MAGISTRATE

/ CONDUCT

POSITION PAPER
SB321

The intent of the sponsor in introducing SB321, "An Act including magistrates within the jurisdiction of the commission on judicial qualifications" is threefold in nature.

First, as magistrates are not currently under the jurisdiction of the Commission on Judicial Qualifications, there is no uniform or central authority for cataloging and resolving complaints lodged against these judicial officers. At the present time, complaints are forwarded to the presiding judge of each judicial district for disposition. The supervision of and method of processing complaints against magistrates may vary from district to district, essentially creating inequities in the system, both for magistrates and the public.

This "due process" inequity is the second reason for the bill's introduction. Magistrates deserve a uniform procedure for responding to complaints levied against them, as well as a method of safeguards against possible arbitrary and capricious acts by presiding judges.

Finally the bill proports to enhance the judicial independence of magistrates by providing this separate and distinct forum for airing complaints. The Supreme Court has determined, of course, that serving at the pleasure of the presiding judge does not impair the independence of magistrates to adjudicate cases impartially. (Buckalew v. Holloway 604 P. 2d 240 1979)

Without quibbling with the court's decision in this matter, the sponsor is convinced that having an independent review and recommendation by the Commission will better serve the interests of justice and preserve the independence of these judicial officers.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99801
907 465-3800

MEMORANDUM September 24, 1985

SUBJECT: Magistrates

TO: Senator Pat Rodey
Senate Judiciary Committee

FROM: Michael F. Ford
Legislative Counsel

I have enclosed a copy of Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979). This case held that magistrates are judges, at least regards the reference in article IV, section 4, of the Alaska Constitution. The court also held that having the magistrate serve at the pleasure of the presiding judge does not violate the constitutional objective of an independent judiciary. The reasons given by the court were that the legislature is not bound by that concept, and that the influence of the presiding judge is not a form of political patronage. The court did not discuss exactly what due process a magistrate was entitled to, but did indicate that a magistrate was not without legal recourse, including constitutional due process requirements.

The court did not rule on the issue of whether magistrates are within the jurisdiction of the Commission on Judicial Qualifications, but indicated that assuming that jurisdiction did exist, it would not conflict with the power of removal by the presiding judge. I cannot understand how a magistrate could be a judge for article VI, section 4, and not also be a judge for article IV, section 10, of the Alaska Constitution. However, as the court failed to rule on this point, CSSB 321 (Jud) would seem to clear up any possible confusion over the issue.

MFF:lmb
M1/021

Enclosure

Ford
9/23/85

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 321 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act including magistrates within the jurisdiction of the commission on judicial qualifications."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 22.30.080(2) is amended to read:

(2) "judge" means a justice of the supreme court, a judge of the court of appeals, a judge of the superior court, [OR] a judge of the district court, or a magistrate who is the subject of an investigation or proceeding under sec. 10, art. IV, Constitution of the State of Alaska and this chapter.

Training problem - rather than ethics problem

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM September 24, 1985

SUBJECT: Magistrates

TO: Senator Pat Rodey
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FROM: Michael F. Ford
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I have enclosed a copy of Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979). This case held that magistrates are judges, at least regards the reference in article IV, section 4, of the Alaska Constitution. The court also held that having the magistrate serve at the pleasure of the presiding judge does not violate the constitutional objective of an independent judiciary. The reasons given by the court were that the legislature is not bound by that concept, and that the influence of the presiding judge is not a form of political patronage. The court did not discuss exactly what due process a magistrate was entitled to, but did indicate that a magistrate was not without legal recourse, including constitutional due process requirements.

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MFF:lmb
M1/021

Enclosure

Ford
9/23/85

1 IN THE SENATE BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 321 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

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7 of the commission on judicial qualifications."

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14 State of Alaska and this chapter.

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January 1986 MAGISTRATES

DISTRICT/NAME WORK PHONE MAILING ADDRESS

First Judicial District

John Howard, Sr..........788-3229...Box 123, Angoon.......99820-0123
Elizabeth M. Dennis......826-3306...Box 164, Craig........99921-0164
Carl W. Heinmiller.......766-2801...Box 169, Haines.......99827-0169
Maxine L. Savland........945-3668...Box 260, Hoonah.......99829-0260
Richard N. Siangco.......465-3444...Box U, Juneau.........99811-4100
William L. Cheney........785-3651...Box 297, Kake.........99830-0297
Susan E. Thomsen.........225-3195...415 Main St., Room 400
Ketchikan.............99901-6399
Kimberly Daniels.........735-2217...Box 36, Pelican............99832
Kathleen A. Stewart......772-4466...Box 1009, Petersburg..99833-1009
Marilyn D. Hanson........747-3291...304 Lake St., Room 203
Sitka......................99835
Jean M. Worley...........983-2368...Box 495, Skagway......99840-0495
Linda Hartshorn..........874-2311...Box 869, Wrangell.....99929-0869
Terrence J. Gallagher....784-3274...Box 354, Yakutat......99689-0354

Presiding Judge - Thomas E. Schulz
Training Judge - Duane Craske
Deputy Training Judge - Linda Hartshorn
Administrator - Kristen Carlisle

Second Judicial District

Reginald Gates...........852-4800...Box 2700, Barrow......99723-2700
(vacant)....................................Gambell.....99742-0093
Anita Greist.............475-2172...Gen. Del., Kiana......99749-9999
James A. Farr............442-3208...Box 317, Kotzebue.....99752-0317
(vacant).................443-5216...Box 100, Nome.........99762-0100
(vacant)...................................Noorvik......99763-0146
Steven T. Lisbourne, Sr..368-2912...Gen. Del., Pt. Hope...99766-9999
Abner Gologergen.........984-6011...Box 111, Savoonga.....99769-0111
Lori Fleshman............484-2181...Box 658, Selawik......99770-0658
(vacant)...................................Shungnak..........99773
Lowell V. Anagick Sr. ...624-3015...Box 185, Unalakleet...99684-0185

Presiding/Training Judge - Charles R. Tunley
Training Judge - Paul Jones
Deputy Training Judge - James Farr
Administrator - Mike Hall

DISTRICT/NAME	WORK PHONE	MAILING ADDRESS

Bethel Area

Herb Viergutz............675-4325...Box 136, Aniak........99557-0136
Craig R. McMahon.........543-2298...Box 130, Bethel.......99559-0130
Dorothy Kameroff.........949-1748...Box 137, Emmonak......99581-0137
Alice Smith..............827-8229...Box 89, Mekoryuk......99630-0089
John Smith...............556-8015...Gen. Del., Quinhagak.......99655
Denice Beans.............438-2912...Box 134, St. Marys....99658-0134
Dorothy Sundown-Alder....558-5427...Box 8, Scammon Bay.........99662

Presiding Judge - Jay Hodges
Training Judge - Christopher Zimmerman
Deputy Training Judge - Skip Slater
Administrator - Charles "Mac" Gibson

Third Judicial District

Karl Heiker..............532-2440...Box 8, Cold Bay.......99571-0008
Mary J. Wentworth........424-3378...Box 696, Cordova......99574-0696
Geoffrey Comfort.........842-5215...Box 209, Dillingham...99576-0209
Sheldon S. Sprecker......822-3405...Box 86, Glennallen....99588-0086
(see Dist. Ct. Judge)....235-8171...3670 Lake St., Homer.......99603
Brigitte McBride.........283-3110...145 Main Street Loop, Room 106
Main Floor, Kenai..........99611
Charles W. Shawback......246-6151...Box 197, King Salmon*.99613-0197
Dennis Nelson............486-5765...202 Marine Wy, Kodiak.99615-1367
Joe O'Connell............745-4284...268 E. Fireweed,
Palmer...............99645-0860
George Rukovishnikoff Jr.546-2300/2226(Home), Box 76,
St. Paul Island.......99660-0076
(vacant).............................Sand Point................99661
Christine Kashevarof.....234-7679...Drawer H. Seldovia....99663-0257
George Peck............. 224-3075...Box 1929, Seward......99664-1929
George Dozier, Jr........581-1266...Box 245, Unalaska.....99685-0245
(see Superior Ct. Judge).835-2266...Box 127, Valdez.......99686-0127
Christopher Sullivan.....472-2356...Box 606, Whittier.....99693-0606

Presiding Judge - Douglas Serdahely
Training Judges - John Bosshard III
Glen Anderson
Rural Court Training Assistant - Ross Ripley
Administrator - Albert Szal

*Naknek Court

DEPUTY MAGISTRATES

DISTRICT/NAME	WORK PHONE	MAILING ADDRESS
First Judicial District		
Henrietta Kato	826-3306	Box 164, Craig 99921-0164
Mimi G. Gregg	766-2801	Box 120, Haines 99827-0120
Margaret Hendon	465-2379	Box U, Juneau 99811-4100
Geraldine Branham	225-3195	415 Main St., Room 400 Ketchikan 99901-6399
Darlene Whitethorn	772-4466	Box 1009, Petersburg 99833-1009
Charlotte Swanberg	747-3291	304 Lake St., Room 203 Sitka 99835
Jerri Feris	874-2311	Box 869, Wrangell 99929-0869
Ann Lowe	874-2311	Box 869, Wrangell 99929-0869
Second Judicial District		
May N. Pannick	442-3208	Box 317, Kotzebue 99752-0317
Janet Tobuk	443-5216	Box 100, Nome 99762-0100
Third Judicial District		
Goldeen Goodfellow	264-0440	303 K St., Anch 99501-2083
Ross Ripley	264-0456	303 K St., Anch 99501-2083
Susan Weltz	424-7312	Box 696, Cordova 99574-0696
Maureen Wentz	842-5215	Box 209, Dillingham 99576-0209
Wava Schliesing	822-3405	Box 86, Glennallen 99588-0086
Anna Creasey	235-8171	3670 Lake St., Homer 99603
Robin Turnbull	283-3110	145 Main Street Loop, Room 106 Kenai 99611
Sandra Otto	283-3110	145 Main Street Loop, Room 106 Kenai 99611
Jackie Allen	745-4282	268 E. Fireweed, Palmer 99645-0860
Joanne Graham	745-4282	268 E. Fireweed, Palmer 99645-0860
Janet Moore	224-3075	Box 596, Seward 99664-0596
Mary Hawkins	581-1266	Box 245, Unalaska 99685-0245
Tracee Schnell	835-2266	Box 127, Valdez 99686-0127
Phyllis Johnson	835-2266	Box 127, Valdez 99686-0127
Fourth Judicial District		
Marjorie Huntsman	683-2213	Box 41, Healy 99743-0041
Kaye Knutsen	832-5430	Box 449, Nenana 99760-0449
Madge Kelleyhouse	883-5171	Box 187, Tok 99780-0187

DISTRICT/NAME	WORK PHONE	MAILING ADDRESS
Fourth Judicial District		
Tracy Blais	895-4211	Box 401, Delta Junction........99737-0401
Skip Slater	452-9220	604 Barnette St., Room 221 Fairbanks............99701-4577
Sharon C. Smyth	662-2336	Box 152, Ft.Yukon.....99740-0152
James Jackson**	656-1322	Box 167, Galena.......99741-0167
Barbara Macfarlane***	683-2213	Box 41, Healy.........99743-0041
	832-5430	Box 449, Nenana.......99760-0449
Paul Verhagen	366-7243	Box 231, Tanana.......99777-0231
Iris A. Lathrop	883-5171	Box 187, Tok..........99780-0187

Presiding Judge - Jay Hodges
Training Judge - Christopher Zimmerman
Deputy Training Judge - Skip Slater
Administrator - Charles "Mac" Gibson

**James Jackson is the magistrate for both Galena and McGrath.
***Barbara Macfarlane is the magistrate for both Healy and Nenana.

For additional information concerning magistrates, their addresses and telephone numbers, contact: Magistrate Services, 303 K Street, Anchorage, Alaska 99501-2099, (907) 264-8233.

CORONERS/PUBLIC ADMINISTRATORS

Name	Work Phone	Mailing Address
D. Charlene Doris	264-0690	303 K St., Anch.......99501-2083
Richard N. Siangco	465-3444	Box U, Juneau.........99811-4100
Fred H. Smith	452-9211	604 Barnette St., Room 202 Fairbanks............99701-4577
Susan E. Thomsen	225-3195	415 Main St., Room 400 Ketchikan............99901-6399

COMMITTING MAGISTRATES

FAIRBANKS: John Hessin...452-9236...604 Barnette St., Room 107
Fairbanks.............99701-4577

ANCHORAGE: Brian Johnson, Janna Stewart, Ron Wielkopolski, Roy Williams, Ethan Windahl
303 K Street
Anchorage, AK 99501-2083
Phone: 264-0715

Anchorage committing magistrates work 12-hour shifts at the courthouse as follows:

Daytime Duty		Night Duty	
Monday-Friday	264-0715	Monday-Friday	264-0715
Saturday, Sunday and Holidays	264-0471/2/3 or 264-0715	Saturday, Sunday and Holidays	264-0471/2/3 or 264-0715 or 279-1441

January 1986

CLERKS OF COURT

DISTRICT/NAME	WORK PHONE	MAILING ADDRESS
First Judicial District		
*Henrietta Kato	826-3306	Box 164, Craig....99921-0164
Mimi Gregg	766-2801	Box 120, Haines...99827-0120
Sharon Walker	465-3453	Box U, Juneau.....99811-4100
Nancy Humphreys	225-3195	415 Main St., Room 400 Ketchikan.........99901-6399
Darlene Whitethorn	772-4466	Box 1009, Petersburg........99833-1009
Charlotte Swanberg	747-3291	304 Lake St., Room 203 Sitka..................99835
Jerri Feris	874-2311	Box 869, Wrangell.99929-0869
Second Judicial District		
Tonyia Lunceford	852-4800	Box 2700, Barrow..99723-2700
May N. Pannick	442-3208	Box 317, Kotzebue 99752-0317
Janet Tobuk	443-5216	Box 100, Nome.....99762-0100
Third Judicial District		
Goldeen Goodfellow	264-0440	303 K St., Anch...99501-2083
*Diane Mickey	532-2440	Box 8, Cold Bay...99571-0008
*Susan Weltz	424-7312	Box 696, Cordova..99574-0696
Maureen Wentz	842-5215	Box 209, Dillingham........99576-0209
Wava Schliesing	822-3405	Box 86,Glennallen.99588-0086
Anna Creasey	235-8171	3670 Lake St., Homer..................99603
Robin Turnbull	283-3100	145 Main St. Loop, Room 106 Main Floor, Kenai......99611
Julie Jedlicka	246-4240	Box 197, King Salmon.......99613-0197
Lori A. Wade	486-5765	Box 1367, Kodiak..99615-1367
Jackie Allen	745-4282	268 E. Fireweed, Palmer............99645-0860
Janet Moore	224-3075	Box 596, Seward...99664-0596
Mary Hawkins	581-1266	Box 245, Unalaska.99685-0245
Phyllis Johnson	835-2266	Box 127, Valdez...99686-0127
Fourth Judicial District		
Hilma Shavings	543-2196	Box 130, Bethel...99559-0130
Margaret Christopherson	895-4211	Box 401, Delta Junction....99737-0401
Susan Paterson	452-9265	604 Barnette St., Room 342 Fairbanks.........99701-4571
*Wilmina Stevens	662-2336	Box 152, Ft.Yukon.99740-0152
*Cynthia Motschenbacher	656-1322	Box 167, Galena...99741-0167
*Marjorie Huntsman	683-2213	Box 41, Healy.....99743-0041
*Kaye Knutsen	832-5430	Box 449, Nenana...99760-0449
Madge Kelleyhouse	883-5171	Box 187, Tok......99780-0187

