HB

709

- will cost more cause will require cause hearings — in time, paperwork, cost to client, acrimony

Promotes mistrust of system — easily get past personal feelings — courts not judges

Number of judges racially biased — can't prove, but feel.

Allegns bias annoys judges & makes life harder for attys

Memorandum

Alaska Court System

TO: Karla Forsythe
General Counsel

DATE : February 2, 1983

FROM: Robert G. Fisher
Fiscal Officer

SUBJECT: Travel Costs - Pre-emptions

The following information is provided in response to your request for information on the cost of travel arising from the pre-emption of judges.

Several problems prevent an accurate reporting of these costs. To begin with, Technical Operations does not accumulate statistics strictly on the number of pre-emptions. Some statistics are available for all the categories of disqualifications, but not all courts are represented. Secondly, the travelling judges do not report the specific reason for travelling to other courts on their reimbursement claims. The result is the court does not have the capability to identify the actual cost of pre-emptive disqualifications.

Despite these problems, all judicial travel claims for the period of 7/1 through 12/31/82 were reviewed. Those claims which appeared to be related to the pre-emption or disqualification of a judge were analyzed further. While this method of estimating costs is not perfect, it provides an approximate cost figure.

The schedule presented below shows the travel costs of providing judicial coverage for disqualifications at various court locations during the six month period ending 12/31/82.

COURT LOCATION	TRAVEL COSTS
Juneau - District Court	$ 2,500
- Superior Court	600
Ketchikan - District Court	1,250
- Superior Court	1,100
Bethel - Trial Courts	3,900
Kenai - Trial Courts	650
Homer - District Court	2,700
TOTAL	$12,700

Note - With per diem for travelling judges, annual costs would probably be $50,000 or so, according to Art Snowden - JJ Brewer

The approximate annual cost would be $25,400. To obtain estimated costs for individual locations the six month figures should be doubled.

Adm. F-1
Rev. 2-73

PARRISH LAW OFFICE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
536 FOURTH AVENUE
FAIRBANKS, ALASKA 99701

O. NELSON PARRISH
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OF COUNSEL

TELEPHONE
(907) 456-4070

March 10, 1983

Representative Anthony Vaska
Capitol Office Building
Pouch V
Juneau, Alaska 99811

Dear Representative Vaska:

I am writing regarding House Bill 79 which has apparently been introduced in the First Session of the 13th Legislature. This bill provides that the current Alaska Statute 22.20.022 providing for peremptory disqualification of judges be repealed. I wish to express my most sincere opinion that the passage of this bill would constitute a giant leap backward in the struggle for a fair and impartial judiciary in Alaska.

I take a particular interest in this bill because my father, Robert A. Parrish, strongly supported it when it was originally passed. I have paid special attention to the effect which it has had upon the judiciary and justice in individual cases. I have consulted with numerous other lawyers whose opinions I respect. Among those, the near unanimous consensus is that the peremptory disqualification procedure has been of great benefit to the state and should not be abandoned.

The peremptory disqualification procedure operates on two independent levels. Each is basic to fair adjudication of both civil and criminal controversies in this state.

On the first level, the disqualification procedure helps insure that a party or his counsel will not be required to participate in litigation before a judge who is consciously or unconsciously biased against him. Despite its rapid growth and large size, Alaska is a small state in terms of its citizens inter-relationships and their relationship with the judiciary. Lawyers especially have the occasion to go before the same judge time and time again during the course of the average year. Trial judges wield substantial power well beyond that which can be controlled by appellate review. The potential is always present that a judge will for non-judicial reasons act in a biased manner against a given attorney or party. The availability of a peremptory challenge effectively precludes a judge from at least repeatedly acting in a biased manner against a lawyer or party.

Additionally, despite the high quality of the Alaskan judiciary, lawyers are often correct in the belief that a certain judge may not be properly suited to the trial of a certain type of case. Again, the peremptory challenge procedure helps insure that such a lawyer or his client will not be bound to accept a given judge to try any given type of case.

At the second level, the peremptory challenge procedure promotes and assures that the judiciary will in general operate in a completely unbiased manner and will strive to provide justice uniformly.

It is easy to say at this stage of the judiciary's development that we do not need a peremptory challenge law because there is no evidence that any judge has been acting in a biased manner toward any particular attorneys or any particular type of cases. But, this has not always been the case. There have in the past been strong inter-personal conflicts between lawyers and judges which have resulted in biased decisions. Likewise, before the peremptory challenge law there was much less uniformity in judicial application of the law. It is my strong belief that the peremptory challenge law has contributed substantially to the improved judicial situation in this state.

The exercise of a peremptory challenge in any given case is of little significance to a judge. However, if a pattern develops whereby a certain attorney is repeatedly challenging the same judge, it becomes apparent to the bar in general that that attorney does not believe he can get a fair trial in front of that judge. No judge wishes to be subject to such public opinion and therefore each strives to avoid bias in his attitude towards attorneys and/or parties and their cases. This office has not had occasion to peremptorily challenge a judge for many years. Nevertheless, we consider the right to a peremptory challenge a fundamental guarantee of the high quality and unbiased judiciary that we have.

Likewise, if any judge develops a pattern of bias in a given type of case, that pattern will soon become evident through the use of peremptory challenges. Again, since such a pattern is indicative of bias, no judge would want it to continue. Therefore, he will be spurred to closely evaluate his rulings in light of those of other judges and conform to them. In this way, the judiciary acts in a more uniform manner. Uniform application of laws is desirable. Aside from equality of treatment, it speeds the revision process if the people or the lawmakers disagree with the manner of application.

Perhaps the most important attribute of the peremptory challenge procedure is that it allows attorneys to represent their clients to the fullest extent without fear of subsequent judicial reprisal in other cases. In the absence of a peremptory challenge rule, judges can develop the attitude that they are always right and that any attorney who challenges their judgment by openly disagreeing with it or appealing it is wrong. In the absence of a peremptory challenge, a challenge to the authority of such a judge will be met with conscious or unconscious retaliatory measures in a subsequent case.

I am pleased to say that in Fairbanks, at least, there is no evidence of such attitudes. However, as they did exist before the peremptory challenge law and do exist in other states without such a law, I am constrained to believe that there is a cause and effect relationship.

I have not had any experience with political controversies in the courts. However, I would assume that the risk of a biased judge is as great there as it is in other types of cases. As a lawmaker, I would think that you would be especially attuned to the importance that an unbiased judge makes in a legal controversy. I am sure you can see as well as I that there is always the potential for the selection of a judge who simply should not be chosen to hear a given case. I also hope you can understand that judges, as human beings, are sensitive to their reputation as to fairness. Since the peremptory challenge rule may be the singlemost important means by which judicial reputations can be developed and communicated, their continued existence is critical.

I understand that there are concerns of expediency which would militate in favor of repealing the peremptory challenge rule. I, for one, favor taking measures which increase the efficiency and reduce the cost of the legal system. Nevertheless, the importance of the peremptory challenge procedure in terms of judicial quality and fairness offsets by far its cost in terms of efficiency and expense. Therefore, I hope that you will oppose passage of House Bill 79.

Sincerely,

James A. Parrish

JAP:mgs

TO: Don.

FROM: Jan

DATE: 1/31/83

RE: Repeal of Peremptory Challenge of Judge law - AS 22.20.022
Judiciary committee hearing on 1/31/83

The following is a review of the laws and court rules relating to the peremptory disqualification of a judge. I have also summarized the UCLA-Alaska law review article, "Peremptory Challenges of Judges in the Alaska Courts", written by Robert Levinson in 1977.

