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Testimony of

JUDGE THOMAS B. STEWART

before the

SENATE STATE AFFAIRS COMMITTEE

HJR 7:  
Constitutional Amendment  
Election of the Attorney General

May 26, 1983

Members Present:

Senator Vic Fischer, Chairman  
Senator Tim Kelly  
Senator Bill Ray  
Senator Pat Rodey  
Senator Arliss Sturgulewski

## TRANSCRIPT OF PROCEEDINGS

SENATOR FISCHER:

We next have Judge Tom Stewart with us. I might just, as a matter of introduction, say that Judge Stewart was a member of the Legislature in the 1950s, helped organize the Alaska Constitutional Convention, served as a secretary for the Convention, subsequently served in the State Senate, has been a very prominent judge, and is now before us. Tom?

JUDGE STEWART:

Thank you, Mr. Chairman. The question of an elected Attorney General, I think should be looked at from several different aspects of the issue. I would begin with a question of history, and it's kind of a truism that those who do not look at history are condemned to its errors. The history of this issue, just in Alaska, is that we had an elected Attorney General for forty-six years, from 1913 until 1959. The people who considered whether as a state we should continue to have an elected Attorney General included twenty-seven former members of the Legislature who had functioned under an elected Attorney General for many years in their combined experience, including an Attorney General who was elected, Ralph J. Rivers, and who came to the convention convinced that the Attorney General should be elected, and upon the basis of the debate there and the information that he learned from it, voted against the election of the Attorney General. The appointed Attorney General decision was ultimately made. Look to the history of other states, and I recall very clearly when a gentleman named Thomas

E. Dewey, who was the Governor of New York, came to Alaska in the late 1940s or the early 1950s, and met with political leaders in Alaska, and one specific word of advice that he made after his years of experience as Governor of New York and a leading prosecutor was: "Whatever you do, do not elect the Attorney General in your state."

Now, another aspect besides history, and we'll touch a little bit on the history of election of attorneys general in other states, but I think before doing so I would like to look a little bit at the nature of his functions. By nature, it's an error to label the Attorney General the attorney for the people. In fact he is not that. He is the attorney for the executive branch of the government. A governor is the Governor for the people, but not the Attorney General. A citizen cannot go up to his office and say, "I want an opinion." He will of necessity say to you: "we don't give opinions for the citizens; we give opinions for the executive branch and its agencies."

And I might pause a moment there; there's been an unfortunate history in Alaska that the Legislature has somehow looked to the opinions of the Attorney General as guidance for the meaning of the laws. In my judgment that's a serious error. The Legislature should have its own attorney. It should not look to the Attorney General.

Now, the Attorney General is like any other professional attorney. He is an attorney. His professional duty is to his client. His professional duty is to help his client realize his client's needs, not to make an independent judgment of what he thinks is right or wrong in

terms of his client's needs, but what his client thinks his needs are, and as a professional person, he should be looking to that.

Now, there's a mistaken view. Perhaps you might believe that somehow the Attorney General's opinions, which are published, are usually, hopefully, well considered, thought out, researched, and detailed--somehow have the quality of a judicial opinion. They do not. They are fundamentally different in nature, because they are not framed on an adversary basis. They are not based upon two sides genuinely, seriously opposed to one another, summoning every argument on the opposite sides. Rather they are framed like any other attorney's opinion, based on what he thinks his client's interests are. He's an advocate of that side, where a judge sits and listens to both sides. A judge, in effect, listens to cross examination. He listens to the argument, to the criticism of the argument, and to the counter criticism of the argument. The Attorney General has none of that in the framing of his opinions, and his opinions should not be viewed as if they had behind them the adversary process, which is fundamental to a judicial opinion or decision.