*Permanent Part-Time

**Naknek court

January 1986

AREA COURT ADMINISTRATORS

First Judicial District

Kristen Carlisle.........225-9875.......415 Main St., Room 206
Ketchikan.........99901-6399

Second Judicial District

Michael Hall.............264-8250.......303 K St., Anch...99501-2099

Third Judicial District

Albert Szal..............264-0415.......303 K St., Anch...99501-2083

Fourth Judicial District

Charles "Mac" Gibson.....452-9200.......604 Barnette St., Room 210
Fairbanks.........99701-4576

DISTRICT COURT JUDGES

DISTRICT/NAME	WORK PHONE	MAILING ADDRESS
First Judicial District		
Linn H. Asper	465-3443	Box U, Juneau........99811-4100
George L. Gucker	225-3197	415 Main St., Room 400 Ketchikan............99901-6399
Third Judicial District		
Glen C. Anderson	264-0660	941 W. 4th, Anch......99501-2074
Elaine Andrews	264-0664	941 W. 4th, Anch......99501-2074
Martha Beckwith	264-0652	941 W. 4th, Anch......99501-2074
Natalie Finn	264-0662	941 W. 4th, Anch......99501-2074
William H. Fuld	264-0658	941 W. 4th, Anch......99501-2074
John D. Mason	264-0656	941 W. 4th, Anch......99501-2074
Ralph H. Stemp, Jr.	264-0451	941 W. 4th, Anch......99501-2074
David Stewart	264-0451	941 W. 4th, Anch......99501-2074
Michael White	264-0648	941 W. 4th, Anch......99501-2074
James C. Hornaday	235-8171	3670 Lake St., Homer.......99603
Fourth Judicial District		
Christopher Zimmerman	452-9249	604 Barnette St., Room 313 Fairbanks............99701-4572
Hugh H. Connelly	452-9251	604 Barnette St., Room 341 Fairbanks............99701-4572
H. E."Ed" Crutchfield	452-9250	604 Barnette St., Room 313 Fairbanks............99701-4572
Jane Kauvar	452-9248	604 Barnette St., Room 304 Fairbanks............99701-4572

SUPERIOR COURT JUDGES

First Judicial District

Thomas E. Schulz.......225-3141......415 Main Street, Room 400
Ketchikan............99901-6399
Rodger Pegues..........465-3422......Box U, Juneau........99811-4100
Walter"Bud"Carpeneti...465-3420......Box U, Juneau........99811-4100
*Thomas M. Jahnke......772-4466/.....Box 1009, Petersburg.99833-1009
874-3966......Box 869, Wrangell....99929-0869
Duane K. Craske........747-6271......304 Lake Street, Room 203
Sitka....................99835

*Judge Thomas M. Jahnke serves as Superior Court Judge for Wrangell and Petersburg.

Second Judicial District

Michael I. Jeffery.....852-4800......Box 2700, Barrow.....99723-2700
Paul B. Jones..........442-3208......Box 317, Kotzebue....99752-0317
Charles R. Tunley......443-5216......Box 100, Nome........99762-0100

Third Judicial District

S.J. Buckalew, Jr.......264-0408......303 K St., Anch.....99501-2083
Victor D. Carlson.......264-0418......303 K St., Anch.....99501-2083
Rene Gonzalez...........264-0425......303 K St., Anch.....99501-2083
Karen L. Hunt...........264-0772......303 K St., Anch.....99501-2083
Karl S. Johnstone.......264-0410......303 K St., Anch.....99501-2083
Joan Katz...............264-0403......303 K St., Anch.....99501-2083
Peter A. Michalski......264-0510......303 K St., Anch.....99501-2083
J. Justin Ripley........264-0414......303 K St., Anch.....99501-2083
Douglas J. Serdahely....264-0401......303 K St., Anch.....99501-2083
Brian C. Shortell.......264-0430......303 K St., Anch.....99501-2083
Milton Souter...........264-0412......303 K St., Anch.....99501-2083
Charles K. Cranston.....283-3117......145 Main Street Loop, Room 106
Kenai...................99611
Roy H. Madsen...........486-5765......202 Marine Way,
Kodiak..............99615-1367
Beverly W. Cutler.......745-5071......268 E. Fireweed,
Palmer..............99645-0860
John Bosshard, III......835-2266......Box 127, Valdez.....99686-0127

Fourth Judicial District

Christopher R. Cooke....543-2196......Box 130, Bethel.....99559-0130
James R. Blair..........452-9313......604 Barnette Street, Room 425
Fairbanks..........99701-4569
Jay Hodges..............452-9317......604 Barnette Street, Room 430
Fairbanks..........99701-4569
Mary E. Greene..........452-9319......604 Barnette Street, Room 434
Fairbanks..........99701-4569
Gerald Van Hoomissen....452-9315......604 Barnette Street, Room 426
Fairbanks..........99701-4569

THE ALASKA SUPREME COURT

303 K Street
Anchorage, AK
99501-2084
(907) 264-0629

604 Barnette Street
Fairbanks, AK 99701-4568
(907) 452-9300

P.O. Box U
Juneau, AK
99811-4100
(907) 465-3410

Chief Justice
Jay A. Rabinowitz.....452-9300...604 Barnette Street, Room 418
Fairbanks................99701-4568
264-0632...303 K St., Anchorage.....99501-2084

Associate Justices
Edmond W Burke.......264-0624...303 K St., Anchorage.....99501-2084

Allen T. Compton......264-0601...303 K St., Anchorage.....99501-2084

Warren W. Matthews....264-0618...303 K St., Anchorage.....99501-2084

Daniel A. Moore, Jr...264-0622...303 K St., Anchorage.....99501-2084

COURT OF APPEALS

Alexander O. Bryner...264-0751....303 K St., Anchorage....99501-2084

Robert G. Coats.......264-0757....303 K St., Anchorage....99501-2084

James K. Singleton....264-0674....303 K St., Anchorage....99501-2084

APPELLATE COURT CLERK'S OFFICE

303 K Street, Anchorage, Alaska 99501-2084

David Lampen, Clerk of the Appellate Courts.................264-0607
Nadya Rodlessny, Secretary..................................264-0607
Pam McIntire, Chief Deputy Clerk............................264-0608
Carolyn Hudnall, Legal Technician...........................264-0609
Deputy Clerks:
Sherrie Beck..264-0611
Jan Collins...264-0631
Patsy Hernandez...264-0629
Peggy Lewis...264-0612
Carol Vance...264-0630

Introduced: 5/10/85
Referred: Judiciary

1 IN THE SENATE BY RODEY

2 SENATE BILL NO. 321

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act including [certain] magistrates within the
7 jurisdiction of the commission on judicial qualifica-
8 tions."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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11 (2) "judge" means a justice of the supreme court, a judge
12 of the court of appeals, a judge of the superior court, [OR] a judge
13 of the district court who is the subject of an investigation or pro-
14 ceeding under sec. 10, art. IV, Constitution of the State of Alaska
15 and this chapter, or a magistrate if the location at which the magis-
16 trate holds court also has a superior court that holds regular
17 sessions.

CALLED FLAVIN

MAGISTRATE SUS
CAROL BAEKEY 264-~~0554~~ 8237

LINDA HARTSHORN WRANGELL 874-2311
SCHELLINGJURN

State pays legal fees for judges disciplined for conduct

Continued from Page A-1

public employees.

However, the agreement also contains an unusual provision obligating the state to pay defense costs for "proceedings before the Judicial Conduct Commission, the Alaska Bar Association, the Alaska Public Offices Commission, or any similar entity." Only judges and lawyers would normally be subject to discipline by these panels.

Assistant Attorney General Bill Mellow, who approved the pact for Gorsuch, agreed that other state employees brought before disciplinary boards do not have their lawyers' fees paid by the state.

The agreement does not differentiate between judges cleared of wrongdoing and those found the equivalent of guilty.

Keene, a Superior Court judge, was reprimanded earlier this year by the Judicial Conduct Commission for telling a racist joke at the retirement dinner for Judge Ralph Moody. An earlier, unrelated complaint against Keene was dismissed by the commission.

The state paid $11,339 to Anchorage attorney Laurel Peterson for representing Keene in the two matters, said Don Hitchcock of the Department of Administration.

Gucker, a District Court Judge, was censured by the Supreme Court last September for making sexual overtures out of court to witnesses testifying in a case before him. Gucker's attorney, Ken Jensen, was paid $5,952.

Brown, who wants to end or modify the agreement, said he does not like the Department of Law being in the position of arguing with judges about whether their legal fees are covered by the state.

"The state of Alaska has an awful lot of cases before these judges," he said Thursday.

The court system may have to buy an insurance policy providing liability coverage for its employees, he said. And if the state continues to provide legal defense for the judges, the definition of what constitutes actions "taken as part of official duties" will have to be refined.

Mellow said he had doubts about the disciplinary provision of the agreement at the time he approved it.

"I never saw it as a contract," he said, explaining why he let the agreement go into force. "I guess I thought we can always back out at a later time, so let it go."

Mellow recommended against paying the Keene and Gucker bills.

"I had not even contemplated something like this," he said. "We don't do it for anybody else, why should we do it for them?"

As an example, state-paid lawyers defend a state trooper charged with false arrest, but would not defend a trooper brought before the Police Standards Council for a hearing on whether his state police license should be revoked.

And, in an extreme example, Gov. Bill Sheffield will have to foot an estimated $250,000 in legal bills for his defense in impeachment hearings, where he was found the equivalent of not guilty.

Snowden also recommended against paying the bill submitted for defending Keene in the judicial commission proceeding where he ended up being reprimanded.

"I told them that he was not performing a judicial function and recommended that they not pay it," Snowden said.

The agreement was originally sought by state judges because of a recent U.S. Supreme Court decision that judges are not immune from paying court costs and attorneys fees, even in cases where they otherwise have judicial immunity, Snowden said.

Mellow said there was also concern about how obligated the Department of Law is to defend employees of a separate branch of government — the court system. However, on that issue, the agreement is redundant, he said. The department routinely provides lawyers for judges named in lawsuits related to actions taken in the courtroom.

Anchorage Daily News Sept 20, 1985

State pays fees of judges disciplined for conduct

By SHEILA TOOMEY
Daily News reporter

The state of Alaska paid attorneys' fees for two judges recently disciplined for unjudicial conduct.

Under a "memorandum of agreement" between the court system and the state, more than $17,000 was paid to lawyers representing Ketchikan judges George Gucker and Henry Keene for separate disciplinary proceedings before the Judicial Conduct Commission or the Alaska Supreme Court.

The agreement is dated April 1985 and signed by Art Snowden, executive director of the court system, and former Attorney General Norm Gorsuch, a Department of Law official said.

Current Attorney General Hal Brown said he made the decision to pay lawyers for both Keene and Gucker but is now seeking to do away with or renegotiate the agreement.

It obligates the state to defend all court employees who are sued for actions taken as part of their job — a benefit generally provided as a matter of routine to all

See Back Page, STATE

MAG. TRAINING - GEN'L

I. <u>ON-SITE NEW MAGISTRATE TRAINING</u>

A. LEGAL TRAINING

1. Organization of court system.
2. How to use statutes, rules and administrative code.
3. Jurisdiction; magistrate duties.
4. Judicial ethics.
5. Organization of the criminal code.
6. Elements of crimes.
7. Taking complaints and issuing summonses, arrest warrants and bench warrants.
8. Bail.
9. Arraignments, including a mock arraignment, and first felony appearances.
10. Sentencing.
11. Probation revocation.
12. Search warrants.
13. Drunk driving laws.
14. Emergency children's proceedings.
15. Domestic violence.
16. Coroner duties.
17. Small claims.
18. Alcohol local option law (where appropriate).

B. CLERICAL TRAINING

1. Calendaring, case numbering.
2. Accounting duties, including trust and revenue accounts.
3. Filing of statistical and technical operations reports.
4. Ordering equipment.
5. Vital statistics.
6. Marriages.

II. CORRESPONDENCE LESSONS (to be completed within six months of appointment).

A. Lesson 1: Introduction to the Court System
B. Lesson 2: The Criminal Process
C. Lesson 3: Jurisdiction
D. Lesson 4A: Library Research - Statutes
E. Lesson 4B: Library Research - Rules of Court
F. Lesson 4C: Library Research - Administrative Code
G. Lesson 4D: Library Research - Caselaw
H. Lesson 5: Judicial Ethics
I. Lesson 6: Search Warrants
J. Lesson 7: Bail
K. Lesson 8: Domestic Violence

we remand to the trial court with instructions to vacate Hensel's sentence on the charge of malicious destruction of property. As thus modified, the judgment of the superior court is AFFIRMED.

BURKE, J., not participating.

Honorable Judge S. J. BUCKALEW; Honorable Judge Ralph E. Moody; and State of Alaska, Appellants,

v.

James HOLLOWAY, Appellee.

No. 4058.

Supreme Court of Alaska.

Dec. 14, 1979.