AS 22.20.022, if a party or the party's attorney files an affidavit alleging under oath the belief that a fair and impartial trial cannot be obtained if the judge assigned to the case hears the case, then the presiding judge must immediately assign the case to another judge.

Criminal Rule 25(d) and Civil Rule 42(c) state that each party in a criminal case (prosecution and defense) and in a civil case have the right to one change of a judge. The parties need not file an affidavit alleging bias. The rules set forth the procedures to be followed in requesting a change of judge.

House Bill 79 would repeal AS 22.20.022 and the criminal and civil rules. The bill would also amend AS 22.20.020 to read that a judge can be disqualified only under AS 22.20.020 or AS 22.30.070. As 22.20.020 sets for the grounds for disqualifying a judge for: 1) interest in the outcome of the case; 2) not being present when the case was presented; 3) appearing as a material witness in the case; 4) being related to the parties; 5) having represented one of the parties in the past two years; or 6) feeling that a he cannot render a fair and impartial decision. AS 20.30.070 sets grounds for suspension, removal, retirement and censure of a judge as a result of a recommendation by the commission for judicial qualifications or as a result of being charged with a felony.

BACKGROUND on peremptory disqualification of a judge - In the Alaska Civil Code of 1900, the legislature passed a bill allowing for the disqualification of a judge for cause. The litigants had to prove that the judge was biased in a formal hearing before the judge could be disqualified. In 194[illegible] Alaska passed its first peremptory disqualification act. The litigant had to allege in an affidavit that the judge was biased against the affiant. No hearing was held and the change of judge made as a matter of right. This same act was recodified in the same form on statehood. In 1967, AS 22.20.022 was passed. It is essentially the same as the original 1940 act. In 1974, the Alaska Supreme Court promulgated CR 42(c) and CrR 25(d).

According to the law review article, Alaska has one of the most liberal acts of this type in th e nation. Few states allow disqualification of a judge without at least the formal requirement of an affidavit alleging bias. The artical points out though, that the elimination of that requirement avoids the rancor felt by some judges at being called biased. The court rules contradict the statute because they do not require an affidavit while the statute does. Gieffels v. State held that the court rules supercede the statute because the constitution gives the court tthe power to make its own rules. Art. IV, sec. 15.

The article discusses whether the legislature, under the separation of powers doctrine, has the power to legislate a peremptory disqualification act. The article concludes that it does. The article states that such an act is not an infringement on the judiciary's power to pass its own rules when the statute requires the litigant to prove bias and removal of the judge for actual bias is necessary to safeguard the litigant's right to a fair trial. The legislature could not pass a valid law which allowed for the recusal of a judge without alleging bias, although the judiciary could. Such an act would not affect the substantive rights of a party, merely his procedural rights. The judiciary has the only power to pass procedural rules. The article also discusses whether the right to a peremptory challenge of a judge is a constitutional right. This is unclear when the right is based on bias of the judge. Of course, a party has the right to appeal a case tried before a biased judge. The issue is whether you can disqualify a judge before the trial. It is clear that there is no constitutioanl basis for the right specified in the CrR 25(d) and CR 42(c).

JUSTIFICATION FOR THE STATUTE

1. It is very difficult to prove racial bias or any other kind of bias.
2. If you lose a motion to excuse a judge for bias, you must face that judge throughout the trial
3. Having to allege bias of a judge, even in an affidavit, pisses off alot of judges.
4. If you lose a motion for a change of a judge, you have to decide to go through a trial, appeal the case, and possibly go through another trial, or appeal the decision denying the motion to change the judge through a petition of review. The result is court time and delay and exjpense.

CHANGE OF COURT RULE

Since House Bill 79 proposes to change a court rule, two-thirds of each house must approve the change. Art IV, Sec. 15.

WHO may testify -

I contacted Jim Douglas, Paul Grant, and Bart Rosselle in Juneau. Bart is former president of the bar assn. In Anchorage, I contacted Mary Ann Foley, president of the Anchorage Assn. of Women Lawyers, Karen Hunt, and Diane Valentine, v.p. of Anchorage Bar. Karen Hunt was going to try and contact other attys.

inal Rule 25(d)[61] and Civil Rule 42(c),[62] both alleviate much

61. ALASKA CRIM. R. CT. 25(d) [hereinafter cited as Criminal Rule 25(d)] provides:

> Change of Judge as a Matter of Right. In all courts of the state where a master calendar system has been adopted, a judge may be peremptorily challenged as follows:
>
> (1) *Entitlement.* In any criminal case in Superior or District Court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge. When multiple defendants are unable to agree upon the judge to hear the case, the trial judge may, in the interest of justice, give them more than one change as a matter of right; the prosecutor shall be entitled to the same number of changes as all the defendants combined.
>
> (2) *Procedure.* At the time required for filing the omnibus hearing form, or within 5 days after a judge is assigned the case for the first time, a party may exercise his right to change of judge by noting the request on the omnibus hearing form or by filing a "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. A judge may honor a timely informal request for change of judge, entering upon the record the date of the request and the name of the party requesting it.
>
> (3) *Re-Assignment.* When a request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be absolutely necessary to prevent immediate and irreparable injury before the action can be transferred to another judge. However, if the named judge is the presiding judge, he shall continue to perform the functions of the presiding judge.
>
> (4) *Timeliness.* Failure to file a timely request precludes a change of judge under this rule as a matter of right.
>
> (5) *Waiver.* A party loses his rights under this rule to change a judge when he agrees to the assignment of the case to a particular judge or participates before him in an omnibus hearing, any subsequent pretrial hearing, a hearing under Rule 11, or the commencement of trial. No provision of this rule shall bar a stipulation as to the judge before whom a plea of guilty or of nolo contendere shall be taken under Rule 11.

62. ALASKA CIV. R. CT. 42(c) [hereinafter cited as Civil Rule 42(c)] provides:

> Change of Judge as a Matter of Right. In all courts of the state, a judge or master may be peremptorily challenged as follows:
>
> (1) *Nature of Procceding.* In an action pending in the Superior or District Courts, each side is entitled as a matter of right to a change of one judge and of one master. Two or more parties aligned on the same side of an action, whether or not consolidated, shall be treated as one side for purposes of the right to a change of judge, but the presiding judge may allow an additional change of judge to a party whose interests in the action are hostile or adverse to the interests of another party on the same side. A party wishing to exercise his right to change of judge shall file a pleading entitled "Notice of Change of Judge." The notice may be signed by an attorney, it shall state the name of the judge to be changed, and it shall neither specify grounds nor be accompanied by an affidavit. A judge may honor an informal request for change of judge. When he does so, he shall enter upon the record the date of the request and the name of the party or parties requesting change of judge. Such action shall constitute an exercise of the requesting party's right to change of judge.
>
> (2) *Filing and Service.* The notice of change of judge shall be filed and copies served on the parties, the presiding judge, and the area court administrator, if any, in accordance with Rule 5, Alaska Rules of Civil Procedure.
>
> (3) *Timeliness.* Failure to file a timely notice precludes change of judge as a matter of right. Notice of change of judge is timely if filed before commencement of trial and within five days after notice that the case has been assigned to a specific judge. In a court location having a

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Superior Court
State of Alaska
FOURTH JUDICIAL DISTRICT
P.O. BOX 130
BETHEL, ALASKA
99559

CHAMBERS OF
CHRISTOPHER R. COOKE, PRESIDING JUDGE

PHONE: (907) 543-2298

January 19, 1983

Mr. Gerald L. Wilkerson, CPA
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

Enclosed is my response to your questionnaire of January 10, 1983. I am glad the Legislature has taken the time and effort to gather information from those involved in the criminal justice system regarding problems and recommendations for change.

