's a sure thing that he would serve only a single term.

It's also quite possible — in fact, very likely — that some extremely capable men and women would seek election to the office, were it up to the people to decide. An elected attorney general would be his or her own person, with his or her reputation on the line. And he or she would be no lackey to any governor, or any legislature.

There's no doubt that were the office an elected position, it would be used by many as a stepping stone to higher office — the governorship, for example, or a seat in the U.S. House or U.S. Senate. But what's wrong with that?

Rep. Fred Brown, the Fairbanks Democrat who heads the House Judiciary Committee sponsoring this constitutional change, sees this as a means of strengthening government. So do we. And we hope he prevails so that this matter can be brought to the ballot for a vote of the people.

EDITORIAL PAGE
The Anchorage Times
ROBERT B. ATWOOD
Editor and Publisher

WILLIAM J. TOBIN
Associate Editor
And General Manager

FRED DICKEY
Executive Editor

Page A-6 Monday, April 20, 1981

The better way

IT'S TOO BAD that former Attorney General Avrum Gross doesn't think it's a good idea for Alaskans to elect their attorney general. But just because he feels that way detracts not one iota from the merit of the proposal.

It would be astonishing were Mr. Gross, who now teaches a couple of courses at Stanford University law school, to come out for an elected attorney general. His public career has been as an appointed legal spokesman for Gov. Jay Hammond.

Fortunately, there are other legal experts — whose qualifications and public service careers are are least as good as those of Mr. Gross — who feel precisely the opposite. They offered testimony contrary to that of Mr. Gross by satellite communication facilities in a hearing last week before the House Judiciary Committee.

The attorneys general of Pennsylvania and Colorado and the assistant attorney general of California told the committee that an elected attorney general is more independent of the governor and administration and thus less vulnerable to political repercussions from decisions.

FORTY of the nation's 50 states elect their attorney general. Alaska is one of only five states where the office is filled by appointment of the governor. In the other five the selection is made in a variety of ways, including legislative appointment.

Mr. Gross, however, thinks the Alaska way is best. Were it otherwise, he contended, the governor would attempt to shift blame for administration failures onto the attorney general rather than have a clear responsibility himself.

That's a pretty feeble defense of the present system.

If anything goes wrong in the administration of any program, regardless of the attorney general, any governor is going to be politically adept enough to dance out of the line of responsibility.

THE ATTORNEY general of Pennsylvania told members of the Judiciary Committee that Pennsylvanians voted overwhelmingly in favor of a constitutional amendment to make the office elective because they felt the attorney general was "not responsive to public needs" and that there was a "cozy arrangement" between the attorney general and the governor.

Colorado's attorney general said an elected attorney general carries "at least the aura of having an independent political base" and can say no to the governor "when the governor ought to be said 'no' to."

An assistant California attorney general said an elective attorney general is more efficient than an appointive one and "is not necessarily a threat to the functioning of the governor."

Those comments make sense for Alaska. And the legislature should take steps to bring this constitutional change to the ballot.

There seems little doubt that the amendment would be approved, if the legislature would only give the people a chance to vote.

EDITORIAL PAGE

The Anchorage Times

ROBERT B. ATWOOD
Editor and Publisher

WILLIAM J. TOBIN
Associate Editor
And General Manager

DREX HEIKES
Managing Editor

Page A-10 Thursday, July 2, 1981

Memo to politicians

STATE OFFICIALS who depend on votes of Alaskans for their public offices would be wise to arrange for the attorney general to be elected. A statewide poll by Dittman shows that public support is overwhelming.

In response to the simple question "Should the attorney general be elected?" 61 percent responded affirmatively and 27 percent preferred appointment.

That was the quick reaction from Alaskans scattered far and wide. The idea of electing that important official was favored by 73 percent of those in rural areas, 63 percent in Central Alaska (Fairbanks), 56 percent in Southcentral, 67 percent in Anchorage.

Only in Southeast Alaska was the response different. There it was 41 percent for appointment and 42 percent for election.

A SECOND QUESTION put to the same respondents — built up still more the case in favor of the elective process.

It cited some of the powers that go with the office of attorney general. Upon hearing them, the respondents were 71 percent for and only 21 percent against.

That question put it this way: "If you knew that the attorney general of Alaska, who is appointed, also appoints all state prosecutors and district attorneys throughout the state, would you support having the attorney general remain an appointed position or would you support the attorney general becoming an elected position?"

Those favoring election gained 10 points while those for appointment lost 6 points.