Proceeding was brought by former magistrate alleging that statute which provides that magistrates serve at the pleasure of presiding judge of superior court was unconstitutional. The Superior Court, Third Judicial District, Mark C. Rowland, J., entered summary judgment in favor of magistrate on his claim that such statute violated constitutional requirement that judges be selected for "terms prescribed by law," and appeal was taken. The Supreme Court, Matthews, J., held that: (1) magistrates are "judges" within meaning of constitutional requirement that judges be selected for terms prescribed by law, but (2) requiring a magistrate to serve "at the pleasure of the presiding judge of the superior court" does not violate the constitutional mandate.

Boochever, J., filed an opinion dissenting in part in which Rabinowitz, C. J., joined.

1. Justices of the Peace ⟹8

A "magistrate," who is not merely an assistant to a district court judge but presides with full authority over a court of limited jurisdiction, exercising judicial power vested by the Constitution, is a "judge" within meaning of constitutional requirement that judges be selected for terms prescribed by law. Const. art. 4, §§ 1, 4; AS 22.20.010.

See publication Words and Phrases for other judicial constructions and definitions.

2. Justices of the Peace ⟹10

Given that magistrate's dismissal and reinstatement were matters of public rather than private interest and that his views had been fully aired in and considered by both Supreme Court and trial court, Supreme Court declined to be bound by form of state's argument below in case challenging dismissal. AS 22.15.170(c).

3. Judges ⟹7

As used in constitutional mandate that judges shall be selected in manner, for terms, and with qualifications prescribed by law, "term" was not intended to imply period of service that is fixed in time but, rather, a broader definition provided by Webster's Third New International Dictionary, "the time for which something lasts," was in closer accord with the apparent purposes of the constitutional mandate. Const. art. 4, § 4.

See publication Words and Phrases for other judicial constructions and definitions.

4. Judges ⟹4

Justices of the Peace ⟹8

Under constitutional provision which sets forth specific selection procedures, terms and qualifications for justices and judges of the supreme and superior courts, and which leaves creation of all other courts to legislature, directing it to provide for selection, terms and qualifications of judges of courts it creates, constitutional framers expressly sought system in which justices and judges would be accountable for their performance in office. Const. art. 4, §§ 1, 4, 6.

5. Justices of the Peace ⟹10

Statutory provision that magistrates serve at pleasure of presiding judge of superior court does not violate constitutional requirement that judges of courts other than the supreme and superior courts be selected "for terms prescribed by law," since Constitution does not indicate that in creating new courts, legislature is bound by framers' concept of independence for supreme and superior court justices and judges, since magistrates are not subject to specific political pressures, since having magistrates serve at the pleasure of presiding superior court judge does not affect their independence to adjudicate cases impartially, and since dismissed magistrates have legal recourse. AS 22.15.170(c); Const. art. 4, § 1.

6. Justices of the Peace ⟹10

Assuming that constitutional procedures concerning suspension, removal, retirement or censuring of justices or judges are applicable to magistrates, such provisions are supplementary to removal procedure that defines end of judge's term and thus, even if constitutional removal provisions are applicable to magistrates, such provisions do not restrict legislature's authority to provide that magistrates serve at pleasure of presiding judge of the superior court. AS 22.15.170(c); Const. art. 4, §§ 4, 10.

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James T. Brennan, John S. Hedland, Rice, Hoppner, Hedland, Fleischer & Ingraham, Anchorage, for appellee.

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OPINION

Before RABINOWITZ, C. J., BOOCHEVER, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

MATTHEWS, Justice.

On August 22, 1977, James Holloway was terminated from his position as Dillingham magistrate, by order of Judge Buckalew, then acting as presiding superior court judge of the third judicial district. The termination order was subsequently approved by the presiding superior court judge, Judge Moody, pursuant to AS 22.15.170(c) which provides in pertinent part: "Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed."

By way of summary judgment, Holloway prevailed below on his claim that AS 22.15.170(c) violates article IV, section 4 of the Alaska Constitution, which provides:

> *Qualification of Justices and Judges.* Supreme court justices and superior court judges shall be citizens of the United States and of the State, licensed to practice law in the State, and possessing any additional qualifications prescribed by law. Judges of other courts shall be selected in a manner, for terms, and with qualifications prescribed by law.

The trial court found that magistrates are "judges of other courts" within the meaning of article IV, section 4, and that service at the pleasure of the presiding judge falls short of that section's requirement that judges be "selected . . . for terms prescribed by law."[1] We reverse, based on our contrary interpretation of that latter requirement.

The state conceded at the trial level that magistrates are "judges," but now wishes to retract that concession. We find it unnecessary to address the retraction issue. The argument that magistrates are not article IV "judges" rests primarily on the assertion that territorial commissioners were the predecessors of Alaska magistrates, and that the framers of the Alaska Constitution must have been aware that United States commissioners had been

1. All other questions, such as whether Holloway's summary dismissal comports with due process, were expressly held in abeyance by the parties at the trial level, and we intimate no view on the merits of claims not yet litigated.

found not to be "judges" by the United States Supreme Court.[2] This argument has many weaknesses,[3] chief among them being the fact that the territorial commissioners were predecessors of present-day Alaska district court judges as well as magistrates,[4] and it is incontestable that article IV, section 4 was intended to confer the appellation "judge" on the former. Thus the state's historical proofs tend more to demonstrate the framers' rejection, rather than adoption, of the circumscribed definition of "judge" found in earlier cases.

As for the various pronouncements of the convention delegates[5] and the first state legislature[6] that have been cited, we discern in them only the recognition that article IV, section 4 intended to leave the legislature considerable flexibility in the creation of new courts. It is hardly inconsistent with that theme of flexibility for article IV to designate as "judges" those who wield the authority vested in such new courts. Finally, the state has been able to point to no modern authorities supporting the distinction it wishes to draw between judge and magistrate.[7]

2. *Todd v. United States*, 158 U.S. 278, 282, 15 S.Ct. 889, 890, 39 L.Ed. 982, 983 (1895); *United States v. Allred*, 155 U.S. 591, 595, 15 S.Ct. 231, 233, 39 L.Ed. 273, 274 (1895). *See Grin v. Shine*, 187 U.S. 181, 187, 23 S.Ct. 98, 101, 47 L.Ed. 130, 135 (1902).

3. The "commissioners" found by the Supreme Court not to be "judges," unlike present-day Alaska magistrates, never had authority to try civil cases, *see Allred*, 155 U.S. at 595, 15 S.Ct. at 233, 39 L.Ed. at 274, and were not given even "petty crimes" jurisdiction until 1940. 54 Stat. 1058 (current version at 18 U.S.C. § 3401). *Special* commissioners authorized by Congress to serve in the territory of Alaska were empowered to try cases in 1884. 23 Stat. 24. *See also* 30 Stat. 1253 (1899); Carter Code ch. 42 § 410, ch. 70 § 702 (1900). While territorial courts were declared to be nonarticle III courts in *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828), it was not on the ground that their judges were not judges. *See* Note, *Masters and Magistrates in the Federal Courts*, 88 Harv.L.Rev. 779, 782–84 (1975). The only case deeming territorial commissioners not to be judges relied on the wholly inapposite Supreme Court decisions in *Todd* and *Allred*. *Ex Parte Nelson*, 8 Alaska Reports 8, 11 (1924).

4. Alaska commissioners presided over the "justice court," the primary territorial trial court of limited jurisdiction. The jurisdiction of the justice court, and its relation to the federal district court serving Alaska, respectively, were nearly identical to the jurisdiction now residing in the state district court, and the relation of the latter to the state superior court. *Compare* A.C.L.A.1949 §§ 65-2-1, 69-2-1, 53-2-1, and 66-3-1, with AS 22.15.030–.050 and AS 22.10.020(a) (1979).

5. *See, e. g.*, the statement of Delegate McLaughlin:

   There is competent authority in here for the legislature to create any type of court imaginable and the court with the rule-making power and the administrative power is the supreme court. We can establish probate courts, magistrate courts, if they so desire, justice of the peace courts, domestic relations courts, courts of special sessions, courts of any conceivable nature. . . .

1 Minutes of the Constitutional Convention 733–34.

6. In creating the district court, then called the district magistrate court, the legislature declared:

   It is the intent of the Legislature by the passage of this Act [this chapter] to implement the organization of the state courts provided for in the Constitution of the State of Alaska by establishing subordinate courts as an integral part of a unified judicial system. To this end, the district magistrate courts as herein established shall constitute the sole and exclusive subordinate court system of the state . . . with each such district magistrate court having as court officers district magistrates with general trial power within the limits of the court's jurisdiction and deputy magistrates of limited trial power sufficient to meet the immediate requirements of justice in the less populated areas of the state. (Bracketed portion in original text).

A.C.L.A. § 52A-2-42 (Supp.1959). The district magistrates and deputy magistrates were renamed district judges and magistrates, respectively, by § 3 ch. 24 SLA 1966.

7. Federal magistrates are not "judges" under federal law, since art. III, § 1 of the U.S.Const. requires that all federal "judges" be tenured for life, and magistrates are not. 28 U.S.C. § 631(e). However, a federal magistrate may enter judgment only in certain misdemeanor cases, and then only upon the written waiver by the defendant of his or her right to be tried by a federal district judge. 18 U.S.C. § 3401. This is substantially less than the civil and

[1] A magistrate is a judicial officer[8] of the district court. AS 22.15.020(b). Like a district court judge, a magistrate may issue writs of habeas corpus, issue search and arrest warrants, and conduct preliminary examinations in any criminal proceeding. AS 22.15.100(1, 4, and 5). In addition a magistrate may hear, try and enter judgment in a small claims action, AS 22.15.040, and in any case in which recovery of money damages, personal property, penalty, or forfeiture is sought, when the amount in controversy is less than $1,000; may enter judgment upon a plea of guilty in any criminal case in which the district court has jurisdiction; may "hear, try, and enter judgments in all cases involving misdemeanors, if the defendant consents in writing that the magistrate may try him;" and may "hear, try and enter judgments in all cases involving infractions under AS 28[9] and violations of ordinances of political subdivisions." AS 22.15.120(1, 2, 3, 5, 6, and 7). Just as with a judgment entered by a district court judge, appeal from a magistrate's entry of judgment is to the superior court. AS 22.15.240. Thus a magistrate is not merely "an assistant" to a district court judge, as suggested by the state, but presides with full authority over a court of limited jurisdiction, exercising the judicial power vested by article IV, section 1 of the Alaska Constitution.[10] Such a person is a "judge" within the meaning of article IV, section 4.

[2, 3] Finding magistrates to be "judges", we must next consider whether requiring a magistrate to serve "at the pleasure of the presiding judge of the superior court" violates article IV, section 4's mandate that "judges of other courts *shall be selected* in a manner, *for terms*, and with qualifications *prescribed by law*" (emphasis added).[11] As the word "term" has been interpreted by courts in a variety of contexts,[12] and as it is used elsewhere in the

Alaska magistrates. AS 22.15.040; 22.15.120(1, 2, 3 and 7). Moreover, the federal courts have not yet determined whether 18 U.S.C. § 3401 constitutes a delegation of adjudicatory power to a non life-tenured official in violation of the Federal Constitution. *See* I. Hall and M. Waxner, 8B Moore's Federal Practice, Appendix § 0.02[2] (2d ed. 1978). The primary argument in support of constitutionality rests on the defendant's consensual waiver and not on the assertion that the magistrate is not acting as a judge. *See, e. g.*, W. Bloch, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U.Chi.L.Rev. 584, 595 (1973). Other powers delegated to federal magistrates have been upheld only insofar as they do not permit magistrates to render ultimate decisions on potentially dispositive questions of law. *See, e. g.*, *Mathews v. Weber*, 423 U.S. 261, 270–71, 96 S.Ct. 549, 554, 46 L.Ed.2d 483, 491–92 (1976); *United States v. Wisnowski*, 580 F.2d 149, 150 (5th Cir. 1978); *United States v. First National Bank of Rush Springs*, 576 F.2d 852, 853 (10th Cir. 1978); *Taylor v. Oxford*, 575 F.2d 152, 154 (7th Cir. 1978). *See generally*, *Masters and Magistrates*, *supra* note 3 at 782–97.

8. AS 22.20.010 provides:

   The term "judicial officer" means a supreme court justice, including the chief justice, a judge of the superior court, a district judge and a magistrate.

9. Title 28 concerns minor offenses relating to the use of motor vehicles.

10. Art. IV, § 1 provides in part:

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

11. In the trial court the state conceded that a "term" connotes a fixed period of time, and argued the validity of AS 22.15.170(c) under a somewhat different theory than that presented on appeal. Thus, Holloway urges this court to find the critical issue of this lawsuit waived, and to order his reinstatement as Dillingham magistrate. Given that Holloway's dismissal and reinstatement are matters of public rather than private interest, and that his views have been fully aired in and considered by both this court and the trial court, we decline to be bound by the form of the state's argument below. *See, e. g.*, *Marks v. State*, 496 P.2d 66, 67 (Alaska 1972).

12. Despite the willingness of courts to define "term" as referring to a "fixed" period however, when specific holdings are scrutinized, few provide actual support for the proposition that "service at the pleasure of" is not a "term." *See, e. g.*, *Delahay v. State*, 476 P.2d 908, 911 (Alaska 1970), *cert. denied*, 402 U.S. 901, 91 S.Ct. 1381, 28 L.Ed.2d 642 (1971); *Collision v. State ex rel. Green*, 9 W.W.Harr. 460, 2 A.2d 97, 100 (Del.1938); *Sueppel v. City Council of Iowa City*, 257 Iowa 1350, 136 N.W.2d 523, 525 (1965); *State ex rel. Anderson v. Fousek*, 91 Mont. 448, 8 P.2d 791, 793 (Mont.1932).

Alaska Constitution,[13] it refers to a period of service that is fixed in time. As it is used in article IV, section 4, however, we do not believe it was intended to imply such a precise limitation.[14] A broader definition of the word, "the time for which something lasts," Webster's Third New International Dictionary, is in closer accord with the apparent purposes of article IV, section 4.

[4] The provisions of article IV that set forth specific selection procedures, terms, and qualifications,[15] refer to the justices and judges of the supreme and superior courts, the only courts created by the constitution. Section 1 leaves the creation of all other courts to the legislature; section 4 directs the legislature to provide for the selection, terms, and qualifications of the judges of the courts it creates. The directive is unqualified and would appear to vest absolute discretion in the legislature. For example, despite the extensive deliberation engaged in by the delegates regarding the selection procedure that would best avoid involving judges in politics,[16] section 4 does not impose on the legislature the duty to mirror the procedures chosen by the framers. Similarly "qualifications": though the first sentence of section 4 requires only that supreme and superior court justices and judges be citizens and be admitted to the bar, the second sentence does not require the legislature to adopt even these minimal qualifications for the judges of the courts it creates. It would thus be an incongruous construction if the remaining directive, relating to the "terms" of "judges of other courts," was meant to be a precise commandment, rather than merely point to an area in which the legislature has the power to act.