As judge in a single-judge court in a rural region, many of my responses reflect perceptions from this vantage point. I am not fully informed as to the operation of all components of our system throughout the state.

I would like to underscore several matters raised in the questionnaire. First, I believe we are facing a crisis in our correctional system. Additional facilities must be built at once, and in particular the long-promised but never-built jail facility in Bethel should be constructed without further delay.

It also appears to me that a large number of the people being committed to jail from this region are young, unsophisticated, uneducated, and lacking in basic employment skills. This situation may grow more acute with the trend toward presumptive sentences for first offenders and a possible easing of waiver standards for juvenile offenders. I think special consideration should be given to establishing a correctional institution aimed at youthful offenders where they could receive an opportunity for education and vocational training without being co-mingled with more experienced convicts.

The peremptory challenge problem is a difficult one for a single-judge location. However, I am not convinced that the proposed elimination of the challenge would be an improvement. It would produce more challenges for cause which would be time consuming to resolve and might tarnish the

image of the judge system. However, I think that the court system could do a better job of responding to change of judge situations.

I am pleased with your interest in examining the use of peremptory challenges in jury selection. I think that a reduction in the number of challenges would speed up the trial process greatly particularly in rural locations where convening juries is expensive and time-consuming. Often it takes us longer to select a jury for a felony trial than it does to present the evidence. I would suggest a reduction of peremptory challenges to three on each side, the number used in civil and misdemeanor cases, for all trials. This will also greatly reduce the possibility that peremptory challenges can be used to manipulate the jury to exclude, for example, members of a particular racial group, or women in sexual assualt cases, etc.

Thank you again for your interest in these matters.

Very truly yours,

Christopher R. Cooke

Christopher R. Cooke
Superior Court Judge

CRC:fs

cc: Senator John Sacket
Representative Tony Vaska

TESTIMONY IN FAVOR OF PASSAGE OF HB 79

by MILO FRITZ

THANK YOU, MR. CHAIRMAN.

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

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

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

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

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

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

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

NOW, IN A STATEMENT AT A HEARING REGARDING JUDGE HORNADAY HELD IN HOMER ON JANUARY 5, 1983, SUPERIOR COURT JUDGE MARK ROWLAND TESTIFIED THAT JUDGE HORNADAY WAS PEREMPTORILY CHALLENGED IN ABOUT 80% OF THE CASES COMING BEFORE HIM, ONLY A SMALL PERCENTAGE OF WHICH HAD TO DO WITH DRUNKEN DRIVING. IN OTHER WORDS, BY ACCIDENT OR DESIGN, MOST OF THE LAWYERS ON THE KEANI PENINSULA INDULGED IN A VENDETTA AGAINST JUDGE HORNADAY, PEREMPTORILY DISQUALIFYING HIM. IN EFFECT, THESE LAWYERS SAID, "OKAY, SO YOU ARE GOING TO HAND OUT MAXIMUM SENTENCES AGAINST OUR DRUNK DRIVING CLIENTS. THEREFORE, WE WILL PEREMPTORILY DISQUALIFY YOU FOR ALL OUR CASES." OF COURSE, THIS LEFT JUDGE HORNADAY WITH LITTLE TO DO AND MADE IT NECESSARY FOR SUPERIOR COURT JUDGE MARK ROWLAND TO DISPATCH A JUDGE FROM ANCHORAGE AT NEEDLESS EXPENSE TO HOMER TO HEAR JUDGE HORNADAY's CASES. AND SINCE HORNADAY HAS BEEN RENDERED INEFFECTIVE, ROWLAND HAS TRANSFERRED HIM TO ANCHORAGE AS OF JUNE 1,

THUS QUITE LEGALLY TRANSGRESSING THE WILL OF THE PEOPLE OF THE KENAI PENINSULA. JUDGE ROWLAND IS NOT WRONG; THE LAWYERS ARE NOT WRONG; THE LAW IS WRONG AND HB 79 RECTIFIES THE SITUATION.

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

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

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

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

JUDGE EDMUND BURKE HAD THIS TO SAY, "A RELATED PROBLEM IS ONE CAUSED BY THE RIGHT TO A PEREMPTORY CHALLENGE. THIS RIGHT, WHICH YOU GAVE TO LITIGANTS IN 1967, ENABLES A PARTY OR HIS ATTORNEY TO DISQUALIFY A JUDGE WITHOUT FIRST ESTABLISHING GENUINE CAUSE. THE PROBLEM IS ONE OF EFFICIENT ADMINISTRATION OF THE COURTS, PARTICULARLY IN SINGLE JUDGE LOCATIONS."

"AS MANY OF YOU KNOW, IT RECENTLY BECAME NECESSARY FOR THE PRESIDING JUDGE IN THE THIRD JUDICIAL DISTRICT TO TRANSFER JUDGE HORNADAY FROM HOMER TO ANCHORAGE. THE SOLE REASON FOR THIS ACTION IS THE FACT

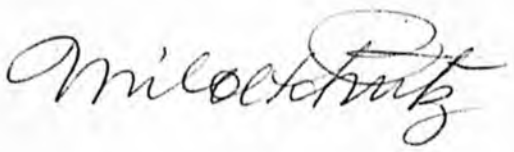
THAT JUDGE HORNADAY IS BEING CHALLENGED IN OVER EIGHTY PERCENT OF THE CRIMINAL CASES ASSIGNED TO HIM FOR TRIAL. IN ORDER TO HANDLE THOSE CASES IT HAS BEEN NECESSARY TO SEND OTHER JUDGES TO HOMER, A PROCESS THAT IS BOTH COSTLY AND DISRUPTIVE OF THE BUSINESS OF THE COURTS IN OTHER LOCATIONS."

"SIMILAR PROBLEMS HAVE ARISEN ELSEWHERE, ALTHOUGH NEVER TO THE DEGREE SEEN IN HOMER. THE POTENTIAL, HOWEVER, IS THERE. AT ANY MOMENT, A JUDGE IN A SINGLE JUDGE LOCATION CAN BE RENDERED INEFFECTIVE BY USE OF THE PEREMPTORY CHALLENGE. IN MULTI-JUDGE LOCATIONS THE PROBLEM IS LESS SERIOUS BECAUSE OF THE ABILITY TO REASSIGN CASES FROM ONE JUDGE TO ANOTHER, WITHOUT CALLING FOR OUTSIDE HELP. EVEN IN THESE LOCATIONS, HOWEVER, THE PEREMPTORY CHALLENGE CONTINUES TO INFLUENCE THE EFFICIENT OPERATION OF THE COURTS."

"FINDING AN ACCEPTABLE SOLUTION FOR THIS PROBLEM IS NOT AN EASY TASK. THERE ARE RESPECTABLE ARGUMENTS ON BOTH SIDES OF THE ISSUE. THE PROBLEM, HOWEVER, IS ONE THAT YOU SHOULD ADDRESS."

THIS BILL, HB 79, REPRESENTS A SOLUTION.

I THANK YOU, MR. CHAIRMAN.



ALASKA

STATE LEGISLATURE

MEMORANDUM

TO: Members of the Legislature

FROM: Representative Milo H. Fritz MHF

DATE: March 14, 1983

RE: Peremptory Challenge

This is a copy of the statute before the 1967 change, which allowed peremptory challenge.

ds

Appeal from joint judgment.—See Stanley v. Greenberg, 5 Alaska 178.

Am. Jur. reference.—2 Am. Jur., Appeal and Error, § 1 et seq.