It's an error to think that the Attorney General can somehow satisfy pressing, immediate political concerns about a particular issue. What gives him the ability to try to read in what the newspapers are printing, or what he sees on TV, or what some constituents are saying, that that is the opinion of the majority of the people? He is not elected to determine what the policy of the government should be. I mean, he's not chosen to do that, whether elected or otherwise. He's chosen

to be the legal advisor to the executive branch, and he should not frame his opinions based on current political views. That's the Governor's choice. The Governor is the one that is chosen to fix the policy of the executive branch of the government, or it's the Legislature's choice in making the laws. Now, it would be a sorry state of affairs if the Attorney General framed his opinions, not on what his client desires to do to answer the public need, but what somehow is his reading of political opinion and then to color his professional legal opinion based on that kind of a view.

I have substantial personal experience. I served under an elected Attorney General for better than three years -- under two of them: under elected Attorney General Ralph J. Rivers and under elected Attorney General J. Gerold Williams. What the Attorney General decides cuts across the whole spectrum of the executive branch. He advises each and every department, and believe me, gentlemen and ladies, from what I saw in the operation of that office, his opinions, when he is elected, are colored by what he thinks that commissioner should do on a specific issue when he is going to be answering to the people in an election, rather than on what the policy of the executive branch will be in general.

If the Attorney General is elected you have built in conflict with the Governor. Wherever they have different personal views, there is going to be an expression of opinion and the Attorney General will determine what he thinks will help him politically, and not what will help the Governor on the other side; so that his opinions are going to

be

affected by his personal posture in the eyes of the electorate, rather than on what the right legal decision should be for the benefit of the executive branch. An elected Attorney General has a constant ambition to be the Governor, and is, therefore, necessarily in conflict with the elected Governor.

The problem of putting this issue to the vote of the people is that it's an issue that should not be viewed as an independent question. The question is not just whether the Attorney General should be elected. The question is what kind of an executive branch do you want? Now, you hear it commonly said that under our constitution we have a strong Governor. I suggest to you that that's a mistaken characterization. What you have is an accountable Governor, a Governor who can be held to account for the conduct of the entire executive branch. His strength is a function of the Legislature: what kind of laws the Legislature passes, what kind of limitations the Legislature puts on his authority. If you put an independent elected officer there, whose functions will cut across the entire executive branch, you can no longer hold the Governor accountable for what he does, because he may try to take action and the Attorney General can thwart it by his opinion.

Another reason why it should not go to the electorate is because there is an inadequate opportunity to debate this issue. You cannot put it in the perspective of what kind of an executive branch do you want. It's, as I say, an issue that should not

and cannot rationally be considered independently of that larger question of the nature of the executive branch, and if you put it in the form of the resolution that's before you today, that's not what will be before the voters to consider and to look at.

In my judgment, there is no sound argument in saying that forty-five states have elected attorneys general. If you get an elected Attorney General, believe me, you will not change it. You can never, as it were, take away an elected Attorney General from the electorate. I suggest to you that before you consider this serious question, that you should invite some governors from some other states where this system functions to testify to you what happens in their states. Invite the Governor of New York, invite the Governor of California, invite the Governor of Washington, and see what they say to you about how an independent person in that office frustrates the capacity of the executive branch to operate.

Now, let me turn back to history just a little bit. There was some mention made previously about the Attorney General of the United States, and in history the form of our state government is patterned from the federal government. I don't think you've ever heard a serious voice raised that the Attorney General of the United States should be elected. He is the advisor to the President and to the executive branch as such. He is the supervisor of the prosecutors for the nation. But I don't think you hear any responsible, reliable voice on the national scene say that somehow the government of the United States would be better if the Attorney General were elected. And the

history of that idea is two hundred years old.

Now, I'd just like to quote to you a few sentences from the Federalist Papers, number 70, written by Alexander Hamilton in 1783. It was addressed to the people of the State of New York at the time in the Federalist Papers: "There is an idea which is not without its advocates that a vigorous executive is inconsistent with the genius of republican government." Now, I would remind you, republican government is representative government. It is a government where you, the elected representatives, are asked to make wise decisions, decisions that the electorate cannot in its forum make, but which take the kind of consideration that you people can give it. "Enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation." "Energy in the executive is a leading character in the definition of good government." Now, energy is the capacity to make a decision and carry it out. If you elect the Attorney General, you will deprive the Governor of that energy. His energy will go to fighting with the enemy within his own ranks. His energy will be directed to the intrafamily warfare within his cabinet generated by having an independent and conflicting voice there.