Article IV, section 6 specifies the "terms" of the justices and judges of the supreme and superior courts:

> Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

The "terms" thus delineated constituted a rejection of the federal judicial system, in which federal judges serve no "term", but remain in office for life unless impeached.[17] The framers of the Alaska Constitution expressly sought a system in which justices and judges would be accountable for their performance in office.[18]

[5] Providing that magistrates serve "at the pleasure of the presiding judge of the superior court" is clearly designed to achieve an ongoing guarantee of accountability. The legislature's intent in creating the office of magistrate was "to meet the immediate requirements of justice in the less populated areas of the state."[19] Given Alaska's area, that task is not an easy one. Pursuant to the enabling provision of AS 22.15.020(c), Administrative Rule 31[20] authorizes the appointment of sixty-four magistrates, nearly half again as many as the total number of supreme, superior and district court justices and judges serving the state.[21] In order to fill these positions no degree of education or legal training is required of applicants.[22] Magistrates normally serve in communities in which no superior or district court judges sit permanently,[23] making day to day supervision impossible. It is apparent that the broad power vested in the presiding superior court judge to dismiss magistrates is intended to provide an unencumbered means of quickly remedying any situation in which judicial unfitness is impairing the administration of justice in rural Alaska. With respect then to the accountability demanded in the requirement that the legislature designate the "terms" of judges, service "at the pleasure of" constitutes a "term."[24]

Appellee Holloway argues that though service "at the pleasure of" the superior court may satisfy the framers' concern for judicial competence, the provision does violence to the framers' objective of establishing an independent judiciary. There is no doubt that judicial independence was a paramount concern of the delegates;[25] nor can there be any doubt that a judge who serves at another's pleasure does not enjoy complete independence. Nonetheless, we cannot conclude that the authority given the presiding judge of the superior court violates the framers' intent.

First, article IV does not indicate that in creating new courts, the legislature is bound by the framers' concept of independence for supreme and superior court justices and judges. Though the constitutional design for the selection and retention of the latter officials embodies the core of the framers' statement regarding independence,[26] article IV, section 4 would seem to empower the legislature to embrace precisely the procedures rejected by the framers, *e. g.*, selection of judges by partisan election, or by the governor. It is thus impossible to extract from article IV a firm concept of judicial independence applicable to legislatively created courts.

Second, the independence of which the delegates spoke was independence from political pressures. The objective was an impartial judiciary. The framers rejected a system in which judges competitively campaign for election, fearing that financial and psychological debts would be incurred in the process,[27] and that pre-election decisions in controversial cases would be molded

13. As originally adopted, the constitution used "term" to describe the definite periods of service of the governor and secretary of state, art. III, §§ 4 and 7, legislators, art. II, § 3, and members of the judicial council, art. IV, § 8, and used "term" generally to describe the period in office of all justices and judges, art. IV, § 13. Article IV, § 2(b) (adopted in 1970) refers to the [illegible] year "term of office" of the chief justice. In referring to persons appointed to serve at the pleasure of the governor, art. III, § 25, and chief justice, art. IV, § 16, the word "term" is not used.

14. With the exception of art. IV, wherever "term" or "service at the pleasure of" appears in the constitution as originally adopted, supra note 13, the reference is to a period of service for a particular office, thus allowing the drafters to be precise in their terminology. The language of art. IV, §§ 4 and 13, on the other hand, applies to any judge of any court the legislature might create, and "term" in that context may intend only the more general, though equally valid connotation of any limitation on a period of service. *Cf.* Webster's Third New International Dictionary (1971) ("a limited or definite extent of time"); Black's Law Dictionary (4th ed. 1968) ("the period during which elected officer or appointee is entitled to hold office").

15. Article IV, §§ 4, 5, and 6.

16. *See, e. g.,* 1 Proceedings of the Constitutional Convention 584–614.

17. Article II , § 1 of the U.S.Const. provides in pertinent part: "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior . . . ."

18. *See* 1 Proceedings of the Constitutional Convention 586, 598–99.

19. § 25 ch. 184 SLA 1959, A.C.L.A. § 52A-2-42 (1959 Supp.).

20. Rules Governing the Administration of All Courts.

21. The number of supreme, superior, and district court justices and judges are set by AS 22.05.020, 22.10.120, and Administrative Rule 31, respectively.

22. AS 22.15.160(b) provides:

> A magistrate shall be a citizen of the United States and of the state, at least 21 years of age, and a resident of the state for at least six months immediately preceding his appointment. The supreme court may prescribe additional qualifications.

This court has prescribed no additional qualifications. Administrative Rule 36.

23. See Administrative Rules 32–34.

24. We reject the appellee's suggestion that since "service at the pleasure of" the superior court does not *require* a periodic accounting, it may result in a lifetime appointment without review of a magistrate's performance. The possibility that the presiding superior court judge will simply ignore the supervisory duty implicitly imposed by AS 22.15.170(c) is too remote to invalidate the scheme *per se*. Moreover, this court, given its rule-making powers under art. IV, § 15, may mandate periodic performance evaluations, if such become necessary to give effect to the statute.

25. *See* 1 Proceedings of the Constitutional Convention 586–602.

26. *Id.* at 601–02.

27. *Id.* at 584–85, 601–02.

more by public mood than the dictates of law;[28] they likewise rejected a simple gubernatorial appointment system, fearing executive dominance over the judiciary.[29] Magistrates are not subject to any of these specific pressures: they do not campaign, are never accountable to the voting public, and are not appointed by the governor.[30]

For a magistrate to serve "at the pleasure of" the presiding superior court judge does not impair the independence of the magistrate to adjudicate cases impartially. The influence of the presiding judge simply cannot be equated with the undue influence potential in voter outrage or executive patronage. The latter may affect the outcome of particular cases in contravention of the dictates of the law, merely as a result of psychological pressure; the pressure that inheres in serving at the pleasure of the presiding judge, by promoting competency, tends to ensure precisely the opposite result, namely, that adjudication will be in conformity with the law.

We recognize of course that a position of authority may be abused; however, the mere potential for abuse does not in this case render the statutory mechanism *per se* unconstitutional. Magistrates dismissed pursuant to AS 22.15.170(c) are not necessarily without legal recourse. Abuses in particular cases may still be subject to the dictates of other constitutional commands, such as due process, and in this case to the rulemaking and supervisory powers of this court.[31] We presume that these issues will be explored at trial.

[6] Holloway's final contention is that article IV, section 10[32] is applicable to magistrates and establishes the only means by which a magistrate may be removed from office. Assuming, without holding, that the section 10 procedures are applicable to magistrates,[33] we do not share the appellee's conclusion. At the very least, the removal provisions of article IV are supplementary to the removal procedure that defines the end of a judge's term. If such were not the case, sections 10 and 6 of article IV would be in direct conflict, since the retention elections for which supreme court justices and superior court judges must stand are most definitely a means of removing the latter from office. Thus even if section 10 is applicable to magistrates, it does not restrict the legislature's authority under section 4 to the prescribe that magistrates shall serve at the pleasure of the presiding judge.

The judgment of the superior court is REVERSED.

BOOCHEVER, Justice, with whom RABINOWITZ, Chief Justice, joins, dissenting in part.

I do not agree with the portion of the opinion that holds that the requirement of art. IV, § 4, of Alaska's Constitution specifying that: "[j]udges of other courts shall be selected . . . for terms . . . prescribed by law" is satisfied by the provisions of AS 22.15.170(c). That section specifies that:

> The presiding judge of the superior court in each judicial district shall appoint the magistrates for the district court for the judicial district. Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed.

28. *Id.* at 586, 598.

29. *Id.* at 598.

30. Magistrates are appointed by the presiding superior court judge. AS 22.15.170(c). We note that the territorial commissioners who exercised the powers of the offices now held by district judges and magistrates, at the time of the constitutional convention also served at the "pleasure" of their superior judicial officers. A.C.L.A. 1949 § 54-4-1.

31. The chairperson of the committee that drafted the judiciary article, assured the convention delegates that any abuses that might result from the "great flexibility" conferred by art. IV, § 4 on the legislature, would be subject to remedial action by this court under the administrative rulemaking power delegated to it by art. IV, § 15. 1 Proceedings of the Constitutional Convention 733.

32. Adopted in 1968, art. IV, § 10 created a commission on judicial qualifications which could recommend to the supreme court that a justice or judge be suspended, removed from office, retired or censured.

33. A contention disputed by the state.

Specifying service "at the pleasure" of an authority seems to me to be the very antithesis of designating a "term." There might be some argument if a term were prescribed—for one, two or more years—and removal specified at the pleasure of the presiding judge. But here no term has been prescribed so we need not reach that issue.[1]

The word "term" connotes a fixed period of time, and the use of the adjective "fixed" in connection with the noun "term" would be a redundancy. The framers of our Constitution sought to avoid redundancy.[2]

The majority admits that the word "term" as interpreted by courts in a variety of contexts refers to a period of service that is fixed in time. Among cases so holding are *Bayley v. Garrison*, 190 Cal. 690, 214 P. 871, 872 (1923); *Kratzer v. Commonwealth*, 228 Ky. 684, 15 S.W.2d 473, 474–75 (1929); *Board of Education of Pendleton County v. Gulick*, 398 S.W.2d 483, 485 (Ky.App.1966); *State ex rel. Gilbert v. Board of Commissioners of Sierra County*, 29 N.M. 209, 222 P. 654, 655 (1924); *State ex rel. Matlack v. Oklahoma City*, 38 Okl. 349, 134 P. 58, 59 (1913) (all cases construing "term" in a constitution). *See also Sueppel v. City Council of Iowa City*, 257 Iowa 1350, 136 N.W.2d 523, 527 (1965); *Ida County Sav. Bank v. Seidensticker*, 92 N.W. 862, 866 (Iowa 1902) (defining "term" in other contexts). In fact, it has been stated that "an officer removable at the pleasure of the appointing officer has, in the strict meaning of the word, no 'term' of office." *State ex rel. Bonner v. District Court*, 122 Mont. 464, 206 P.2d 166 (Mont.1949), *quoting*, 46 C.J.S. *Officers* § 98.

The distinction between a requirement of specifying a "term" of office and a general authorization to the legislature is discussed in *Collision v. State ex rel. Green*, 2 A.2d 97 (Del.1938), wherein it was held that a provision authorizing the governor to remove members of the State Industrial Accident Board "with or without cause" was upheld because of the absence of a constitutional requirement that a "term" be prescribed for the office. The court stated:

> As there is nothing in the Delaware Constitution which requires the legislature in the creation of statutory offices to prescribe fixed and definite terms for their occupancy, it must necessarily follow that no constitutional inhibition exists against the creation of such an office to be held during the pleasure of the appointing power.[3]

In contrast, Alaska's Constitution does contain a provision requiring the legislature to prescribe "terms" of magistrates.

The majority further admits that as used elsewhere in Alaska's Constitution, the word "term" refers to a "period of service that is fixed in time."[4] I fail to see any reason to utilize a different, and what seems to me to be a most strained, interpretation of the word "term" when applied to magistrates.

I would affirm Judge Rowland's decision that service at the pleasure of the presiding judge falls short of the constitutional requirement that judges be selected for "terms prescribed by law."

1. *But see Collision v. State ex rel. Green*, 2 A.2d 97 (Del.1938), discussed *infra*.

2. *Thomas v. Bailey*, 595 P.2d 1, 6 (Alaska 1979).

3. *Id.* at 100. In our prior case concerning the office of a district judge, we did not have presented the issue of whether service "at pleasure" complied with the constitutional requirement of prescribing "terms" of office. *Delahay v. State*, 476 P.2d 908 (Alaska 1970).

4. *See* Note 13 of the majority opinion, for examples.

LESSON 5: JUDICIAL ETHICS

The "Code of Judicial Conduct" is located in Volume III of the Alaska Rules of Court. The rules in this code, called "Canons", are the rules and standards which judges in Alaska are required to follow. You should read the canons carefully so that, as a magistrate, you will know the rules and standards which you must follow.

The first question usually asked is why formal rules and standards are necessary for judges. Our court system is a public institution charged with the duty of making fair and just decisions. If the people within the court system behave in a dignified and responsible manner, it is more likely that the public will have confidence in its courts. Judges are the most visible members of the court system. The public expects its judges to follow the rules of the justice system.

A judge is constantly in public view. Because some judges had engaged in questionable behavior prior to 1924, the American Bar Association* adopted rules for judges -- Canons of Judicial Ethics. Since 1924 the rules have been changed to reflect changing public views about how judges should behave.

*The American Bar Association is a voluntary association of lawyers who develop legal and judicial policy.

The Alaska Code of Judicial Conduct was adopted in 1973. The Alaska Supreme Court decided it was necessary to have written standards for judges.

In part, this is for the protection of judges because the written standards make it easier for a judge to know what the judge should not do. Magistrates are considered to be judges under the Code of Judicial Conduct and, as a judge, you are bound by the Code of Judicial Conduct. Some of the canons are inapplicable to part-time judges and those are noted in this lesson. If, at any time during your term as a judge, you have questions about what is proper behavior for a judge, you should read the relevant section of the Code of Judicial Conduct. Then, if you still have questions, you should contact your training judge or presiding judge.

Each canon will be covered in this lesson. Each canon appears on the left-hand side of the page, with an explanation of the canon on the right-hand side of the page.

After reading the lesson, you should answer the questions in the test.

Part I. Canons

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective. (Added by Supreme Court Order 170 dated September 17, 1973)

CANON 1. A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

If people are to believe in a system of justice, the judges in the system must be "independent" and "honorable". Being "independent" means being free from the influence of public opinion and making honest and fair decisions based on the facts presented in your court. Being "honorable" means acting in the most respectable manner, being honest in all your activities and conducting yourself in a manner which shows you deserve the public trust.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness. (Added by Supreme Court Order 170 dated September 17, 1973)

CANON 2. A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

Section A of Canon 2 states that a judge should respect and obey the law. At all times you should remember that you are a judge and your community looks to you as a model. In all your dealings you should be honest and fair.