Sec. 22.15.250. Disposition of fines. When by law any fees, fines, forfeitures, or penalties are levied and collected by the district magistrate or deputy magistrate, the proceeds and all other money collected shall be accounted for and transmitted to the administrative director of the judicial system for transfer to the general fund of the state except as provided in § 270 of this chapter. (§ 21 ch 184 SLA 1959)

Sec. 22.15.260. Bond. Before entering upon his duties each district magistrate and deputy magistrate shall execute and file with the administrative director a surety bond in form and amount to be determined by rule of the supreme court. The state shall pay for the bond. (§ 22 ch 184 SLA 1959)

Am. Jur. reference.—30A Am. Jur., Judges, § 12.

Sec. 22.15.270. Retention of fines, etc., by political subdivisions. All fines, penalties and forfeitures resulting from violations of ordinances of political subdivisions shall be returned to the political subdivision whose ordinance is involved in the manner provided by rule of the supreme court. The political subdivision shall pay to the state administrative director of the court for transfer to the general fund of the state such sums as shall pay for the judicial services rendered to the political subdivision by the magistrate rendering the services. Fines, penalties and forfeitures imposed after appeals accrue to the state, unless the appeal is prosecut by the political subdivision. (§ 23 ch 184 SLA 1959)

Chapter 20. Officers and Employees.

Article 1. Judicial Officers.

Sec. 22.20.010. Judicial officer defined. The term "judicial officer" means a supreme court justice, including the chief justice, a judge of the superior court, a district magistrate and a deputy magistrate. (§ 54-2-1 ACLA 1949)

Am. Jur. reference.—14 Am. Jur., Courts, § 22.

Sec. 22.20.020. Disqualification of judicial officer. (a) A judicial officer may not act as such in a court of which he is a member in any of the following cases:

Re-1967 Law

(1) in an action or proceeding to which he is a party or in which he is directly interested;

(2) when he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;

(3) when he is related to either party by consanguinity or affinity within the third degree;

(4) when he has been attorney in the action or proceeding in question for either party;

(5) when a party, or an attorney for a party to an action or proceeding, civil or criminal, files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or his attorney or in favor of an opposite party, or attorney for an opposite party, to the suit, and that it is made in good faith and not for the purpose of delay, and the affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed within one day after the action, suit, or proceeding is at issue upon a question of fact, unless good cause is shown for the failure to file it within that time. No party or attorney may file more than one such affidavit in any case. The provisions of this subdivision apply only to the superior court.

(b) In the cases specified in (3) and (4) of this section the disqualification may be waived by the parties and is waived unless a party raises the objection. (§ 54-2-1 ACLA 1949)

Revisor's note.—Also see the Rules of Civil Procedure relating to "Disability of a Judge."

This section contains the only conditions under which the judge should abandon the trial of a cause and send it to another judge. United States v. Pratt, 3 Alaska 400, affirmed in 170 F. 881.

The affidavit must assert facts from which a sane and reasonable mind may infer bias or prejudice. United States v. Pioneer Packing Co., 10 Alaska 70; Graff v. Electrical Enterprises, Inc., 12 Alaska 322.

And is subject to strict construction.—That affidavits of prejudice are to be strictly construed has been held consistently. United States v. Pioneer Packing Co., 10 Alaska 70.

Personal bias must be shown.—The affidavit of prejudice must show that a personal bias exists, and the holding is that judicial bias or rulings of a judge which are the subjects of correction on appeal do not constitute personal bias. United States v. Pioneer Packing Co., 10 Alaska 70.

Filing of affidavit.—The affidavit must be filed within the time specified by statute and the recused judge must determine the question. United States v. Pioneer Packing Co., 10 Alaska 70.

Requires that cause be at issue upon question of fact.—This section specifically requires that the cause be at issue upon a question of fact before the affidavit may be filed. United States v. Pioneer Packing Co., 10 Alaska 70.

When cause is at issue.—A cause is not at issue upon a question of fact until all permissible motions and demurrers have been waived or filed and passed upon, and the proper pleading, setting forth the claims of the respective parties, has been filed. United States v. Pioneer Packing Co., 10 Alaska 70.

Mere assertion of bias insufficient.—A mere assertion of belief that the judge is biased or prejudiced, giving no reasons in its support, does not disqualify the judge under the provisions of this section. Pacific Coal, etc., Co. v. Pioneer Min. Co., 205 F. 577.

It is a mistake to assume that a judge can be ousted from jurisdic-

tion to try a cause upon an allegation of mere bias or prejudice. United States v. Pratt, 3 Alaska 400, affirmed in 170 F. 881.

Attorney may allege prejudice in a respectful manner.—An attorney may in a proper case, in a respectful manner, allege that the judge is prejudiced against his client, and unless the act is done with reckless disregard of truth, or with the express intention to reflect upon the honor and integrity of the judge, it is not a contempt. Tjosevig v. United States, 225 F. 5.

And untrue or excess facts are not proper ground for contempt or criticism.—Where an attorney filed a proper affidavit of prejudice and of interest, if the facts therein stated were untrue, the fact that they were untrue is not a proper basis for adjudging a contempt, nor is the fact that the affidavit contained more than was necessary to accomplish the change of judges a ground for punishment or criticism. Pav v. United States, 36 F. (2d) 639.

Duty of judge not to withdraw from case where affidavit is insufficient.—A judge against whom an insufficient showing for recusation has been made owes it to his oath of office and to the litigant who has invoked the jurisdiction of the court over which he regularly presides not to withdraw from the case, where an insufficient affidavit of prejudice has been filed, however much his personal feelings may incline him to do so. Graff v. Electrical Enterprises, Inc., 12 Alaska 322.

Statements made by the judge in a prior suit involving a different defendant, and in the case at bar, did not show any objectionable attitude on the part of the judge, or any personal bias against the defendant in the case at bar. United States v. Pioneer Packing Co., 10 Alaska 70.

Cited in Stringer v. United States, 16 Alaska 305, 233 F. (2d) 947.

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

State's right to file affidavit disqualifying judge for bias, 115 ALR 866.

Right of party in course of litigation to challenge title or authority of judge, 144 ALR 1207.

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

Sec. 22.20.030. Power of judicial officers. A judicial officer may

(1) preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of a duty imposed upon him by law;

(2) compel obedience to his lawful orders, as provided by law;

(3) compel the attendance of persons to testify in a proceeding pending before him in the cases and manner provided by law;

(4) administer oaths to persons, in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and the performance of his duties;

(5) take and certify the proof and acknowledgment of a conveyance of real property, or any other written instrument authorized or required to be proved or acknowledged;

(6) take and certify the acknowledgment of satisfaction of a judgment in any court;

(7) take and certify an affidavit or deposition to be used in any court of justice or other tribunal of the state. (§§ 54-2-3, 54-2-5, 54-2-6 ACLA 1949)

The power to punish for contempt is the highest exercise of judicial power. United States v. Pratt, 3 Alaska 400, affirmed in 170 F. 881.

It is not an incident to the mere exercise of judicial functions. United

Judge blames lawyers for high disq

Empire - 2-3-83

Lawyers counter that challenges are needed to guarantee fairness

By CHRIS JARVIS
Empire Staff Reporter

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

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

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

Alaska Court Administrator Art Snowden said the peremptory challenges, which allow lawyers to ask for a different judge without stating a reason, are an "administrative nightmare," noting it costs the state an estimated $30,000 a year to fly judges into a jurisdiction to hear a case

Williams, a former Alaska State Trooper, said members of the bench should not be blamed.

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

Lawyers generally disagree.

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

qualification rate

cases, said lawyer Richard Burnham.

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

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

Although acknowledging it costs money to fly a judge to hear the cases of a disqualifed judge, Burnham said there are other solutions to the problem. For example, he said, a superior court judge could hear district court cases or, if that is not possible, another district judge could be hired.

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

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

Continued on Page 2

Judge...