TWO MESSAGES are handed to the politicians in that poll. The first is that a substantial majority of Alaskans want their attorney general elected, not appointed. The second is that the proposal gains strength when Alaskans are reminded of the power that lies in the office.

A politician can readily see the significance. He is disappointing his constituents if he ignores the proposal and he may discover his reelection in jeopardy if the day comes when a candidate campaigns against him on that issue.

In rural areas the final lineup was 85 percent for election. In Central Alaska 75 percent. In Southcentral 71 percent and in Anchorage 74 percent. Even in Southeast Alaska many voters changed their minds on the second question. The final tally there was 54 percent for election and only 34 percent for appointment.

No matter how you cut it

THE UNIVERSAL preference of the majority of Alaskans for electing the state's attorney general was pointed up in many different ways in a Dittman poll that showed 71 percent in support and only 21 percent opposed.

Dittman reported that the election proposal has overwhelming support in almost every bracket of the population, be it based on age, sex, income, educational attainment, party registration.

AMONG ALASKANS who have registered as Democrats or Republicans, 72 and 73 percent, respectively, favor election. Non-partisans were 69 percent in favor. Alaskans aged 18 to 24 are 77 percent in favor, those 56 and over, 75 percent and those in between range from 68 to 72 percent.

The poll showed 76 percent of the women and 66 percent of the men favor election. Homemakers are 75 percent for it. Private and public sector employees as a whole favor it 71 to 74 percent. Among state employees, however, the idea is not so popular. Yet more than half (56 percent) are for it.

Support of the election proposal declines as family incomes increase but the majority in all categories favor it. In low income groups 77 percent favor it while in higher income households 67 percent do.

Curiously, the idea of electing the attorney general is more popular among those who don't bother to register, and hence probably don't vote, than among those who do. Those not registered showed 73 percent for election while registered voters were 71 percent favorable.

THE RESULTS of that Dittman survey will be engraved on the minds of those who plan political campaigns. And Dittman's final analysis might inspire some of them to get on the bandwagon to amend the constitution so as to give the people the elective power they want.

That analysis was, "Presenting information regarding the attorney general's powers and responsibilities causes a strong shift to the elected option — especially among the 'undecided' respondents. In total, the undecided percentage declines from 12 to 7½ and more than 5 percent of those who favored the current appointed status changed their minds to support the elected provision when it was learned that the attorney general has broad appointive powers of his own."

The Anchorage Times

ROBERT B. ATWOOD
Editor and Publisher

WILLIAM J. TOBIN
Associate Editor
And General Manager

DREX HEIKES
Managing Editor

Page B-4 Sunday, November 22, 1981

Weak arguments

RIGHT OFF THE BAT, there was a loud objection to the Anchorage Crime Commission's proposal that Alaska's attorney general and the local prosecuting attorneys should be elected. The complaints came from the appointed attorney general and one of his appointed district attorneys.

The flaws they see in the proposal are worthy of public review.

For one thing, they said, electing such officials would bring the justice system into politics. They would become subject to pressure from members of the public with axes to grind.

For another, they argue, lawyers would run for attorney general and district attorney in hopes of using the positions as stepping stones to higher political office.

BUT THOSE aren't necessarily flaws. On the contrary, it's possible to argue that those prospects would offer an enormous improvement in the way things are done in Alaska.

Take the second objection first. Under the Alaska constitution, only two state government officials are elected statewide — the governor and the lieutenant governor. Everybody else in the system, including the judges, is appointed by the governor or by department heads appointed by him.

The only other elected officials in Alaska are the city or borough mayors, elected locally; 60 members of the legislature, elected in local districts, and the three members of the state's congressional delegation, elected statewide. Not much of a stepladder on which people interested in public service can climb toward higher office.

An elected attorney general naturally would be looked upon as a potential candidate for governor or U.S. senator or congressman. What's wrong with that? It might be a powerful incentive for the one occupying that spot to do an outstanding job.

AS TO THE COMPLAINT that an elected attorney general might be subject to public pressure, again the advantages are compelling.

Why shouldn't the attorney general have to dance on a hot public griddle if the people become alarmed over deficiencies in the administration of justice?

The system as it now exists makes the attorney general the personal lawyer of the governor, his political defender and his legal arm in waging political warfare against the legislature and the public.

So long as he remains protected by the governor's skirts, the attorney general is immune from public pressure. All kinds of policies can be legitimatized, even though they might infuriate wide segments of the public and frustrate the aspirations of the people.

Legal opinions issued by the attorney general bind state agencies. They can be tools of the governor to guide, maneuver, control and stop all kinds of enterprises — economic and otherwise.