Section B of Canon 2 states that a judge should not allow the judge's personal relationships to affect the judge's decisions. This means that family, friends, business dealings and transactions and political feelings should not be part of what you think about when making a judicial decision. You should not allow other people to use your name or office for private or political gain. You should not let

any person in a community think that the person can influence you. You should do your best not to give anyone the idea that you can be improperly influenced.

As a judge, you should never voluntarily testify as a character witness in a court proceeding. A character witness is a person who makes a statement under oath about another person's traits and habits. For example, if a close friend asks you to testify at her child custody hearing about her ability to be a good parent, you should refuse. You should only appear and testify as a witness if you are subpoenaed, that is, ordered by the court to appear.

Generally, as a judge, you are not to introduce or present facts in a proceeding. For example, a judge would not normally subpoena and question a witness. The factual

presentation is the responsibility of the plaintiff or defendant in a case. In limited situations, such as a children's proceeding, you, as a judge, can introduce facts. (See Children's Rule 20.)

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

CANON 3. A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

When you were appointed a magistrate, you accepted a high level of responsibility within your community. Your judicial duties are of great importance. As a judge, you should be available for all court proceedings. Your duties and the limits of your powers are set out in Title 22.

A. Adjudicative Responsibilities.

1. As a judge, you should make sure you understand the law and follow all laws and legal procedures. You should keep up with changes in the law. Your decisions should be based on evidence presented to you in court. You should not be influenced by public pressure.

(2) A judge should maintain order and decorum in proceedings before him.

2. As a judge, you are in control of your courtroom. At all court proceedings you should maintain order and require proper behavior from all persons.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

3. As a judge, you should be patient, dignified and courteous. You should require all other persons in court to be patient, dignified and courteous.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

4. As a judge, you should allow every person legally interested in a court proceeding the right to be heard in court. This means that any person whose legal rights might be affected has a right to be heard.

An ex parte communication is a person speaking alone or secretly to a judge. As a judge, you should not allow any ex parte communications. All parties in a court proceeding have equal rights to a fair and impartial hearing and should be heard in court.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

There may be situations where you, as a judge, will find it necessary to speak to a disinterested expert to gain a necessary understanding of a legal issue in a case. For example, you are hearing a case in which a contract clause is at issue. You wish an explanation of this clause from your training judge. The training judge is not involved in the case. In a case like this, you, as the judge, would tell the parties the name of the training judge you consulted and what the training judge said. Each of the parties should be allowed a reasonable time to respond to this information.

5. You, as a judge, should handle all court business efficiently and promptly.

6. Neither you nor any court employees under your direction should publicly comment on a case before a case is heard or while it is being heard. However, you, as a judge, may talk about your official duties and

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during the sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the broadcasting, televising, recording, and the taking of photographs in the courtroom and areas immediately adjacent thereto during a judicial proceeding open to the public or during recesses between such sessions of court, provided:

(i) that a plan for media coverage has been approved by the supreme court. A plan for media coverage shall contain safeguards to ensure compliance with (ii) through (iv) of this subsection and shall include provisions governing the numbers and types of camera and broadcast equipment to be allowed, numbers of camera and equipment operators, location of cameras and equipment and media personnel, movement of personnel and equipment, lighting augmentation if any to allowed, forms, designation of courtrooms approved for coverage, and other details as may be necessary to regulate the media activity in accordance with this subsection;

explain procedures of the court. For example, you could talk to the city council or a high school class about the types of cases a magistrate is allowed to hear.

7. The Alaska Supreme Court has adopted a plan for media coverage of judicial proceedings. Media coverage includes broadcasting, televising, or recording by a party other than the court or taking still photographs of proceedings conducted by the supreme court, court of appeals, superior courts and district courts. Whenever you have any questions about media coverage in your courtroom, you should contact your presiding judge and area court administrator. The Alaska Supreme Court Plan for Media Coverage of Judicial Proceedings is very specific.

Basically, the presiding judge and area court administrator for each district should state what area of each court location

(ii) that in civil proceedings other than those listed in subparagraph (iii) permission shall have been expressly granted by the judge, and that in criminal proceedings other than those listed in subparagraph (iii) permission shall have been expressly granted by the judge and the defendant. For media coverage of Supreme Court and Court of Appeals proceedings only the permission of the Court shall be required;

(iii) that the media coverage provisions set forth in subparagraph (ii) shall not apply to matters involving juveniles, divorce, dissolution of marriage, domestic violence, child support, child custody and visitation, adoption, paternity and other family matters. Media coverage of these proceedings is prohibited. For media coverage of proceedings which deal with sexual offenses, the permission of the victim, the defendant, and the judge shall be required;

(iv) that the media activity will not distract the participants, impair the dignity of the proceedings, or interfere with the achievement of a fair and impartial hearing or trial;

(v) that in trial court proceedings, no witness, juror, or party who expresses to the judge any prior objection shall be photographed by any camera, nor shall the testimony of such a witness, juror or party be broadcast or telecast;

(vi) that participating members of the media shall agree to abide by the provisions of this subsection and any approved plan for media coverage; and

(vii) that each judge shall provide the administrative director on request information concerning any media coverage of proceedings before that judge, including written reasons for any denial by the judge of permission for media coverage. (Amended by Supreme Court Order 502 effective February 1, 1982)

is a public area in which media coverage may take place without obtaining prior approval. Media personnel wanting to cover a civil or criminal proceeding in your court must make a request through your area court administrator, who forwards the request to you. You make the decision whether media coverage will be permitted and what the limits of that coverage will be. In a criminal trial, it is the responsibility of the media personnel to get written permission from the defendant to film or audiotape the proceeding. The plan for media coverage of judicial proceedings does not apply to matters involving juveniles, divorce, dissolution of marriage, domestic violence, child support, child custody and visitation, adoption, paternity and other family matters. There should be no broadcasting, televising, or recording by a party other than the court

or taking still photographs of these proceedings.

If the media wishes to cover any of your proceedings, you should contact your area court administrator who will work with you to see that the Alaska Supreme Court plan for media coverage of judicial proceedings is followed. The Alaska Supreme Court Plan for Media Coverage of Judicial Proceedings applies only to media broadcasting, televising, recording or taking of still photographs in the court by a party other than the court. The media cannot be stopped from coverage out of or away from the court, such as taking photographs of a defendant entering a court.

Generally, you should note that anyone can order, pay for and get a cassette recording of a proceeding, court order or transcript. However, some proceedings, for example, grand jury and children's

B. Administrative Responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

proceedings, are confidential and cassette recordings of confidential proceedings, court orders, or transcripts are not available to the public.

B. Administrative Responsibilities.

1. As a judge, you are to be diligent, meaning efficient and thorough in performing your duties. You should help other court staff, if any, to do their jobs properly.

2. You should require court staff members under your supervision to maintain the same standards of honesty and diligence required of a judge.

3. If you, as a judge, become aware of unprofessional conduct of another judge or a lawyer, you should report the offending judge to the Commission on Judicial Conduct or the offending lawyer to the Alaska Bar Association.

4. As a judge, you should not appoint or hire any employees without all necessary

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

approvals and in accordance with court system personnel rules.

C. Disqualification.

1. When you, as a judge, cannot be fair and impartial or when other people could question your fairness, you should disqualify yourself from the case. If you have a bias or prejudice against a party or a witness, you should not hear the case -- this means disqualifying yourself. "To disqualify" means that you will not hear a case. If you have personal knowledge of facts in a case and you could not be fair and impartial or it would appear you could not be fair and impartial, you should not hear the case. If you or a law partner were a lawyer for a party in a case, you should not hear that case. Where you have, or a member of your family living in the same household has, a financial interest in a case -- that is, you

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

or a family member could profit or lose money -- you should not hear the case.

Where you or your spouse or a close family member is connected to a case, you should not hear the case. For example, a connection could be that you or your spouse, or close family member are (i) a party in a case, (ii) an officer, director or trustee for a corporation or organization in a case, (iii) acting or have acted as a lawyer in a case, (iv) known to have an interest that would be largely changed by the decision in the case, or (v) to be a witness in a case.

This means you must be <u>very</u> careful to insure that you can be fair and impartial in all the matters you hear. You should stay informed about your family's financial interests so that you can be certain your immediate family, including those family members living in your home, have no connection to the matters you hear. If you

or your family members have any meaningful connection with a matter before you, you should disqualify yourself, that is, not hear the case. Also, if your impartiality could be questioned by other people, you must remember to avoid "even the appearance of impropriety" or unfairness.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

2. This section tells you that you should always be aware and informed of your personal and financial interests and of your spouse's and children's financial interests. If you do not know these things, then you might not know when your impartiality and fairness could be questioned by members of your community.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

3. This section tells you the meaning of the words used in Canon 3C:

(a) The civil law system of calculating the degree of family relationship is a system explaining the closeness of one's relatives. The first degree of the family

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

relationship is a person's child. The second degree of the family relationship is grandchildren, brothers and sisters and grandparents. The third degree of the family relationship is great grandchildren, nephews and nieces, uncles and aunts and great grandparents.

Canon 3C(1)(d) refers to a person within the third degree of relationship to a judge or judge's spouse. This means all your family members and your spouse's family members within the first degree, second degree or third degree of relationship. Thus, Canon 3C(1)(d) requires you to be aware of your family's activities and involvements which may come before you as a judge.

(b) A "fiduciary" is a person who acts in a position of trust for another. This can include an (i) executor -- a person appointed under a will to carry out the directions of the will, or (ii) an

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

administrator -- a person appointed by a court to settle property, or (iii) a trustee -- a person to whom another's property or management of another's property is entrusted, or (iv) guardian -- a person who guards, protects or takes care of another person or property.

(c) A "financial interest" means an actual money interest or some way in which you could realize any gain or loss to your money or property. If you regularly tell someone else how to handle money or property, even though the money or property does not belong to you, that is a financial interest.

An office in an educational, religious, charitable or fraternal organization is not a financial interest. If you have a policy with a mutual insurance company or put your money in a mutual savings association, that is not a financial interest. However, if an educational, religious, charitable, fraternal

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1) (c) or Canon 3C(1) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding. (Added by Supreme Court Order 170 dated September 17, 1973; amended by Supreme Court Order 387 effective November 1, 1979; and by Supreme Court Order 502 effective February 1, 1982)

or civic organization of which you are a director or officer appears before you, as a judge, you should not hear the case. If your mutual insurance company or mutual savings association appears before you and your decision in the court proceeding could affect your interest, you should not hear the case because you would give the appearance of being unable to be fair and impartial.

Owning government securities is a financial interest only if the outcome of proceedings before you could largely affect the value of the government securities.

D. Remittal of Disqualification.

If you are disqualified under Canon 3C(1)(c) or (d), that is, you or a member of your family have an interest in a case before you, you should state on the record the reason why you are disqualifying yourself from the case. You must make a full disclosure by stating all the reasons you are

disqualifying yourself. If <u>all</u> the parties agree, <u>in writing</u>, that your interest or that of your family is small and does not matter, you can hear the case. The agreement, signed by all parties and their lawyers, becomes part of the record of the proceeding. However, if you know or feel or it appears you cannot be fair, you should not hear the case, even if all the parties agree in writing.

CANON 4

A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

CANON 4. A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM AND THE ADMINISTRATION OF JUSTICE

A. You may speak, write and teach about the law, the legal system and the administration of justice, as long as your activities do not cast doubt on your ability to be fair when you decide cases. You should never discuss any case which is pending before you.

B. You may appear at public hearings before an executive or legislative body or official. You may speak only about matters concerning the law and the legal system. You may not speak about a particular case which is pending before you. For example, you could speak about fish and wildlife sentencing patterns in your court or region, but you could not speak about a fishing violation then pending in your court or pending in another court.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice. (Added by Supreme Court Order 170 dated September 17, 1973)

C. You may serve as a member, officer or director of an organization or agency working on the improvement of the law, the legal system and the administration of justice. For example, you could serve on an interagency committee investigating statewide sentencing patterns or on the court system forms committee.

You should never personally raise money for organizations or participate in their fund raising activities.

CANON 5

A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

A. **Avocational Activities.** A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. **Civic and Charitable Activities.** A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

CANON 5. A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES

This Canon sets the guidelines for judges and their activities outside their judicial duties.

A. Avocational Activities.

This section requires that your outside activities -- in the arts, sports, social and recreational activities -- not affect your judicial dignity or judicial performance.

B. Civic and Charitable Activities.

You may be involved in civic and charitable activities as long as those activities do not interfere with your judicial duties or fairness. You may be an officer, trustee or non-legal advisor of a

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events.

civic or charitable organization which is not run for the economic or political benefit of its members.

If it is likely that the organization will regularly be in your court, you should not be part of the organization or act as an officer, trustee or non-legal advisor.

You may be an officer, director or trustee of a civic or charitable organization. However, you should not raise money or speak at any fund raising events or permit your office as judge to lend prestige to a fund raising event. You may attend fund raising events for a civic or charitable organization. For example, you could be a member, officer, director or trustee for the Boy Scouts or Girl Scouts, a hospital, your church, or the local search and rescue organization and attend their fund raising events. (Note the difference between Canon 7A(c), which states clearly that you <u>cannot</u>

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

attend political events, including fund raising events. Any organization or group engaged in or taking sides in public policy or the election of individuals to office is considered a political organization. For example, the Republican, Democratic, or Libertarian parties would be considered political organizations.)

You should not give financial advice to a civic or charitable organization. However, you may serve on the board of directors of a civic or charitable organization.

C. **Financial Activities.**

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

C. Financial Activities.

This section requires you to handle your business and financial activities responsibly.

(1) You should handle your business and financial activities so you can be fair in hearing your cases.

(2) This section allows you to invest money and operate a business. However, you must manage investment and financial activities so you can be fair in hearing your cases.

(3) Your investments and any other financial interests should be arranged so that you will not be disqualified from cases. If you have financial or investment interests which cause or will cause you to be frequently disqualified, you should rearrange your finances to avoid disqualification.

(4) You and your family should not take advantage of your position to accept gifts,

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

favors or loans. This section states that you and family members living in your household may accept:

(a) a gift given at a public function to express appreciation; books for official use given by publishers or an invitation to you and your spouse to attend a legal activity;

(b) ordinary social hospitality, such as a dinner invitation;
a gift, a bequest (left to you in a will), favor or loan from a relative;
a wedding or engagement gift;
a loan on the same terms and conditions required of any other borrower;
a scholarship or fellowship on the same terms applied to

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

other applicants;

(c) any other gift, bequest, favor or loan if the person giving it is not likely to come before you in court. If the value of the gift, bequest, favor or loan is greater than $100.00, you must report it to the Administrative Director of the Alaska Court System, including the date, place and nature of the benefit you received. See Canon 6C for reporting requirements.