Continued from Page 1

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

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

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

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

"I admit I'm old fashioned," Williams said. He seldom likes to grant delays in court proceedings because cases often end up dismissed when delayed too long, he said.

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

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

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

It is the court's responsibility to assure efficiency in the system especially with criminal case loads in Juneau almost doubling in four years, he said.

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

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

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

Pre-emption of judges 'disruptive'

by Jeff Berliner
Times Writer

A handful of state judges are "disrupting" the state court system because they are removed from cases so frequently, says state court administrator Art Snowden.

Court records show that one Anchorage judge and five other judges from around the state are excused from cases far more than their colleagues.

Although the current debate over pre-emptions has focused on Homer District Court Judge James Hornaday, he is not the only judge regularly excused from cases by lawyers. There are 42 trial judges in the state, (the eight appellate judges may not be pre-empted), and lawyers routinely excuse six of them.

According to court records, in addition to Hornaday, the judges being regularly bumped from

See Judges, page A-4

Judges

(Continued from page A-1)

cases are Juneau District Court Judge Gerald Williams, Fairbanks District Court Judge Stephen Cline, Anchorage Superior Court Judge Karl Johnstone, Juneau Superior Court Judge Roger Pegues, and Wrangell Superior Court Judge Henry Keene.

By law, attorneys have a right of pre-emption, called peremptory challenge, which means that each side in a case may excuse the judge assigned to that case one time. The parties involved do not have to state the reason. Lawyers have five days from the initiation of a case to file a notice for a change of judge. The legislature is now considering a bill to repeal lawyers' right to pre-empt a judge.

Court officials have called the pre-emption an "administrative nightmare" because of the problems in reassigning judges.

"It is more efficient without it," Snowden said, adding that the court system has not taken a policy on the peremptory challenge and is probably split on the issue.

Snowden called it "a disruption" that costs the state court system an average of $30,000 yearly in extra costs of reassigning cases to other judges.

The biggest expense, Snowden said, is paying travel and expense money to have judges journey to one-judge areas to fill in where the only judge in town has been legally removed from a case.

That has happened so much in Homer that Hornaday has been ordered to pack up, leave town, and don his judicial robes in Anchorage. Even if lawyers pre-empt him there, the reasoning is, there are other judges to fill in. Presiding Judge Mark Rowland ordered Hornaday to move to Anchorage by June 1 to fill a judicial vacancy here.

Hornaday has been pre-empted from about 84 percent of the criminal cases assigned to him. His lawyer, Henry Camarot, claims that Hornaday is pre-empted 8 percent of the time when all his cases are considered.

Cline, Williams and Johnstone are taken off cases up to half the time. All four of the most pre-empted judges have been retained in office by voters in recent elections.

Johnstone, the only Anchorage judge regularly excused, is also the only judge who hears civil cases almost exclusively. The others regularly hear criminal cases, too. Johnstone is pre-empted three times more than all the other Anchorage Superior Court civil judges put together, and his pre-emptions climbed to a high of 20 in December. Judges are assigned between 30 and 40 new cases monthly. Johnstone was pre-empted 153 times in 1982, up from 71 in 1981. And although Johnstone said last summer that his pre-emptions were going down, court records show they are on the rise.

But in Anchorage, the state's biggest judicial district, Johnstone's cases are simply reassigned to another Anchorage judge. That can't be done in Homer, where Hornaday is the only judge. His removal means that court administrators have to send in another judge to hear Hornaday's cases.

Last week the House Judiciary Committee held two days of hearings on the bill to abolish the pre-emption. Lawyers argued against the bill, claiming the pre-emption is used to excuse a judge who may not give their client a "fair shake."

Both defense attorneys and Anchorage municipal prosecutor Allen Bailey argued for keeping pre-emptions around so they have a tool to excuse a judge they think is either too lenient or too harsh when it comes to sentencing.

Diplomate of the American Board of Surgery

Fellow of the American College of Surgeons

PAUL SAYER, M.D.

A Professional Corporation

GENERAL SURGERY

BOX 2353
HOMER, ALASKA 99603

Telephone 235-7659

December 16, 1982

Milo Fritz, M.D.

Anchor Point, Alaska
99556

Dear Milo:

I want you to know that I strongly endorse and support you efforts to prohibit peremptory challenges of the sort which has been causing Judge Hornaday so much trouble. Whatever you can do to stop this kind of a thing I would appreciate it. I encourage you enthusiastic efforts on this bill.

Yours Truly;

Paul Sayer

Paul Sayer, M.D.

PS:jeh

10 DEC 02 123 AM

ALASCOM

Telegram

02029 TDA HOMER ALASKA 36 12-10 1203P AST

PMS REPRESENTATIVE MILO FRITZ

[redacted] PO BOX 158 2054

ANCHOR POINT AK 99556

JUDGE ROWLAND,

WE ARE GREATLY DISMAYED TO LEARN OF YOUR DECISION REGARDING THE TRANSFER OF JUDGE HORNADAY FROM HOMER TO ANCHORAGE. OUR COMMUNITY DOES NOT SUPPORT THIS ACTION. PLEASE GIVE THIS YOUR RECONSIDERATION.

THE HOMER CHAMBER OF COMMERCE

BOARD OF DIRECTORS

CHRISTIAN COMMUNITY CHURCH

Phone 235-8648

"THE CHURCH WITH THE LIGHTED CROSS"

P.O. BOX 1346
HOMER, ALASKA 99603

Rev. Raymond Arno
Box 1346
Homer, Alaska 99603

December 10, 1982

Rep. Milo Fritz
P. O. Box 158
Anchor Point, Alaska 99556

Dear Sir:

The transfer of Judge James Hornaday has caused quite a stir here in Homer and we trust good will come of it.

I personally, along with most of Homer's population, am very disturbed by this move. I am writing to you hoping that something will be done about such action.

First, Judge Hornaday's transfer is a move against the innocent people of Alaska who are being asked to pay with their limbs and lives the price of drinking and driving. Why should this be? I am asking you to do something to increase the penalty for drunk driving state wide.

Secondly, I ask that you do something about the preempting policy that has caused this entire problem. To preempt a Judge without cause is just another advantage for the guilty. This advantage is being paid for by the innocent.

I as a husband, father, Pastor and citizen of Homer and Alaska, want to see our roads and highways safe from the killer loaded with booze and armed with an auto. Will you help us?

Thanks.

Sincerely,

Ray

Rev. Raymond Arno

RA:my

Peninsula Eye Clinic
Peter E. Cannava, M.D., A.P.C.
OPHTHALMOLOGY
P.O. BOX 1629
SOLDOTNA, ALASKA 99669
TELEPHONE 262-4462

February 17, 1983

Rep. Hugh Malone
Pouch V
Juneau, AK 99801

Dear Hugh

Concerning the "pre-emption" bill of Milo's, I would like to suggest that the current law is indeed causing a "hardship." A "hardship" to the community at large who elected their local judges only to see him chastised in the form of a transfer because he is practicing in the fashion the people expected him to!

The current law usurps the right of the community to determine who their judge should be. It places that right in the hands of those attorneys and their clients who pre-empt him.

Please support Milo's solution and don't water it down on the floor! It seems as though the "bad guys" are winning, the "who's got rights" game these days.

Sincerely

Peter

Peter E. Cannava, M.D.

PEC/tc

cc Rep. Milo Fritz, M.D.
Rep. Paul Fischer
Sen. Don Gilman

P.O. Box 1555
Homer, AK 99603

December 9, 1982

Mr. Fritz Sir:

It appalls and infuriates me to realize a group of liberal attornies can determine to whom they shall present a trial case for judgement.