The situation is not unlike having two governments in one city, like the City of Anchorage and the Borough of Anchorage, the City of Juneau and the Borough of Juneau. If you look to the history of our local governments, most of our major communities have wisely consolidated those into one, so that the energy of the people that run them is not in fighting between people in their own community

but in addressing the principal problems. And I say to you that you will deprive the executive branch of its capacity for energy, for making effective decisions, if you saddle the Governor with an opponent within his system.

I don't want to prolong the discussion, but I'm utterly, totally convinced that to allow this to happen, and if you put it to the vote of the people it's likely to happen, because you can't adequately debate it in that forum, you can't put it in its perspective. If you allow it to happen, you will have forever damaged the quality of Alaskan government.

SENATOR FISCHER:

Tom, thank you very much for your solid statement. Are there any questions or comments? Senator Ray?

SENATOR RAY:

Judge Stewart, you brought up something that's been on my mind for a good length of time, and that is the problem with the Attorney General's opinions, and why the Legislature seeks his opinions and puts a great deal of credibility toward them. For the last, oh, at least ten years or more, it would appear to me that most attorneys general have thwarted the will of the Legislature. When we pass a bill that has not been appreciated by the Administration, or the Attorney General finds that the Administration doesn't want to administer, he writes a letter saying it's unconstitutional and, therefore, saying that he is sworn to uphold the laws of the State of Alaska, that he is advising the Administration not to administer it. This is contrary to the

Constitution of the State of Alaska. It says that he cannot do that. He must seek judicial counsel, and the judiciary makes the determination, and you have validated that for me today; and in our times of acquaintance and friendship, I want to thank you most for that statement you made right there. But how can we approach the Attorney General, or how do we overcome that? That's why we seek the opinions, and that's why a lot of times we're more or less bound by them, or we are asking them, rather than just to have our--we must come to a compromise position rather than just to have our bills go down the tube or not be administered.

JUDGE STEWART:

May I respond, Mr. Chairman?

SENATOR FISCHER:

Certainly, Tom.

JUDGE STEWART:

I think you're absolutely right, and it seems to me, as I began, you should look at history. How does it happen that the Attorney General has such a pervasive influence in the Alaskan government? Well, when we were a young territory, a small territory, the Attorney General was the only legal officer to look to. The Legislature had no staff, and there grew up an aura, somehow, of something sacrosanct about the Attorney General, and it should not be. He should be no more and no less than a legal advisor to the Governor. Now, the Governor might be a better lawyer than the Attorney General. You might very well have a Governor who's a lawyer and who's elected, who

knows more about the law, who does his research more carefully, is a better professional person than the Attorney General. He should be able to look at the Attorney General's opinion and say, "thank you, Mr. Attorney General, you're good and I want to keep you on, but I'm not going to pay any attention to that opinion because I don't think it's any good." He should be free to do that. The Legislature should never be bound by the Attorney General in any way. My advice, apart from this thing, is to hire yourself counsel: a counsel to the Senate and a counsel to the House; and rely on them for your legal opinions about the validity of your legislation, not the Attorney General, because his duty is elsewhere.

SENATOR RAY:

But, isn't there some way? You see, where we're thwarted a lot of times is that he will advise the Governor that in his opinion it's unconstitutional, and that, therefore, the Governor should not administer it. And a lot of times, by the time an individual legislator, who knows he's in the right, he does not have the wherewithal to bring court action.

JUDGE STEWART:

To take this to the court?