(5) Canon 5C applies to you and family members, or any person treated like a family member, residing in your home.

(6) You are required to disclose your income, debts and investments only as set out in Canons 3, 5 and 6.

(7) You should never use any information received by you, in your judicial

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

capacity, to your personal advantage or for any purpose other than your judicial duties.

D. Fiduciary Activities.

This section applies only to full-time judges. If you are a full-time judge, you should act only for family members as an executor, administrator, trustee, guardian or in any other position of trust. Family members include a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

However, whether you are a part-time or full-time judge, you should not serve as an executor, administrator, trustee, guardian or any other fiduciary if it is likely that proceedings regarding the person or matter would ordinarily come before you, your court or the appellate jurisdiction of your court. Also, if you are acting in any position of trust, you are still subject to all financial restrictions placed on a judge.

E. **Arbitration.** A judge should not act as an arbitrator or mediator for compensation.

E. Arbitration.

This section applies only to full-time judges. If you are a full-time judge, you should not act as a paid arbitrator or mediator. For example, a local contractor comes to you, says he does not want to file a formal civil case, and asks that you sit as a third party to decide a dispute about the quality of the electrical wiring in a house he built. The contractor says he will be glad to pay you for your time. If you are a full-time judge, you should refuse to act as the third party to decide this dispute. If you are a part-time judge and act as a paid mediator or arbitrator, those activities should not interfere with matters which might come before you.

F. **Practice of Law.** A judge should not practice law.

F. Practice of Law.

This section applies only to full-time judges. A full-time judge should not

practice law. This canon provides that a part-time judge admitted to the bar to practice law in Alaska should not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves. However, Administrative Rule 2(d), Rules of Court, sets out a definite standard -- no employee of the Alaska Court System may engage directly or indirectly in the practice of law in any court in the state of Alaska.

Also, you should not act as a lawyer in a proceeding in which you have served as a judge or in any other proceeding related thereto. (See Part II of the Code of Judicial Conduct.)

G. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities. (Added by Supreme Court Order 170 dated September 17, 1973)

G. Extra-Judicial Appointments.

This section applies only to full-time judges. If you are a full-time judge, you can accept appointments to governmental

committees or commissions only if the group is concerned with issues of law, the legal system or the administration of justice. If you are a part-time judge, you are not bound by this restriction.

As either a full-time or a part-time judge, you may represent your country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities. (A note of caution: you should never represent a private or business interest at any ceremonial activity. See Canon 2B).

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payment does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. **Compensation.** Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would recei- :tivity.

B. **Expense Reimbursement.** Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

CANON 6. A JUDGE SHOULD REGULARLY FILE REPORTS OF COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

As a judge, you may take payment for work performed and reimbursement for expenses only if the source of the payment does not influence or appear to influence you in the performance of your judicial activities.

A. Compensation. Compensation (money earned) should not exceed a reasonable amount for the work performed. Also, you should not be paid more than what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. If you are paid for travel or expenses, the expense reimbursement should be only for travel, food and lodging. Any payment greater than these costs is compensation.

C. Public Reports. A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the Administrative Director of the Alaska Court System at such time and in such form as shall be prescribed by the Administrative Director. (Added by Supreme Court Order 170 dated September 17, 1973)

C. Public Reports. This section applies only to full-time judges. If you are a full-time judge, you should report the date, place and type of activity for which compensation is paid, the name of the payor and the amount of compensation. A spouse's compensation or income is not considered for this purpose. This report should be filed as a public document, at least annually, with the Administrative Director of the court system.

CANON 7

A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS JUDICIAL OFFICE

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2).

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

CANON 7. A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO HIS JUDICIAL OFFICE

A. Political Conduct in General.

(1) Because magistrates are appointed to their posts by the presiding judge of their judicial district, a magistrate is never a candidate for election to judicial office.

As a judge, you should never become a candidate for political office, solicit funds for a political organization, attend political gatherings or purchase tickets for political party dinners or gatherings.

(2) This section is inapplicable. In Alaska, all judges, including magistrates, are appointed. A magistrate is never a candidate for election to a judicial office. All judges except magistrates must, at regular intervals, stand for a retention

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

election in which the judge is the only candidate. A retention election is an election in which the voters decide if the judge may continue to serve.

(3) If you decide to run for office, you must resign as a judge. The only circumstance under which you do not have to resign as a judge is if you are serving as a delegate in a state constitutional convention.

(4) As a judge, your only political activity should be on behalf of measures to improve the law, the legal system or administration of justice.

B. **Campaign Conduct.**

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than ninety [90] days before a primary election and not later than ninety [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2). (Added by Supreme Court Order 170 dated September 17, 1973 and amended by Amendment No. 1 to Supreme Court Order 170 effective May 17, 1974)

B. Campaign Conduct.

This section is for judges who are appointed by the governor to their posts and, after serving a specified number of years, must stand for a retention election by the voters. Magistrates are appointed to their posts by the presiding judge of their judicial districts and serve at the pleasure of the presiding judge. Since a magistrate never is elected or stands for a retention election, this section is not applicable to magistrates.

Part II. Compliance and Effective Date

1. Compliance with the Code of Judicial Conduct.

Anyone who is an officer of the Alaska Court System performing judicial functions, including a special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below:

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, G, and Canon 6C;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore. A judge *pro tempore* is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

Part II. Compliance and Effective Date.

Part II explains who must comply with the Code of Judicial Conduct, the effective date of the Code and when the Code becomes applicable to judges.

1. Compliance with the Code of Judicial Conduct.

Any person who is an officer of the Alaska Court System is considered a judge bound by the Code of Judicial Conduct. This includes special masters, court commissioners, and magistrates.

A. Part-Time Judge.

As already noted, certain sections of the Code of Judicial Conduct do not apply to part-time judges.

B. Judge Pro Tempore.

A judge pro tempore is a person who acts as a judge for a limited period of time. For example, lawyers are sometimes appointed pro tempore district court judges for six months

C. **Retired Judge.** A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G, but he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G. All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges. (Added by Supreme Court Order 170 dated September 17, 1973)

2. **Effective Date of Compliance.**

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) continue to act as an officer, director, or non-legal advisor of a family business;

(b) continue to act as an exec'tor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family. (Added by Supreme Court Order 170 dated September 17, 1973)

when a court caseload is particularly heavy. Generally, magistrates do not act as a judge pro tempore.

C. Retired Judge.

Generally, the section on retired judges does not apply to magistrates.

2. Effective Date of Compliance.

Upon being appointed as a magistrate/judge, you are to arrange your affairs as soon as possible to comply with the Code of Judicial Conduct. If, at the time of your appointment as a judge, you are an officer, director or non-legal advisor of a family business, you may keep this position if the demands on your time and possibility of conflict of interest are not great. Also, if you are an executor, administrator, trustee or other fiduciary for an estate or person not a member of your family, you may keep this position if the demands on your

time and possibility of conflict of interest are not great.

3. Effective Date of Code.

The Code of Judicial Conduct shall be effective as of this date. (Added by Supreme Court Order 170 dated September 17, 1973).

3. Effective Date of Code.

The Code of Judicial Conduct went into effect on September 17, 1973.

If you have any questions whatsoever about decisions you have made or will make about your ethical behavior, you should contact your training or presiding judge.

LESSON 5: JUDICIAL ETHICS

REVIEW TEST

MAGISTRATE: ____________________________

LOCATION: ______________________________

DATE: __________________________________

Return completed test to:

MAGISTRATE SERVICES
303 "K" Street
Anchorage, AK 99501

LESSON 5: JUDICIAL ETHICS

REVIEW TEST

<u>INSTRUCTIONS</u>:

Write your answers to the questions in the spaces provided.

1. Magistrate Smith receives a telephone call from the Village Public Safety Officer ("VPSO"). The VPSO tells Magistrate Smith that he is holding Billy Bad Guy for assault in the fourth degree. Magistrate Smith says he will do the arraignment right away. As Magistrate Smith hangs up the telephone, a council member who is also Billy Bad Guy's uncle comes into the magistrate's office. The council member uncle starts telling Magistrate Smith that the assault was not really Billy Bad Guy's fault and that Annie Assault committed the crime.

   A. What should Magistrate Smith do?

   B. Which canon in the Code of Judicial Conduct gives Magistrate Smith guidance in this situation?

   C. Define ex parte communication.

2. Magistrate Brown, as a private person, decides to attend a city council meeting. He is sitting quietly with other city residents. A council member states that he wants Magistrate Brown to tell the council what decision he is going to make in a trial the next day.

   A. What should Magistrate Brown do?

   B. Which two canons give Magistrate Brown guidance in this situation?

3. Assume the same facts as Question 3. The city council discusses the case which Magistrate Brown is going to hear the next day. The city council votes on how the case should be decided.

A. What should Magistrate Brown do?

B. Which canon gives Magistrate Brown guidance in this situation?

4. Magistrate White is the only court employee in her court. She has fallen far behind in her paperwork. She has not sent in judgments in four months. She has not filed recent forms received from the Alaska Court System. In the last year, she has not filed new pages in her copies of the Alaska Statutes, Alaska Rules of Court, or the Alaska Administrative Code. However, Magistrate White holds all court proceedings promptly.

   A. Is Magistrate White doing her job properly? If so, why? If not, why not?

   B. Which canon gives Magistrate White guidance in this situation?

5. Fishing season has arrived. Magistrate Henry is busy fishing, but still works three hours a day as a magistrate. Magistrate Henry is having difficulty with his arraignments and trials because some of the witnesses are at fish camp.

   A. What should Magistrate Henry do if the defendant is in custody?

   B. What should Magistrate Henry do if the defendant is not in custody?

   C. Which canon gives Magistrate Henry guidance in this situation?

6. Magistrate Henry is in a community where there is a great deal of commercial fishing. A defendant charged with violations under Fish and Game regulations is brought before Magistrate Henry for arraignment. The defendant, Terry Trout, is brought before the magistrate and yells at the policeman. He is rude and swears.

A. What should Magistrate Henry tell defendant Terry Trout?

B. Which canons give Magistrate Henry guidance in this situation?

7. Mary Green has filed a petition for an emergency injunction in a domestic violence action. A reporter from the Tundra Times comes into the court and wants to listen to Ms. Green's hearing.

A. Should the magistrate allow the reporter from the Tundra Times to listen to Ms. Green's domestic violence hearing?

B. Which canon gives the magistrate guidance in this situation?

C. At which type of court proceedings is broadcasting, televising, recording, or taking still photographs by anyone other than court personnel forbidden?

D. Which canon gives a magistrate guidance about the broadcasting, televising, recording, or taking still photographs by anyone other than court personnel during court proceedings?

8. Magistrate Duke has just been appointed. He recognizes that he must conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Still, Magistrate Duke likes to smoke marijuana. He wants to get some marijuana plants, grow marijuana and, if the crop is good, sell it to his friends.

A. Should Magistrate Duke go ahead with his plan to grow marijuana and sell it to his friends? If so, why? If not, why not?

B. Which two canons give Magistrate Duke guidance in this situation?

9. Magistrate White is very far behind in her paperwork. Her presiding judge has given her permission to hire a clerk for two weeks to help with the back filing. Magistrate White's best friend applies for the two-week job.

   A. Should Magistrate White hire her best friend? If so, why? If not, why not?

   B. Which two canons give Magistrate White guidance in this situation?

10. Magistrate Martin is in the community store, waiting in line to buy groceries. The cashier says, "Hey, what do you think about Billy Bad Guy being in jail? Do you think the Anchorage court will put him away like he deserves?"

   A. Can Magistrate Martin say what he thinks? If so, why? If not, why not?

   B. Which canon gives Magistrate Martin guidance in this situation?

11. Assume the same facts as Question 10. Magistrate Martin's part-time clerk, Claude Klerk, is also in line. When Claude Klerk hears the cashier's question, he perks up. Before Magistrate Martin can say a word, Claude Klerk says, "Yeah, that guy has quite a record on him. I hope the Ancnorage judge puts Billy Bad Guy away for life."

   A. Was Claude Klerk's comment proper? If so, why? If not, why not?

B. What, if anything, should Magistrate Martin say or do to Claude Klerk?

C. Which canon gives Magistrate Martin guidance on whether court employees should comment publicly on proceedings in any court?

D. Define "abstain."

E. Define "abstention."

12. Magistrate Salmon works as a magistrate fifteen .rs each week. He also owns a commercial fishing boat. During the summer, Magistrate Salmon works long hours processing fish which a crew catches for him. One day in July two crew members say they are sick and can't go out in the boat. Magistrate Salmon thinks he should go out on the boat. Then he remembers that he has scheduled a felony first appearance hearing, an arraignment, and a presumptive death hearing for that same afternoon. He is worried about losing money and also worried about not doing his job as magistrate properly.

    A. Should Magistrate Salmon go fisning or stay at home for the court proceedings?

    B. Which canon gives Magistrate Salmon guidance in this situation?

13. Felix Friend has known Magistrate Caring for many, many years. Felix Friend has decided to run for city council. Felix Friend is also backing Gary Governor in Alaska's gubernatorial election. Felix goes to Magistrate Caring and asks if Magistrate Caring can put up a sign for Friend and Governor on the side of his house and in his office.

    A. Can Magistrate Caring put up a sign for Felix and Governor on the side of his house? If so, why? If not, why not?

B. Can Magistrate Caring put up a sign for Felix and Governor in his office? If so, why? If not, why not?

C. Which canon gives Magistrate Caring guidance in questions 13A and 13B?

D. Can Magistrate Caring collect money for Friend's campaign? Which canon gives Magistrate Caring guidance in this situation?

14. Felix Friend goes to talk with Magistrate Caring. Felix reminds Charlie Caring that the two men have been friends for fifteen years. Felix says he wants Charlie Caring to go to a potlatch where money will be collected for his campaign.

    A. Can Magistrate Charlie Caring buy a ticket and go to the political dinner being given for Friend? If so, why? If not, why not?