An attorney general answering to the public through the political process would have the freedom to respond to public concerns in ways that are not possible now.

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: HB 456
Title: advisory vote for the election of Attorney General
Sponsor: Ward
Requestor: (H) State Affairs
Date of Request: 1/19/84

FISCAL DETAIL
Agency Affected: Elections
Program Category Affected:
BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES		-0-				
200 TRAVEL		-0-				
300 CONTRACTUAL		1.0				
400 SUPPLIES		-0-				
500 EQUIPMENT		-0-				
600 LAND & STRUCTURES		-0-				
700 GRANTS, CLAIMS		-0-				
800 MISCELLANEOUS		-0-				
TOTAL OPERATING		1.0				
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

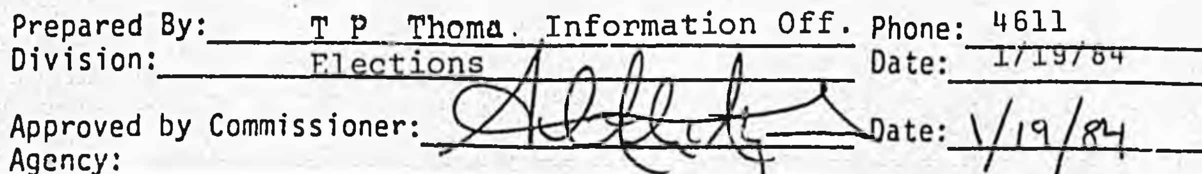
POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL: This proposed advisory vote would necessitate the inclusion of the issue in the Official Election Pamphlet. This Pamphlet is sent to all registered voters, statewide. The printing cost is approximately $1,000. per page. The Official Election Pamphlet cost has been included in the Division of Election's FY 85 budget.

ANALYSIS: Attach a separate page for analysis

Prepared By: T P Thoma. Information Off. Phone: 4611
Division: Elections Date: 1/19/84



Approved by Commissioner: Date: 1/19/84
Agency:

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

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HOUSE BILL NO. 456

Early last session Representative Uehling and Representative Ward sponsored HJR 7 which proposed amendments to the Constitution of the State of Alaska relating to the election of the Attorney General. The legislation passed the House but failed to pass the Senate.

Subsequently, HB 456 has been introduced which would authorize an advisory vote by the registered voters of the State. This would allow the legislature to gauge the feelings of the public and act accordingly.

Submitted by Rep. Jerry Ward's Office

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

January 19, 1984

The Honorable Mitchell Abood
Chairman, House State
Affairs Committee
Alaska State House of
Representatives
Pouch V
Juneau, AK 99811

Re: Elected AG
House Bill 456

Dear Representative Abood:

I do not oppose the concept of having the people express their opinion to the Legislature in an advisory vote on the issue of whether or not the attorney general should be elected. However, I would like to comment on the merits of the underlying question of whether or not we should elect the attorney general.

I have lived and practiced law in our state for most of my adult life. I am absolutely convinced that the needs of all Alaskans are best served by having an appointed attorney general. Election of one cabinet level official makes no more sense than the election of some or all other commissioners.

Historically, the Attorney General has been an appointive, rather than elective, official. In England, the Attorney General was appointed by the Crown and only incidentally acquired elective status through a seat in Parliament. In Colonial America, Attorneys General were usually appointed by the Governor of the colony. The Attorney General of the United States still serve at the pleasure of the President with the advice and consent of the Senate. 1/

1/ Our research indicates that the Attorney General is popularly elected in forty-three states. The Attorney General is appointed by the Governor in five states (New Hampshire, Alaska, Hawaii, New Jersey and Wyoming), three territories and the Commonwealth of Puerto Rico. In Maine, the Attorney General is a "constitutional officer" selected by the Legislature while Tennessee's Attorney General is selected every eight years by the Supreme Court of that state.

The governor, as the state's principal executive officer, needs to have a responsive and reliable Department of Law. I think good management requires an appointed attorney general, but more importantly common sense suggests that the attorney general selection be made by appointment. The delegates to our Constitutional Convention recognized a quarter century ago that, in our vast state with its disparate interests and citizens, the administration of state government requires a strong governor. This still holds true today. The last thing our state needs is an elected attorney general who may have a personal or political agenda which varies from the position of the governor. The friction between the two elected administrative officials can lead to a less responsive state bureaucracy and an unclear accountability of the executive branch to the electorate.