Residing in Homer, I encourage you to rescind the actions of those opposed to honest justice and request that Judge James C. Hornaday remain in his position as District Judge in Homer.

The precedent set in this matter should be one great concern, Corruption has already seeped into our entire judicial system on all levels. The removal of a Judge that is of determined and forthright character proves only to place this great countries liberty in the hands of its' criminal offenders. This fact is more apparent over the years and also by the continual interpretation of our laws through legal gibberish.

I sincerely hope you will not disappoint me nor the countries integrity that was once established by great men and that which is continually preserved by the deths of even greater men.

"If it's peace you want---try working towards Justice."

Sincerely,

Teresa A. Snyder

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

December 23, 1982

Milo H. Fritz
Box 158
Anchor Point, Alaska 99556

Dear Milo:

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

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

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

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

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

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

Very truly yours,

C. R. BALDWIN

CRB/hs

COMMUNITY MENTAL HEALTH CENTER

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

RESOLUTION

SOUTH PENINSULA MENTAL HEALTH ASSOCIATION, INC.

December 11, 1982

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

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

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

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

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

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

Joe P. April

Reverend Joe April, Chairperson

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

Box 335
Homer, Alaska 99603

CITY OF HOMER

REPLY TO:

- ☐ City Hall
  Ph. (907) 235-8121
- ☐ Port of Homer
  Ph. (907) 235-8597
- ☐ Harbor Master
  Ph. (907) 235-3959
- ☐ Public Works Dept.
  Ph. (907) 235-8120
- ☐ City Engineer
  Ph. (907) 235-6368

December 6, 1982

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

Dear Judge Rowland:

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

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

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

Sincerely,

Erle Cooper
Mayor

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

CITY OF HOMER
HOMER, ALASKA

RESOLUTION 82-20(S)

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

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

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

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

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

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

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

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

CITY OF HOMER

Sam Matthews

Sam Matthews, Mayor Pro tem

ATTEST:

Kathleen F. Herold

Kathleen F. Herold, City Clerk

December 6, 1982

Homer Chamber of Commerce

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

Dear Judge Rowland:

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

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

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

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

Sincerely,

HOMER CHAMBER OF COMMERCE

Jim Daily,
President

JD:lag
Enclosures

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

December 13, 1982

K. H. Plourd, Sr.
Box 74
Anchor Point, Ak. 99556

Judge Mark C. Rowland

303 K Street, Courtroom D

Anchorage, Ak. 99501

Dear Sir,

In regards to the case of Judge Hornady.

Your position in this matter is untenable to the people of the Homer area. After Judge Hornaday had been in Homer for some time as a temporary judge, a public meeting was held to determine the position of the people. The vote to keep him here permanently was unanimous. That seems to me to be a mandate from the people.

[illegible] the most recent election, Judge Hornaday was again given an overwhelming vote of confidence by the people of this area. Another clear mandate.

When the news of his proposed removal from Homer reached the people, a ground swell of indignation arose and is gaining momentum daily. I regard this strong spontaneous indignation on the part of most people of this area (except the drunks) as another mandate.

Are not the people in a democracy the ultimate source of power? I like to think so.

Sincerely,

Kenneth H. Plourd, Sr.

Copies: Governor Bill Sheffield
Rep. Milo Fritz ✓
Rep. Hugh Malone
Chief Justice Edmond Burke
Sen. Donald Gilman
Sen. Paul Fischer

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

December 9, 1982

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

Dear Judge Rowland,

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

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

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

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

Speaking for the Christian Ministers Association, I am

Sincerely yours,

J Schmidt

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

cc: Chief Justice Edmond Burke

Alaska Judicial Council

1031 W. Fourth Avenue, Suite 301
ANCHORAGE, ALASKA
99501
(907) 279-2526

February 2, 1983

M E M O R A N D U M

TO: Judicial Council Members

FROM: Francis L. Bremson FB

RE: Peremptory Challenges of Judges

The Judicial Council voted on December 3, 1982 to examine the use of peremptory challenges to judges in other states. The purpose of this review was to determine whether there were tested solutions to the administrative problems which can arise with the frequent use of challenges in single-judge courts. Ms. Teri Carns was assigned responsibility for taking a preliminary look at available literature, contacting court personnel in other states, and using other means as needed to outline potential avenues for further exploration. Ms. Carns will be available to discuss this subject at our meeting on February 15. The following memorandum summarizes her research to date.

1) States Allowing Peremptory Disqualification of Judges

All of the following states have some procedure, whether statutory or embodied in court rules, which is similar to Alaska's peremptory challenge of judges.

Arizona	Minnesota	North Dakota
California	Missouri	Oregon
Idaho	Montana	South Dakota
Illinois	Nevada (civil only)	Washington
Indiana	New Mexico	Wisconsin
		Wyoming

The list is taken from an article in the Oregon Law Review (Disqualification of Judges for Prejudice or Bias, 48 Ore. L. Rev. 311 (1969)). Because the article is fourteen years old, more states may have adopted peremptory challenge provisions during the intervening years. The article notes that some states require affadavits supporting the allegation of bias or prejudice, while the most restrictive states do not allow prejudice or bias of the judge as the sole ground for his disqualification.

2) Studies Available on Peremptory Challenges

We have received reports or studies from California, Idaho, Illinois, the National Center for State Courts, and the American Bar Association. Much of the material received has focused on legal rather than administrative aspects of challenges. Only two studies involving data collection have been received. The California Judicial Council prepared a study in 1962, five years after legislation authorizing peremptory challenges had been passed. The Council found no significant problems at that time. An Idaho study completed in December 1982 noted that three (of 21) judges in the state had been challenged frequently, but most of the challenges were in multi-judge courts. Neither study appears to be particularly relevant to the present situation in Alaska.

The other reports which have been sent to us include copies of statutes and court rules from several states, a report from the National Center for State Courts which describes various grounds for disqualifying judges, recommendations and commentary from the American Bar Association, and an Illinois judicial discipline case centering on the use of peremptory challenges by an Illinois law firm. All of these reports provide useful background information about the range of possibilities in the legal interpretation of peremptory challenges. They would certainly be helpful in drafting legislation or changes in court rules, but none of them address the administrative issues which the Council staff's work was to emphasize.

3) Administrative Solutions

Telephone conversations with court administrators in several states proved to be the most efficient way of discovering answers to the questions raised by Judicial Council members. Three of the states contacted thus far had developed procedures to be used when a judge was disqualified. These are described below.

A. Washington. Pro-tem judges are used in single-judge courts when the regular judge is disqualified in civil cases. An attorney is chosen from a pool of local "experienced" (at least ten to fifteen years of legal practice) lawyers. Parties to the action must stipulate that the attorney is acceptable to them as a judge for the case; if not, another attorney is chosen. In criminal cases, the disqualified judge is apparently responsible for obtaining another judge, although the procedure for this was not discussed.

B. California. Judges in single-judge courts are matched, at the time of their appointment, with another judge in a nearby court in a reciprocal arrangement. If either judge is disqualified, the reciprocating judge automatically takes his place. If both are disqualified, the central administrative office becomes involved in assigning a third (or additional) judge(s). The court's administrative office said that this reciprocal arrangement was effective enough that peremptory challenges did not create serious administrative problems. Pro-tem judges (attorneys appointed on a case-by-case basis, as in Washington) had been employed at one time, but the office said that California's experience with them was not positive enough to continue their use.

C. Wyoming. A judge challenged in Wyoming is allowed to select his own replacement from among all the judges of the state. The effect of this policy is that peremptory challenges are rarely used. If the judge is being disqualified because of his sentencing policies, he can replace himself with a judge who has similar philosophies. It may be noted that some states prohibit the disqualified judge from naming another judge to hear the case, precisely for the reason that he could frustrate the intent of peremptory challenges by choosing a judge with similar philosophies or biases. Countering that, the former Wyoming court administrator contends that allowing the judge this option prevents "judge-shopping".