    B. Which two canons give Magistrate Caring guidance in this situation?

15. Magistrate Frankfurter has been asked by the Hot Dog Party of Alaska to run for the Alaska State Legislature.

    A. Can Magistrate Frankfurter run for public office while he is a magistrate? If so, why? If not, why not?

    B. Which canon gives Magistrate Frankfurter guidance in this situation?

16. Magistrate Brandeis has been working with a judges' committee to come up with new sentencing guidelines. The Senate Judiciary Committee calls Magistrate Brandeis to ask him to come to Juneau to testify in hearings before the Alaska State Legislature.

A. Is it proper for Magistrate Brandeis to testify on behalf of the judges' committee on sentencing before the Alaska State Legislature? If so, why? If not, why not?

B. Which canon gives Magistrate Brandeis guidance in this situation?

C. Brandeis is offered $10,000 per day for each day he testifies or is in Juneau. Can Magistrate Brandeis accept the $10,000 per day fee? If so, why? If not, why not?

D. Which canon gives Magistrate Brandeis guidance about what pay (compensation) he can receive for services rendered?

E. The Senate Judiciary Committee also offers Magistrate Brandeis per diem of $500 per day while he is in Juneau. Should Magistrate Brandeis accept the per diem? If so, why? If not, why not?

F. Which canon gives Magistrate Brandeis guidance about how much per diem or expense money is permitted?

17. Magistrate Salmon runs a commercial fishing boat in the summer. He also processes all fish caught from the boat. One of the fish buyers, Harry Fishie, visits Magistrate Salmon in his office and says, "Hey, Salmon, because you are the magistrate in this place, I am going to offer you ten cents more per pound on your fish than the other guys get."

A. Should Magistrate Salmon accept Harry Fishie's offer on the fish? If so, why? If not, why not?

B. Which canon gives Magistrate Salmon guidance in this situation?

C. Define "refrain from."

D. Magistrate Salmon heard a case in which he learned that Fishie's company was going broke and that the Happy Herring Company gave the best deals. Can Magistrate Salmon use that information by going to the Happy Herring Company to offer them the fish he catches? If so, why? If not, why not?

E. Which canon gives Magistrate Salmon guidance in this situation?

F. Felicia Foxe and Magistrate Salmon are discussing fish prices over tea at the lodge. Ms. Foxe suggests that Magistrate Salmon go up to the Homely Halibut Company to try to sell his fish. Is it proper for Magistrate Salmon to act on Ms. Foxe's suggestion? If so, why? If not, why not?

18. Magistrate Kanuk is bilingual, speaking fluent Yup'ik and English. She has been asked by the local high school to teach Yup'ik. She has also been asked to teach traditional basket weaving to the high school girls.

    A. Should Magistrate Kanuk accept the job teaching Yup'ik and traditional basket weaving? If so, why? If not, why not?

    B. Which canon gives Magistrate Kanuk guidance in this situation?

    C. Define "avocation."

19. Magistrate Bell receives a telephone call from Harry Horrible. Mr. Horrible lives in a neighboring community. Mr. Horrible is the defendant in a rape case. He is trying to find people who will testify at the rape trial.

Mr. Horrible asks Magistrate Bell if she will testify about his character. Magistrate Bell says she will think about it.

A. Should Magistrate Bell testify as a character witness for Harry Horrible at the rape trial? If so, why? If not, why not?

B. Which canon gives Magistrate Bell guidance in this situation?

20. Magistrate Moore went into his office once morning and found a whalebone spirit mask Mary Muffet had left him as a gift. The spirit mask is of a fine quality and worth a great deal of money. Ms. Muffet's son has a trial scheduled before Magistrate Moore in a few weeks.

A. Should Magistrate Moore accept the whalebone spirit mask from Ms. Muffet? If so, why? If not, why not?

B. Which canon gives Magistrate Moore guidance in this situation?

21. Magistrate Salmon needs a bank loan to fix his commercial fishing boat for the fishing season. He calls the bank and asks them if he can get a loan. Bobby Banker says, "For you, anything. I'll also check to see if we can get you better terms than most of our borrowers get."

A. May a magistrate or judge borrow money?

B. If Bobby Banker is able to get better terms for Magistrate Salmon than other borrowers receive, should Magistrate Salmon borrow money at a lesser interest rate than the bank's other borrowers?

C. What are the terms suggested by the Code of Judicial Conduct if a judge borrows money?

D. Which canon gives guidance on the standards for loans by judges?

22. Magistrate Brown and her family are invited to dinner by friends.

A. Is it proper for Magistrate Brown and her family to go to dinner at a friend's house?

B. Which canon gives a judge and his family guidance about what hospitality should be accepted?

23. Magistrate Brown's son still lives at home, but is getting married soon. As soon as the date of the wedding is announced, gifts from friends start arriving.

A. May Magistrate Brown's son and wife-to-be accept the wedding gifts from their friends?

B. Which canon gives Magistrate Brown and her son guidance about accepting gifts?

C. Magistrate Brown's son, on the same terms as all other applicants, applied for and received a scholarship from the University of Alaska. May the son accept the scholarship? If so, why? If not, why not?

D. Which canon gives Magistrate Brown and her son guidance about whether the scholarship should be accepted?

24. A friend gives Magistrate Brown a $500 gift certificate which can be used at a grocery store in Anchorage. The friend tells Magistrate Brown that the gift certificate is to help buy food for her son's wedding.

A. May Magistrate Brown accept the gift certificate? If so, why? If not, why not?

B. What is the test as to whether or not the $500 gift certificate should be accepted?

C. If Magistrate Brown is a full-time magistrate, does she need to make a report of the gift to the Administrative Director of the Alaska Court System? If so, why? If not, why not?

D. Which two canons and sections of the Code of Judicial Conduct give guidance about gifts to magistrates and their family members and the reporting of those gifts?

25. Magistrate Salmon got the loan to fix his commercial fishing boat. Two crew members have quit. Magistrate Salmon works sixty hours a week on the fishing boat and has little time for his magistrate duties. He is doing arraignments at midnight and 1:00 a.m.

A. Does the commercial fishing interfere with the performance of Magistrate Salmon's judicial duties?

B. What is Magistrate Salmon's first priority?

C. Which two canons give Magistrate Salmon guidance in this situation?

26. Magistrate Slick has been a member of the Akpak Search and Rescue Society, not conducted for profit, for eighteen years. In that time Magistrate Slick has been a director and officer of the nonprofit organization. Recently, she was asked to raise money for the Akpak Search and Rescue Society.

A. Was it proper for Magistrate Slick to be a director and an officer of the Akpak Search and Rescue Society while she was a magistrate?

B. In organizations not conducted for profit, such as a parent and teacher association at a local school, a church, a search and rescue organization, the Elks Club, or a theatre group, what positions could a judge hold in the organization?

C. Which canon gives a judge guidance about what he or she may do with respect to civic and charitable activities?

D. May Magistrate Slick raise money for the Akpak Search and Rescue Society?

E. May Magistrate Slick speak at a fund raising event for the Akpak Search and Rescue Society?

F. Which canon gives a judge guidance about standards for conduct in raising funds for civic and charitable activities?

27. Magistrate Douglas comes from the Douglas family which has been feuding and fighting with the Harlan family for twenty years. One of the Harlan boys is accused of assault and reckless endangerment. The Harlan boy pleads not guilty and requests a trial. Magistrate Douglas secretly thinks the Harlan family is a disgrace to the community and this boy is the worst.

    A. If the Harlan boy consents in writing to have Magistrate Douglas hear his case should Magistrate Douglas conduct the trial? If so, why? If not, why not?

    B. Which canon gives Magistrate Douglas guidance in this situation?

28. Magistrate Douglas lives next door to the Stone family. One evening, as Magistrate Douglas is coming home, he sees Mr. Stone in a fist fight with another neighbor. The neighbor files a complaint for assault and battery with the village police.

    A. Should Magistrate Douglas, who saw the events, conduct the arraignment? If so, why? If not, why not?

    B. Should Magistrate Douglas conduct the trial? If so, why? If not, why not?

    C. Which canon gives Magistrate Douglas guidance in this situation?

29. Magistrate Timmons, his wife, and children are shareholders in the village native corporation. The village native corporation owns and manages the village grocery store. When the grocery store has a "good year", profits are high and each shareholder of the village native corporation receives a dividend. When the grocery store profits are low, no one in the village native corporation receives a dividend. The grocery store gives "credit" to some people and allows them to pay grocery bills at the end of the month. John Jerk has been getting groceries on credit and has not paid his bill of $887.42 in three months. The village native corporation, for and on behalf of the grocery store, decides to file a small claims action in the amount of $887.42 in Magistrate Timmons' court.

    A. Does Magistrate Timmons have a financial interest in the subject matter of the small claims trial? If so, why? If not, why not?

    B. Should Magistrate Timmons conduct the small claims trial? Is there any basis to believe he could not be fair?

    C. What canon defines "financial interest" of a judge?

D. Despite Magistrate Timmons having a financial interest in the outcome of the case, is there any procedure which could be used to allow Magistrate Timmons to hear the case?

E. What canon gives guidance to a judge with a small interest in a case to enable the judge to hear the case?

30. Magistrate Slick's ex-husband is accused of assault and reckless endangerment. He pleads not guilty at arraignment.

A. Can Magistrate Slick conduct the trial? If so, why? If not, why not?

B. Which canon gives Magistrate Slick guidance in this situation?

31. Which six canons are not applicable to part-time judges?

A. ______________________ D. ____________________

B. ______________________ E. ____________________

C. ______________________ F. ____________________

32. The presiding judge of the fourth judicial district asks Magistrate Salmon to be on a committee studying sentencing of fish and game violations.

A. May Magistrate Salmon sit on such a committee? If so, why? If not, why not?

B. Which canon gives Magistrate Salmon guidance in this situation?

C. May Magistrate Salmon testify at a public hearing on the sentencing of fish and game violations? If Magistrate Salmon may testify, what limitation is placed on his appearance at the public hearing?

D. Which canon gives guidance to a magistrate desiring to testify at public hearings on matters concerning the administration of justice?

33. If a magistrate has any ethical questions to which he or she does not know the answer, who should the magistrate contact?

34. In a few sentences, why are the canons set out in the Code of Judicial Conduct so important?

Trial Courts
State of Alaska

FIRST JUDICIAL DISTRICT
P. O. BOX 869
WRANGELL, ALASKA
99929

December 12, 1985

Kevin K. Bruce
Senate Judiciary Committee
Pouch V
Juneau, Alaska 99811

Re: CSSB 321: "An Act including magistrates within the jurisdiction of the commission on judicial qualifications."

Dear Mr. Bruce:

The majority of magistrates who responded to my request for comments on CSSB 321 had no objection to passage of the bill. However, many concerns and questions were raised which we believe must be addressed prior to an official response from the Association of Alaska Magistrates. I will list those concerns as presented to me.

1) The magistrates feel they are treated fairly by presiding judges with no fear of arbitrary or capricious acts. The consensus is that a magistrate would be afforded due process should a problem arise. However, it would be beneficial to know the procedure that would be employed upon the filing of a complaint.

2) What are the rules within which the Commission operates? How and when is a complaint determined to be "formal"? When is notification given to the judge?

3) Since we serve at the pleasure of the presiding judge, it is requested, should this bill pass, that any complaint filed against a magistrate be immediately copied to the presiding judge.

4) If magistrates were placed under the jurisdiction of the Commission, would attorneys fees be paid by the state as is now the practice with other judges?

Trial Courts
State of Alaska

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4) If magistrates were placed under the jurisdiction of the Commission, would attorneys fees be paid by the state as is now the practice with other judges?

Kevin K. Bruce
December 12, 1985
Page Two

5) If the Commission recommends action after investigating a complaint, does this recommendation go to the supreme court or to the presiding judge? Who makes the final decision?

6) Would passage of this bill mean that magistrates, in the future, would have to stand for retention election?

7) Since this is one of two areas where the statutes still differentiate between magistrates and other judges, would inclusion under the jurisdiction of the Commission also mean inclusion under judicial retirement?

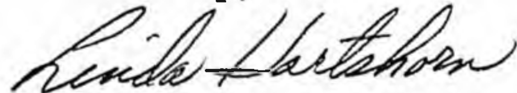
As you can see, there are many questions that need to be answered before we can make the decision to support or oppose this legislation. The general feeling is that it would be good to know there is a fixed procedure for dealing with complaints. However, there is no perception of unfairness or lack of due process under the current system.

The Commission is sending to me their operating manual and annual report, which includes rules and procedures. When this information is received and the above concerns are addressed, we will be able to present a response to your request. I understand that the Court System and the Commission have not yet taken a stand on the bill. We will get ours to you as soon as possible.

I believe the reference in the bill to "Commission on Judicial Qualifications" should be changed to "Judicial Conduct Commission".

Please give me a call at 874-2311 if you have any questions.

Sincerely,



Linda Hartshorn, Magistrate
for The Association of
Alaska Magistrates

cc: All Magistrates

Commission on Judicial
Conduct
303 K STREET
ANCHORAGE, ALASKA 99501
264-0528

December 13, 1985

Mr. Kevin Bruce
Office of Senator Rodey
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

RE: SB 321

Dear Mr. Bruce:

In talking with Ms. Linda Hartshorn, magistrate from Wrangell yesterday, it occurred to me that you are perhaps not familiar with our Staff Manual. I do recall sending you a copy of our Rules of Procedure, but the Staff Manual might be more helpful in that in includes the staff's investigative guidelines. I did send a copy of the current staff manual (legal size paper) and the proposed staff manual (letter size paper) to Ms. Hartshorn for her information. The proposed staff manual incorporates primarily staff procedures which have been adopted since the Commission acquired and electronic typewriter/word processing system. If I can be of further assistance, please let me know. The Commission's Annual meeting is scheduled for Thursday, January 16th, 1986 in Anchorage.

Thank you for your patience and consideration.

Sincerely,

Jane S. Rosenquist

Jane S. Rosenquist
Legal Assistant

encl.

PROPOSED STAFF MANUAL

ALASKA COMMISSION ON JUDICIAL CONDUCT
STAFF MANUAL

POLICY 1 - OPENING ACCUSATION FILE

Upon receipt of a written or oral request for investigation setting forth allegations of judicial misconduct by a member of the state judiciary, or at the direction of the Commission, the following procedure is to be followed:

A. A legal size file folder is punched by a two-hole punch and clip fasteners are attached.

B. Any written communication (date stamped with date of receipt) is punched and inserted on the left side of the folder.

C. An accusation number is assigned and the complainant name is logged in the written complaint log next to the appropriate inquiry number. Further, the same information is logged into the accusation log disk under the appropriate year file name (i.e., 85log, 84log, etc.)