SENATOR RAY:

Yeah. And a lot of times when they do, by the time the two years that it would take to get before the courts, in a lot of instances, it's a moot question. The guy has lost. So you just more or less seek a compromise position with the Administration in order to resolve and

get a half a loaf, rather than to take the whole thing.

JUDGE STEWART:

There's nothing that I know of in the constitution that says the Governor has to follow the opinion of the Attorney General. Just because the Attorney General says it's unconstitutional does not make it so. I know of no way you can answer that question that you put, Senator Ray, without persuading the Governor in the particular instance that he should not follow the opinion of the Attorney General in that instance--or to go get another opinion if you can, to have the Attorney General take another look at it.

SENATOR RAY:

Well, if there is nothing that makes that opinion sacrosanct, that says the Governor can't support the legislation if he wants to ...

SENATOR RODEY:

Well, it might be in his best political interest to have the Attorney General say that and ...

JUDGE STEWART:

That may very well be.

SENATOR RAY:

In fact he might even seek that opinion out so that he can avoid doing what is politically distasteful to him.

JUDGE STEWART:

If that's the case, I think you have no alternative but to summon some resource to get yourself into court. I'd be glad to answer any other ...

SENATOR FISCHER:

Thank you, Tom.

SENATOR STURGULEWSKI:

Mr. Chairman, just a comment, that this is a most provocative discussion of how the Attorney General has evolved and just in the few years that I've been here, why, you see us going to [Legislative] Legal Services when we want one opinion, we go to the Attorney General for another. I think this is worthy of some exploration. It seems to me, one, you could, of course, go to court more often to challenge that opinion, but I almost think it would have to be, to bring change, an evolutionary kind of a thing where you would, in fact, either give the status to your current legal services or hire independent counsel that would be available for advice and you start going there as opposed to what we do now, which is more and more to go to the Attorney General for their opinion. But that is interesting and it would be interesting maybe to see a catalog of things that you might do to bring about the kind of change that will bring more balance there. We use the Attorney General as the final word in a lot of cases.

SENATOR FISCHER:

Senator Ray?

SENATOR RAY:

Because we're forced to. We're forced to reach a compromise position because otherwise he will say in his opinion it's unconstitutional and then the Governor will say, okay, and it's not administered; and then we're up to the wall unless we have the financial resources, the

backing of somebody to get it into court in a rapid fashion and then have the court act upon it.

SENATOR STURGULEWSKI:

Your asking what?

SENATOR RAY:

See, well, I even had the crazy idea one time of asking for advisory opinions from the Supreme Court or from the Superior Court - just advisory opinions on matters of great state interest and just have them give an opinion of whether it was constitutional or not, and they didn't want to do it.

JUDGE STEWART:

Mr. Chairman, may I just add one note, without extending your time, in response to Senator Sturgulewski's comments? I think it might be useful for you to look to the pattern of some other states. Now, the Legislative Affairs Agency is one thing that does its research, and it has its attorney that advises it as a staff. What I'm talking about is counsel to the Senate ...

SENATOR STURGULEWSKI:

That's right. We haven't done that.

JUDGE STEWART:

... and counsel to the House, and you will find that pattern in other states. I happen to know quite well an excellent counsel to the California State Senate, and the nature of the function of his office is very important in the success of legislation in that state, and to giving the - of necessity - the majority in the Senate that chooses him, legal

opinions.

SENATOR FISCHER:

Senator Ray?

SENATOR RAY:

Then, again, Tom, we've been, at various and odd times, in the Legislature, either one house or the other, or both acting in concert, have hired outside counsel in particular areas of interest or to answer specific questions, but then we're always criticized by the public or by those critics of the Legislature who declaim to the public that the Legislature spends its money, they have hired these people to do thus and such, and it gives the appearance that the Legislature is a bunch of spendthrifts when they have legal officers they could go to like the Attorney General which they in error believe is available to us to tell us what is constitutional and what isn't.

JUDGE STEWART:

I appreciate the opportunity to appear, Mr. Chairman.

SENATOR FISCHER:

I really appreciate your testifying.