One other solution which has been suggested for use in Alaska is teleconferencing. The Council staff has not had the opportunity to thoroughly research this possibility. It is presently used by the court on occasion, and may be significantly less costly than transporting a judge to outlying communities.

Further Work

The Judicial Council staff will continue to contact states which allow peremptory challenges to determine what other administrative solutions or legal alternatives may be available.

FLB/jrm

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William V. Boggess

March 29, 1983

Senator Vic Fischer
Pouch V
Juneau, Alaska 99811

Re: House Bill 79,
Repealing Peremptory Disqualification of Judges

Dear Senator Fischer:

House Bill 79 would eliminate the peremptory challenge of judges. It would thus only allow challenges of judges for cause under A.S. 22.20.020. If only challenges for cause are allowed, then challenges for cause will increase. Under the present system, I do not hesitate to appear before judges that I have challenged peremptorily. There are many reasons for changing a judge.

However, if you challenge a judge for cause, it is a very serious accusation. You must state, by affidavit, that you feel the judge cannot be fair and impartial. In a way, you are stating the judge has not followed the judicial canons of ethics. S/he has failed to recuse himself or herself when that is what should have happened. If I ever had to challenge a judge for cause, I would never want to appear before that judge again. I would continue to challenge that judge for cause, particularly if that is what my client wanted or insisted upon.

Using this method of disqualification will cause an increase in legal costs and expenses for clients, and will increase the work of judges. Attorneys will have to file motions to disqualify for cause, accompanied by affidavits and memoranda. There will be hearings on the motion. If the motion is first denied, then it is assigned to another judge for hearing under A.S. 22.20.020(c). If the motion is still denied, the question can go up on appeal, or at least a petition for review can be filed. The peremptory challenge system is so much more efficient, that it should be retained.

If there are problems because there are single judge districts, those are problems should be solved by ingenious

use of telephone hearings, and, if necessary, assignment of a judge from a different district to handle motions and the trial. Eliminating the peremptory challenge of judges will not solve the problem.

Alaska is still a small enough state that many people know judges that they come before. If they are not comfortable, for whatever reason, they should have the right to one peremptory challenge. The times when this has become a problem for the court system are times when a judge has announced publically the sentence s/he intends to give in all drunk driving cases, for example, or cases where lawyers and litigants have consistently felt that the judge's demeanor or decisions were unacceptable.

The peremptory system works very efficiently. If a judge is challenged, another judge is very simply assigned to the case. One piece of paper needs to be filed by the attorney, and another is filed by the courts. (See Civil Rule 42.)

The peremptory challenge of judges should be retained. I urge you to defeat House Bill 79.

Sincerely,

SCHAIBLE, STALEY, DeLISIO & COOK, Inc.

By: _____
Barbara L. Schuhmann

BLS:skb

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ROBERT A. PARRISH
OF COUNSEL

March 10, 1983

Senator Vic Fischer
Capital Office Building
Room W
Juneau, Alaska 99811

Dear Senator Fischer:

I am writing regarding House Bill 79 which has apparently been introduced in the First Session of the 13th Legislature. This bill provides that the current Alaska Statute 22.20.022 providing for peremptory disqualification of judges be repealed. I wish to express my most sincere opinion that the passage of this bill would constitute a giant leap backward in the struggle for a fair and impartial judiciary in Alaska.

I take a particular interest in this bill because my father, Robert A. Parrish, strongly supported it when it was originally passed. I have paid special attention to the effect which it has had upon the judiciary and justice in individual cases. I have consulted with numerous other lawyers whose opinions I respect. Among those, the near unanimous consensus is that the peremptory disqualification procedure has been of great benefit to the state and should not be abandoned.

The peremptory disqualification procedure operates at two independent levels. Each is basic to fair adjudication of both civil and criminal controversies in this state.

On the first level, the disqualification procedure helps insure that a party or his counsel will not be required to participate in litigation before a judge who is consciously or unconsciously biased against him. Despite its rapid growth and large size, Alaska is a small state in terms of its citizens' interrelationships and their relationship with the judiciary. Lawyers especially have the occasion to or before the same judge time and time again during the course of the average year. Trial judges wield substantial power well beyond that which can be controlled by appellate review. The potential is always present that a judge will for non-judicial reasons act in a biased manner against a given attorney or party. The availability of a peremptory challenge effectively precludes a judge from at least repeatedly acting in a biased manner against a lawyer or party.

Additionally, despite the high quality of the Alaskan judiciary, lawyers are often correct in the belief that a certain judge may not be properly suited to the trial of a certain type of case. Again, the peremptory challenge procedure helps insure that such a lawyer or his client will not be bound to accept a given judge to try any given type of case.

At the second level, the peremptory challenge procedure promotes and assures that the judiciary will in general operate in a completely unbiased manner and will strive to provide justice uniformly.

It is easy to say at this stage of the judiciary's development that we do not need a peremptory challenge law because there is no evidence that any judge has been active in a biased manner toward any particular attorneys or any particular type of cases. But, this has not always been the case. There have in the past been strong inter-personal conflicts between lawyers and judges which have resulted in biased decisions. Likewise, before the peremptory challenge law there was much less uniformity in judicial application of the law. It is my strong belief that the peremptory challenge law has contributed substantially to the improved judicial situation in this state.

The exercise of a peremptory challenge in any given case is of little significance to a judge. However, if a pattern develops whereby a certain attorney is repeatedly challenging the same judge, it becomes apparent to the bar in general that that attorney does not believe he can get a fair trial in front of that judge. No judge wishes to be subject to such public opinion and therefore each strives to avoid bias in his attitude towards attorneys and/or parties and their cases. This office has not had occasion to peremptorily challenge a judge for many years. Nevertheless, we consider the right to a peremptory challenge a fundamental guarantee of the high quality and unbiased judiciary that we have.

Likewise, if any judge develops a pattern of bias in a given type of case, that pattern will soon become evident through the use of peremptory challenges. Again, since such a pattern is indicative of bias, no judge would want it to continue. Therefore, he will be spurred to closely evaluate his rulings in light of those of other judges and conform to them. In this way, the judiciary acts in a more uniform manner. Uniform application of law is desirable. Aside from equality of treatment, it speeds the decision process if the people or the lawmakers discern with the correct of application.

Perhaps the most important attribute of the peremptory challenge procedure is that it allows attorneys to represent their clients to the fullest extent without fear of subsequent judicial reprisal in other cases. In the absence of a peremptory challenge rule, judges can develop the attitude that they are always right and that any attorney who challenges their judgment by openly disagreeing with it or appealing it is wrong. In the absence of a peremptory challenge, a challenge to the authority of such a judge will be met with conscious or unconscious retaliatory measures in a subsequent case.

I am pleased to say that in Fairbanks, at least, there is no evidence of such attitudes. However, as they did exist before the peremptory challenge law and do exist in other states without such a law, I am constrained to believe that there is a cause and effect relationship.

I have not had any experience with political controversies in the courts. However, I would assure that the risk of a biased judge is as great there as it is in other types of cases. As a lawmaker, I would think that you would be especially attuned to the importance that an unbiased judge roles in a local controversy. I am sure you can see as well as I that there is always the potential for the selection of a judge who simply should not be chosen to hear a given case. I also bet you can understand that judges, as human beings, are sensitive to their reputation as to fairness. Since the peremptory challenge rule may be the single most important means by which judicial reputations can be developed and communicated, their continued existence is critical.