I could relate anecdotes which illustrate this from other jurisdictions having elected attorneys general. Instead, I would rather provide a quotation from the National Municipal League:

> All authorities on executive organization agree with the position embraced by the Model State Constitution for more than 40 years that administrative power and responsibility should be concentrated in a single popularly elected chief executive. There is growing recognition that the governor, as the representative of all the people, should be equipped with the constitutional status necessary to exercise constructive leadership as the chief lawmaker and political head of his state. 2/

Studies on administrative reorganization usually argue that fragmentation leads to irresponsibility, but that a single chief executive can be held accountable through the electoral system and, as a consequence, can make the administration more responsive. In my opinion, the Governor of Alaska needs the flexibility and discretion that is implied in an appointed attorney general. Anything less will inevitably drive a wedge between the Governor and the Department of Law to the detriment of the citizens of our state.

2/ National Municipal Leagues, MODEL STATE CONSTITUTION (6th ed.) 65-66 (1963).

In addition to the practical problems caused by an elected attorney general, experience in other states with an elected attorney general suggests that the Governor's office will incur substantial costs with respect to the use of separate and additional counsel for the Governor. I am of the opinion that this use (and cost) depends on the relationship between the Governor and the elected Attorney General. In a situation where an elected Attorney General and Governor are cooperative, cordial and share a similar political philosophy, the need for additional Governor's counsel will be reduced. Regrettably, this is not always the situation. A 1976 study by the National Governors' Conference explored the role of Governors' legal advisors. The study, which was based primarily on a questionnaire to these counsel, found problems in this relationship:

> In many states, the relationship between the Governor and the Attorney General is not a smooth one. In addition to whatever political differences there may be between them, there are several operational areas of potential conflict. These include conflicts over the extent to which the legal talent employed by state agencies should report to the Attorney General or to the agencies; concern that the Governor cannot easily deal with the Attorney General because the Attorney General normally provides "yes-no" answers rather than discussions of the legal risk of various options; and the possible frictions that may normally occur in an attorney-client situation. 3/

While I cannot estimate the actual use and cost of additional counsel to oversee the elected Attorney General on behalf of the Governor, I am convinced there will be some extra cost incurred by the Governor's office to hire and use legal counsel even in the best of times. I sadly regret that the citizens of our state will be required to pay for this additional layer of legal bureaucracy.

In addition, in states where the attorney general is elected, the heads of executive departments often hire their own attorneys. In jurisdictions with elected attorneys general, there is often a proliferation of house counsel on the staff of major departments. Historically, such counsel have been employed

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3/ National Governors' Conference, Center for Policy Research and Analysis, LEGAL ADVICE FOR THE GOVERNOR, 7 (November, 1976).

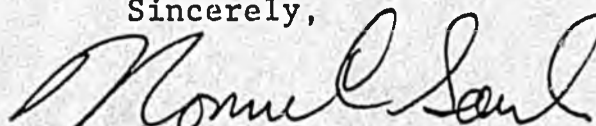
by executive branch agencies to give department head "second" opinion in controversial matters in states having an elected attorney general. Such counsel usually do not have the authority to litigate, but they do provide legal advice to department heads. Without centralized legal service and advice, each agency will rely on advice from its own lawyers. Therefore, agencies will receive differing interpretations as they raise legal issues. This in turn will make consensus among different agencies on issues more difficult to achieve. The result is that public policy decisions in the executive branch will be delayed to the detriment of the public and the legislature. In addition, these house counsel frequently submit _amicus_ briefs in litigation affecting their department's programs. It is not unusual in states with an elected attorney general to see four or five separate briefs filed in a single matter, representing the varying viewpoints of different agencies, in addition to the attorney general's brief. If nothing else, this needless duplication insures that the courts and the public will be confused about state policy on many issues.

In my estimation, the cost for such additional counsel in Alaska could easily exceed $1.0 million annually, within a few years. This cost is simply not warranted by any rational criteria and should be further questioned in light of diminishing revenues. We have many more basic needs in Alaska which command the state government's immediate attention. Surely we do not want a needless layer of extra lawyers embedded in state agencies.

In summary, it is my opinion that electing the Attorney General will split administrative responsibility and executive authority, diffuse the political accountability of the executive branch to the public, add more attorneys to state government, contribute to more intense bureaucratic infighting among agencies, delay the resolution of executive branch policy decisions, and create a higher rate of growth in the state operating budget.

Please call upon me at your earliest convenience if I can provide additional information on this matter.

Sincerely,



Norman C. Gorsuch
Attorney General

NCG:vrb