COMMITTEE REPORT  
SENATE

FURTHER: FINANCE

5/27/83

Date: 6/1/83

Mr. President:

The Committee on JUDICIARY has had CS SSJR 7 (101)

Proposing amendments to the Constitution of Alaska relating to the election of the attorney general.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass  do not pass
- do pass with attached amendments(s)
- replace with CS for \_\_\_\_\_  same title  
 new title
- and recommends \_\_\_\_\_
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

[Signature]

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

[Signature]

\_\_\_\_\_

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

[Signature]

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

CHAIRMAN

[Signature]  
30 MAY 1983

STATE OF ALASKA  
FISCAL NOTE

Revision Date                     , 1983

I. REQUEST

II. FISCAL DETAIL

Bill/Resolution No.: CSSSHJR No. 7 (Judiciary) Agency Affected: Department of Law  
 Title: "...election of the Attorney General." Program Category: Affected: General Govt.  
 Sponsor: House Judiciary (Orig.-Uehling) BRU, Program of Subprogram(s) Affected:  
 Requestor: Senate State Affairs Legal Services, Administrative Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

GENERAL FUND			*	*	*	*
FEDERAL FUNDS						
OTHER (Specif Source)						

POSITIONS:

FULL-TIME			*	*	*	*
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

\* Because expenditures would not begin until the latter part of FY 85, actual costs cannot be determined at this time. Please see Analysis.

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues Director  
 Division: Administrative Services Division

Phone: 465-3672  
 Date: May 26, 1983

Approved by Commissioner: Norman C. Gorsuch, Attorney General  
 Department: Department of Law

Date: May 26, 1983

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
- Copy to Department (for Governor introduced bills)
- Copy to Sponsor
- Copy to Requestor (if different from Sponsor)

CSSSHJR No. 7 (Judiciary)  
Analysis

This resolution provides for a ballot proposition that would, if approved by the voters, amend the state's constitution by changing the position of attorney general from an appointed office to an elected office. The proposed amendments would also remove the governor's organizational and supervisory controls over any function or unit of government headed by the attorney general.

These controls are normally maintained through executive branch procedural requirements imposed on other executive branch agencies by the Department of Administration and the Office of Management and Budget. The controls are exercised by requiring that other departments obtain OMB's and Administration's approval for: purchasing, leasing and supply; professional services contracting; duplicating services; personnel administration and labor relations; equal employment opportunity programs; data processing, information management and telecommunications services; records management; preaudit accounting services; and budget preparation and budget management.

It will be very expensive for an elected attorney general to provide all or most of these services in-house. Although an attorney general may decide to use some of the centrally provided services, key areas such as: personnel; professional services contracting; purchasing, supply and leasing; data processing; and budget preparation and management, would have to be provided in-house if the attorney general's functions are to be at least reasonably free of the governor's supervision. In addition, it is more than likely that attorney timekeeping would be required throughout the Civil Division because most client agencies would not share the same priorities and program goals of an elected attorney general and they would undoubtedly insist that all interagency-funded legal services provided on their behalf be accurately documented and fully substantiated.

Additional costs, expressed in FY 83 dollars, that will provide for complete independence from the organizational and supervisory control of the governor are shown below. Even if the attorney general were to forego a part of this independence, the savings would only amount to 20 or 30% of the total cost because of the necessity to retain in-house control over the essential support services that determine a department's freedom of action.