I understand that there are concerns of proponents which could militate in favor of repealing the peremptory challenge rule. There are, however, other measures which increase the efficiency and reduce the cost of the legal system. Nevertheless, the importance of the peremptory challenge procedure in terms of judicial quality and fairness offsets by far any gain in terms of efficiency and expense. Therefore, I hope that you will oppose passage of House Bill 79.

Sincerely,

James Hanley

James J. Hanley

JJH:rcs

MSG 83-00004537 PRTY 1 03/30/83 15:57:37 ORIG: LA01 IN= 0009 OUT= 0095
FROM: SHIRLEE ANC LIO TO: POMS JUNEAU INFO
TARGET: LJHL SUBJ: POM

3/30/83, SHIRLEE ANC LIO, 4537

TO: SENATORS V. FISCHER, KELLY AND HALFORD

FROM: DON HOPWOOD, 1937 BEAVER PLACE, ANCHORAGE 99504
H 338-4338 W 276-4335

RE: HB 79, PEREMPTORY DISQUALIFICATION OF JUDGES.

THE PURPOSE OF A PEREMPTORY DISQUALIFICATION IS TO ELIMINATE JUDGES WHO ARE UNSATISFACTORY OR WHOSE TRIAL OR SENTENCING PRACTICES ARE NOT IN ACCORD WITH OTHER PARTS OF THE STATE. REPEAL WILL RESULT IN UNEVEN JUDGMENTS AND SENTENCES THROUGHOUT THE STATE AND WILL MAKE THE JUDICIARY LESS ACCOUNTABLE. I URGE YOUR OPPOSITION.

4/5/83, SHIRLEE ANC LIO, 5782

TO: SENATOR V. FISCHER

FROM: STEPHEN S. HART, 1001 W. 19TH AVE., ANCH 99503
H 274-8774 W 276-1130

I AM OPPOSED TO HOUSE BILL 79 REGARDING DISQUALIFICATION OF JUDGES. THERE ARE MANY OCCASIONS WHEN A GIVEN JUDGE'S KNOWN PREDILECTIONS ARE CONTRARY TO THE INTERESTS OF ONE'S CLIENT, AND PROVIDING A SAFETY VALVE IN THE FORM OF A SINGLE PRE-EMPTION AS IS PRESENTLY THE CASE IS A REASONABLE COMPROMISE.

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CF SB100

A worse bill

6 judges in the state

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

Mr. Chairman and ladies and gentlemen of the Committee, thank you for holding this hearing and inviting me to address the Committee. I hope I am not the monster judge that everyone has been talking about. My name is James D. Hornaday and from a perspective of nearly 20 years in Alaska I am speaking to you today as a judge. The judicial cannons permit and even require that judges speak out for the improvement of the administration of justice. And with all of the comments by many of my lawyer friends I feel a little like David when he went up against Goliath. The men and women of good will can and do differ in their opinions, and it does remind a little of the old Alaska adage that if the lawyers are against something it must be worthwhile. I wish it were someone else who was on the line rather than me, frankly I would rather be playing basketball or working on a legal history project. But the question of the peremptory challenge is involved with the independence of the judiciary and the decreasing respect for the judiciary. First of all, the peremptory challenge is not a fundamental constitutional right; it does not even exist anywhere in the Federal system, and there are Federal judges in every state and territory. Apparently it does not even exist in the vast majority, about two-thirds of the states. Alaska is in the extreme minority. It did not exist in Alaska until a 1968 few years ago when some lawyers pushed it through the Legislature. The Federal system and the majority of states get along just fine without it. Now as one example, drunk driving cases are the most serious problem facing the Alaska Court System. Over half of all the jury trials in the entire Court System are drunk driving cases. Drinking was involved in over 80% of the traffic fatalities; over 200 thousand are killed or injured annually on our nation's highways. Let's make clear what the Legislature has already done; the Legislature has passed legislation providing for up to one year in jail and $5,000 fine, revocation of licenses and community work. Now the statutes specifically states that for the first offense a defendant is to receive not less than 72 consecutive hours. It is too serious a problem to leave in the hands of the attorneys and that is the none-effect of the peremptory challenge without cause. Judges are concerned about the peremptory challenge; it is affecting sentences. The Chief Justice has stated publicly that the peremptory challenge moderates sentences and that a judge has to walk a fine line and if they get too far over they will be removed by the peremption. I was told by the presiding judge that I had to take peremptions into consideration when I sentence. It is the most frequent topic of conversation at the Annual Judicial Conference. The leading authority on court delay called the Alaska peremptory challenge an absolute abomination, those were his words. Representatives of the National Center of State Courts were amazed at the existence of the removal without cause. I have heard judges tell the Chief Justice they are concerned about the peremption. It is a problem state-wide, not just in Homer. You have heard the lawyer in Bethel and the problems there. You've heard the judges in Fairbanks. It exists in Kodiak, Ketchikan, Juneau and all over the state, even in multi-judge areas. Now we announced a pattern of sentencing in drunk driving cases in Homer about a year ago which was effective, but sentences were clearly within the sentences permitted by the Legislature. Fifteen days is less than 5% of the maximum penalty. Although the announced pattern is no longer in effect and was rescinded when the higher court ruled that it could not be applied. There are sentencing patterns in Alaska, attorneys keep records of the sentences of judges. So there are patterns but known only to the judges and the lawyers. The public, including the potential defenders, do not know the patterns. It is time to open up the System and bring it out from behind the closed doors of the

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

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

HB 79---PEREMPTY CHALLENGE OF JUDGES REPEAL--

REMARKS BY REPRESENTATIVE JOHN LISKA

THANK YOU MR. SPEAKER:

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

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

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

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

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

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

body. The ability to improve is there, as well as the desire, and I believe that a great deal can be accomplished without additional resources. Mainly, what needs to be done is to increas· our efficiency by adherence to the internal operating procedures that we have already adopted.

Someone once said that the average congregation would be better served if sermons on the avoidance of sin were delivered by the worst sinner in the flock, rather than its minister, although I suppose the two titles are not necessarily inconsistent. In any event, being both the designated leader of the judicial flock and one of its worst sinners, I feel eminently qualified to preach on the continuing problem of delay in the courts.

PEREMPTORY CHALLENGE

A related problem is one caused by the right to a peremptory challenge. This right, which you gave to litigants in 1967, enables a party or his attorney to disqualify a judge without first establishing genuine cause. The problem is one of efficient administration of the courts, particularly in single judge locations.

As many of you know, it recently became necessary for the Presiding Judge in the Third Judicial District to transfer Judge Hornaday from Homer to Anchorage. The sole reason for this action is the fact that Judge Hornaday is

From: A message by Chief Justice Edmund W. Burke to the -12- Thirteenth Alaska Legislature
February 15, 1983

being challenged in over eighty percent of the criminal cases assigned to him for trial. In order to handle those cases it has been necessary to send other judges to Homer, a process that is both costly and disruptive of the business of the courts in other locations.

Similar problems have arisen elsewhere, although never to the degree seen in Homer. The potential, however, is there. At any moment, a judge in a single judge location can be rendered ineffective by use of the peremptory challenge. In multi-judge locations the problem is less serious because of the ability to reassign cases from one judge to another, without calling for outside help. Even in these locations, however, the peremptory challenge continues to influence the efficient operation of the courts.

Finding an acceptable solution for this problem is not an easy task. There are respectable arguments on both sides of the issue. The problem, however, is one that you should address.

CITY PROSECUTIONS

The performance of the Public Defender Agency has a direct impact on the operation of courts. Due to the agency's caseload, the efficient handling of criminal cases is a serious problem. One reason for this is the fact that a considerable part of the agency's work is the defense of