<u>Function</u>	<u>Positions</u>	<u>Salary/ Benefits</u>	<u>Other Position Costs</u>	<u>Total</u>
<b>Director's Office</b>				
	(1) Budget Analyst R19		Travel 2,500	
	(1) Admin. Officer R17		Contractual 24,100	
	(1) Clk. Typist R8		Commod.-ongoing 5,400	
			Commod.-one-time 4,500	
			Equip.-one-time 18,100	
	(3)	113,805	54,600	168,405
<b>Personnel</b>				
	(1) Personnel Mgr. R21		Travel 2,500	
	(2) Personnel Analysts R16		Contractual 54,200	
	(1) Training Officer R18		Commod.-ongoing 14,400	
	(2) Personnel Tech.'s R12		Commod.-one-time 12,000	
	(1) Payroll Clerk R10		Equip.-one-time 24,100	
	(1) Clk. Typist R8			
	(8)	255,307	107,200	362,507
<b>Property/Supply</b>				
	(1) Materials Mgr. R21		Travel 2,500	
	(1) Purchasing Agent R18		Contractual 19,600	
	(1) Supply Officer R16		Commod.-ongoing 7,200	
	(1) Clk. Typist R8		Commod.-one-time 6,000	
			Equip.-one-time 19,300	
	(4)	161,843	54,600	216,443
<b>Finance/Accounting</b>				
	(1) Finance Officer R21		Travel 2,500	
	(1) Acct. Supervisor R16		Contractual 19,900	
	(1) Acct. Clerk R10		Commod.-ongoing 5,400	
			Commod.-one-time 4,500	
			Equip.-one-time 3,600	
	(3)	120,427	35,900	156,327

Attorney Timekeeping

(1) Accountant R18		Travel	1,800	
(3) DP Clerks R11/R9		Contractual	33,000	
		Commod.-ongoing	7,200	
		Commod.-one-time	6,000	
		Equip.-one-time	5,000	
(4)	111,023		64,000	175,023

Records Management

(1) Records Analyst R18		Travel	1,800	
(1) Records Supervisor R15		Contractual	81,200	
(1) Records Handler R12		Commod.-ongoing	9,000	
(2) Microfilm Operators R10/R14		Commod.-one-time	7,500	
		Equip.-one-time	81,000	
(5)	180,432		180,500	360,932

Data Processing/Communications

(1) DP Mgr. R21		Travel	2,500	
(1) Programmer Analyst R18		Contractual	319,900	
(1) DP/Comm. Sys. Supvr. R18		Commod.-ongoing	5,400	
		Commod.-one-time	4,500	
		Equip.-one-time	41,600	
(3)	142,116		373,900	516,016

Duplication Svcs.

(1) Duplication Mgr. R19		Travel	1,000	
(1) Printing Tech. R17		Contractual	74,500	
(2) Machine Operators R12		Commod.-ongoing	57,200	
		Commod.-one-time	6,000	
		Equip.-one-time	154,800	
(4)	163,768		293,500	457,268

TOTAL

(34)	1,248,721		1,164,200	2,412,921
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Non-salary costs include anticipated space rental of 6,000 sq. ft. for the additional staff of 34, at \$2.00 per sq. ft., per month, plus 2,000 sq. ft. each, for records management and duplication services. Also costed in is \$200 per month per employee for contractual services to cover telephone, copying and postage. Ongoing commodities are estimated at \$150 per month, per employee. New position costs include \$1,500 per employee for one-time commodities (furniture and equipment costing less than \$500 per item), and \$1,200 per employee for new position equipment costing more than \$500 per item. Special items include \$15,000 for employee recruitment advertising for non-attorney job applicants, \$5,000 for personnel system printing, and \$20,000 for a data processing program to maintain EEO statistics. Word processors will cost \$14,500 each for a total cost of \$48,000. Records management equipment include storage devices and microfilm/graphics equipment totalling \$75,000. Duplication equipment will cost approximately \$150,000. DP terminals for both the DP section and the timekeeping section will cost \$50,000. Data processing computer-time should be at \$150,000 per year and an additional \$150,000 is included to maintain and enhance the department's work management, timekeeping, opinion indexing, Westlaw and PROMIS systems.

The total additional cost of \$2,412,921 is an enormous increase over the department's current administrative overhead of \$449,800 projected for FY 84. It is, however, part of the price that must be paid if the proposal to have an elected attorney general is adopted by the electorate during the 1984 general election.

Another major cost area that will eventually occur as a result of changing from an appointed to an elected attorney general, will be a proliferation of special counsel on the staff of major departments. Historically, such counsel have been employed by executive branch agencies to give department heads a "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 and submit amicus briefs in litigation affecting their department's programs. It is not unusual in these states to see four or five separate briefs filed in a single matter, in addition to the attorney general's brief, representing the varying viewpoints of different agencies. Costs for just a single special counsel, including secretarial assistance, total about \$150,000 per year in 1983 dollars. Although it is impossible, at this time, to accurately say how extensive the use of in-house counsel will be if there is an elected attorney general, the additional cost for such counsel could easily exceed \$1.0 million annually, within just a few years.

# 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

May 26, 1983

The Honorable Vic Fischer  
Senator  
Chairman, Senate State  
Affairs Committee  
Alaska State Legislature  
Pouch V  
Juneau, AK 99811

Re: Elected AG

Dear Senator Fischer:

You have requested that the Department of Law respond to several aspects of CSSSHJR 7 (Jud). In particular, you have made inquiry regarding:

1. The fiscal impact CSSSHJR 7 (Jud) would have on state government operations;
2. A statement of my position on the proposed legislation;
3. Information on the pattern of elected attorneys general compared to appointed attorneys general in the United States;
4. Information on increased costs associated with utilizing "in-house" counsel for the executive agencies in addition to the elected attorney general.

Attached is a fiscal note and fiscal analysis prepared by my office with respect to CSSSHJR 7 (Jud). As with all fiscal notes, this represents a good faith estimate of the likely increase the proposed legislation would have on the operating budget. In preparing this fiscal note we used conservative estimates of the probable costs an elected attorney general would encompass. If anything, the costs may be higher.

I personally am opposed to CSSSHJR 7 (Jud). 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 a complete election of all commissioners.

Honorable Vic Fischer  
Senator

May 26, 1983  
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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. In our vast state, with disparate interests and citizens, the administration of state government requires a strong governor. 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 officials can lead to a less responsive state bureaucracy with a diffuse accountability 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. 1/

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. 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.

You also requested comparative information on elected versus appointed attorneys general. Our research indicates that the Attorney General is popularly elected in forty-two states.

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

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The Attorney General is appointed by the Governor in six states, three territories and the Commonwealth of Puerto Rico. In Maine, the Attorney General is selected by the Legislature while Tennessee's Attorney General is selected by the Supreme Court of that state. 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.

In response to your question on use and cost of additional counsel for the executive branch in states having elected attorneys general, 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 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 advisors, 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. Nevertheless, all but two of the legal advisors reported that they seek informal opinions for the Governor from the Attorney General. 2/

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

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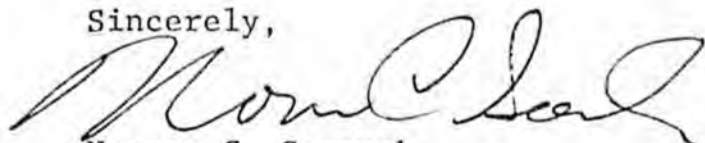
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While I cannot estimate the actual use and cost of additional counsel to oversee the elected Attorney General on behalf of the Governor, I am convinced there will be some additional use by the Governor's office even in the best of times. I sadly regret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

In addition, the heads of executive departments will hire their own attorneys. Thus, there will be a proliferation of special counsel on the staff of major departments. Historically, such counsel have been employed by executive branch agencies to give department heads a "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 and submit amicus briefs in litigation affecting their department's programs. It is not unusual in these states to see four or five separate briefs filed in a single matter, in addition to the attorney general's brief, representing the varying viewpoints of different agencies. Thus, the courts and the public will be confused about state policy on many issues. In addition, the cost for such counsel could easily exceed \$1.0 million annually, within just a few years.

As always, I would be delighted to answer any additional questions you may have.

Sincerely,



Norman C. Gorsuch  
Attorney General

NCG:vrb

Attachment