D. An Intake Form is prepared and clipped to the left side of the file folder (Form 1). Two copies are made if nonjurisdictional, three if jurisdictional [see Intake Form Instructions (E)].

E. An Investigation Log Form is prepared and clipped to the left side of the file folder (Form 2).

F. A file tab with the complainant's last name, the judge's last name, and the accusation number typed on it is attached to the file folder. The folder is stamped "confidential".

G. The accusation number is noted on all documents in the file and all materials subsequently received.

H. Cross index system is prepared as follows:

1. The following information is entered on "card file system-complainant" disk under file name which corresponds to complainant last name, first initial:

   Complainant name   Accusation number
   Judge name   Date opened
   Brief statement of complaint
   Date closed & disposition

2. The "card file system-judge name" disk contains the same information as above, except that the judge's name is typed first and the complainant name second.

I. An introductory acknowledgement letter is sent to the complainant, with file number, following form letter A in the form file book.

J. If the conduct complained of requires a case file or tapes of proceedings, order those using form letter B in the form file book.

K. The file is given to the Executive Director for examination and action.

FORM 1 - INTAKE FORM

A. As much information as possible is filled out from available information.

B. A case number is assigned from the "Accusation Log". The complainant's name is logged in the Accusation Log next to the appropriate complaint number.

C. If a letter, affidavit, or other materials are available explaining the nature of the accusation, this is noted in the "Accusation Summary" portion of the Intake Form.

D. The appropriate status and disposition of the accusation, if known, are marked on the Intake Form. For example, if the complaint is against a magistrate, the form is marked under "Non-jurisdictional", "Magistrate". If the accusation is jurisdictional, the statutory ground(s) for jurisdiction is noted, and the appropriate code from the "Code List of Fact Patterns" is selected and entered under "Type of Misconduct". The first copy of the Intake Form is automatically filed in the "Judge's File" if the accusation is jurisdictional.

E. The original of the Intake Form is placed in the case file. The second copy is placed in the "open" file until the accusation is closed. This copy is removed from the open file and placed in the "closed" file when the accusation is closed. The third copy is placed in the "numerical" file.

FORM 2 - INVESTIGATION LOG FORM

A. The accusation number is typed into the appropriate space on the investigation log form at the time the accusation file is opened.

B. Any time action is taken or occurs concerning the accusation, it is logged on this form. For example, if phone calls are made, correspondence is sent out or received, or files in the clerk's office are researched, a note is made, dated, and the person noting the information logs in their initials.

ALASKA COMMISSION ON JUDICIAL CONDUCT
CODE LIST OF FACT PATTERNS

A. Physical and mental disability

1. Physical illness
2. Age and senility
3. Mental illness
4. Alcohol or drug abuse

B. Judicial Misconduct

1. Improper court decorum (on bench or in chambers)

    a. Improper consideration and treatment of attorneys, court employees, witneses and others

    b. Improper or eccentric bench conduct such as sleeping or drunkenness

    c. Interference in making the record and conducting trials in own court

2. Failure or refusal to dispose promptly of judicial business, enter orders, or cooperate in administration of court

3. Prohibited practice of law

4. Conducting ex parte proceedings or engaging in ex parte discussions

5. Interference with attorney-client relationship

6. Improper use of judicial authority (doing something in judicial capacity that judges are not authorized to do)

   a. In conducting proceedings (refusing to appoint public defenders, not holding court in courtroom, not observing formalities, not informing defendants of their rights or depriving them of their rights, setting bail when defendants are not represented by counsel, or otherwise failing to observe normal procedures as to where or how court is held)

   b. In entering judgement

   c. In threatening or determining bail, sentences, punishment, or contempt

   d. In entering or threatening to enter other judicial orders

   e. In falsely or improperly certifying documents or court records

7. Influence of family, social, political, business, and property relationships

   a. On judicial decisions

      (1) Own decisions
      (2) Decisions of other judges

   b. On making appointments

   c. On other matters relating to the administration of justice - transferring case and reducing charges

8. Conflict of interest

9. Bias

10. Giving or receiving gifts, bribes, loans or favors

11. Impropriety off the bench

    a. Misappropriation or misuse of public employees, property, or funds

    b. Improper comments, accusations, associations or connections

    c. Interference with or influence on pending or impending litigation (litigation before other judges)

    d. Lewd or corrupt personal behavior

    e. Business dealings; extrajudicial business activity conducted for compensation or personal advantage

    f. Use of judicial position to extort or embezzle private funds

    g. Misconduct in the permitted practice of law

    h. Improprieties in personal debts and loans

12. Political and campaign activities - own campaign or other politicians'

13. Abuse of prestige of office

14. Obstruction of justice, perjury, filing false document

15. Criminal behavior

16. Failure to disqualify self

17. Ticket fixing

ALASKA COMMISSION ON JUDICIAL CONDUCT
STAFF MANUAL

POLICY 2 - INVESTIGATIVE GUIDELINES

The following are guidelines which govern the general approach taken by the staff in the conduct of its investigations and interviews:

A. The Executive Director or investigator shall initially identify him or herself to the witness.

B. Where applicable, reference shall be made to the authority by which the Commission conducts its investigations, specifically, Alaska Const., Art. IV, Sec. 10, and A.S. 22.30.011.

C. Clear and emphatic reference shall be made to the strict confidentiality of the investigation, and reference made to the prohibition imposed on the Commission and its staff regarding disclosure of the existence or content of the investigation.

D. A request shall be made that the witness, in turn, keep the interview confidential.

E. No admission is to be made by the investigator regarding the subject of the investigation and the witness is to be admonished that no inference regarding the subject of the investigation should be drawn from the questions asked.

F. The investigator shall indicate that the statement given by the witness will remain confidential as a part of the Commission's investigative file until such time, and only if and when, the Commission files a formal complaint pursuant to Rule 9C(4) of the Commission's Rules of Procedure.

G. Further caution shall be given that in the event of an ensuing hearing, the witness may be called to testify and the present statement given by the witness could be used to refresh his or her recollection or point out any material contradiction in his or her later testimony.

H. Unless otherwise approved by the Commission, only those witnesses who are believed to have specific knowledge of the subject matter of the investigation are to be contacted and interviewed.

I. During the course of the interview, generalized questions shall be employed regarding the alleged misconduct of a particular judge, which would not reveal the source of previously supplied information.

J. During the course of the interview, factual or leading questions shall be employed only for the purpose of attempting to refresh the recollection or seek clarification of a prior contradictory response.

K. The interview shall be immediately terminated upon the expression of the witnesses' reluctance or refusal to participate in the interview or to answer further questions.

L. Generally, the investigation should be limited to the initial scope of the inquiry.

M. If there is indication of possible criminal involvement, the witness should be advised that the Commission may refer the matter to the proper law enforcement authority for further investigation.

N. All witnesses may be interviewed by members of the Commission staff or by other individuals appointed in writing by the Commission or its Executive Director.

O. In an interview with the Respondent, counsel for the Respondent may be present during the course of the interview if the Respondent so desires.

P. A witness may be accompanied by legal counsel during the course of an interview.

Q. If deemed necessary, an interview can be preserved by means of a stenographic record or taped recording, subject to the prior approval of the Executive Director and with the initial indication to the witness that the interview will be so preserved.

R. Under normal circumstances, a witness is to be interviewed at a location convenient to the witness.

S. An investigative report should contain a summary of all pertinent facts.

T. Staff investigations are to be completed as expeditiously as possible with cumulative evidence sought only where necessary to establish a continuing pattern of misconduct.

U. In analyzing judicial conduct the Executive Director and the investigator(s) shall be guided by Art. IV, Sec. 10 of the Alaska Constitution and A.S. 22.30.011.

CURRENT
STAFF MANUAL

ALASKA COMMISSION ON JUDICIAL CONDUCT
STAFF MANUAL

POLICY 1 - OPENING INQUIRY FILE

Upon receipt of a written or oral request for investigation setting forth allegations of judicial misconduct by a member of the state judiciary, or at the direction of the commission, the following procedure is to be followed:

A. A legal size file folder is punched by a two hole punch and clip fasteners are attached.

B. Any written communication (date stamped with date of receipt) is punched and inserted on the left side of the folder.

C. An inquiry number is assigned and the complainant name is logged in the complaint log next to the appropriate inquiry number.

D. An Intake Form is prepared and clipped to the left side of the file folder. (Form 1)

E. An Investigation Log Form is prepared and clipped to the left side of the file folder. (Form 2)

F. A file tab with the complainant's last name, the judge's last name, and the inquiry number typed on it is attached to the file folder. The folder is stamped "confidential".

G. The inquiry number is noted on all documents in the file and all materials subsequently received.

H. File index cards are prepared and filed as follows:

1. The following information is typed on a 3 x 5 card:

   Complainant name — Inquiry number
   Judge name
   Date opened
   Brief statement of complaint
   Date closed and disposition

2. A second index card is typed with the same information as above, except that the judge's name is typed first and the complainant's name second. The first card is to be filed in the "complainant card file" and the second card is to be filed in the "judge card file".

I. The file is given to the staff assistant for examination and action.

ALASKA COMMISSION ON JUDICIAL CONDUCT
STAFF MANUAL

FORM 1 - INTAKE FORM

A. As much information as possible is filled out from available information.

B. A case number is assigned from the "Complaint Log". The complainant's name is logged in the Complaint Log next to the appropriate complaint number.

C. If a letter, affidavit, or other materials are available explaining the nature of the complaint, this is noted in the "Complaint" block of the Intake Form.

D. The appropriate status and disposition of the inquiry, if known, is marked on the Intake Form. For example, if the complaint is against a magistrate, the form is marked under "Non-jurisdictional", "Magistrate" and under "Referral" to "Presiding Judge". If the complaint is jurisdictional, the appropriate code form the "Code List of Fact Patterns" (Form 1a) is selected and entered. A copy of the Intake Form is automatically filed in the "Judge's File" if the complaint is jurisdictional.

E. The original copy of the Intake Form is placed in the case file. The second copy is placed in the "open" file until the inquiry is closed. This copy is removed from the open file and placed in the "closed" file when the inquiry is closed. The third copy is placed in the "numerical" file.

FORM 2 - INVESTIGATION LOG FORM

A. The inquiry number is typed into the appropriate space on the investigation log form at the time the inquiry file is opened.

B. Any time action is taken or occurs concerning the inquiry, it is logged on this form. For example, if phone calls are made, correspondence is sent out or received, or files in the clerk's office are researched, a note is made, dated, and the person noting the information logs in their initials.

ALASKA COMMISSION ON JUDICIAL CONDUCT
INTAKE FORM

Accusation No.________ Date Opened: ________ Date Closed: ________

Name: ____

Address: ____

Phone: (Hm) ___________ (Wk) ___________

RESPONDENT JUDGE: ______________________________

JUDICIAL DISTRICT: 1 2 3 4 **COURT:** Superior, Appeals, Supreme, District

NONJURISDICTIONAL: Attorney, Magistrate, Federal, Other ___________

JURISDICTIONAL: Misconduct, Mental Disability, Physical Disability

STATUTORY GROUNDS:

Disability: ___________
Conviction: ___________
Wilful Misconduct: ___________
Wilful/Persistent Failure to Perform Duties: ___________
Conduct Prejudicial to Admin. of Justice: ___________
Conduct that Brings Judicial Office into Disrepute: ___________
Violation of Code of Conduct: ___________
Habitually Intemperate: ___________

TYPE OF MISCONDUCT:

Improper Court Decorum: ___________
Administrative Failure/Refusal: ___________
Prohibited Practice of Law: ___________
ExParte Proceedings/Discussions: ___________
Interference - Attorney/Client: ___________
Improper Use of Judicial Authority: ___________
Improper Influence: ___________
Conflict of Interest: ___________
Bias: ___________
Gifts, Bribes, Loans, Favors: ___________
Impropriety Off Bench: ___________
Improper Political/Campaign Activities: ___________
Abuse of Prestige of Office: ___________
Obstruction of Justice: ___________
Criminal Behavior: ___________
Failure to Disqualify: ___________
Ticket Fixing: ___________

DISPOSITION: ___________________________________
RECOMMENDATION: ________________________________
____
____

ACCUSATION SUMMARY - SEE REVERSE

FORM 2

ALASKA COMMISSION ON JUDICIAL CONDUCT
INVESTIGATION LOG FORM
INQUIRY # ____ - ______

DATE	ACTION TAKEN	INITIALS

FORM 1a

ALASKA COMMISSION ON JUDICIAL CONDUCT
CODE LIST OF FACT PATTERNS

A. Physical and mental disability

1. Physical illness
2. Age and senility
3. Mental illness
4. Alcohol or drug abuse

B. Judicial Misconduct

1. Improper court decorum (on bench or in chambers)

   a. Improper consideration and treatment of attorneys, court employees, witnesses and others

   b. Improper or eccentric bench conduct such as sleeping or drunkenness

   c. Interference in making the record and conducting trials in own court

2. Failure or refusal to dispose promptly of judicial business, enter orders, or cooperate in administration of court

3. Prohibited practice of law

4. Conducting ex parte proceedings or engaging in ex parte discussions

5. Interference with attorney-client relationship

6. Improper use of judicial authority (doing something in judicial capacity that judges are not authorized to do)

   a. In conducting proceedings (refusing to appoint public defenders, not holding court in courtroom, not observing formalities, not informing defendants of their rights or depriving them of their rights, setting bail when defendants are not represented by counsel, or otherwise failing to observe normal procedures as to where or how court is held)

   b. In entering judgment

   c. In threatening or determining bail, sentences, punishment, or contempt

   d. In entering or threatening to enter other judicial orders

   e. In falsely or improperly certifying documents or court records

7. Influence of family, social, political, business, and property relationships

   a. On judicial decisions

      (1) Own decisions
      (2) Decisions of other judges

   b. On making appointments

   c. On other matters relating to the administration of justice - transferring case and reducing charges

8. Conflict of interest

9. Bias

10. Giving or receiving gifts, bribes, loans or favors

11. Impropriety off the bench

    a. Misappropriation or misuse of public employees, property, or funds

    b. Improper comments, accusations, associations, or connections

    c. Interference with or influence on pending or impending litigation (litigation before other judges)

    d. Lewd or corrupt personal behavior

    e. Business dealings; extrajudicial business activity conducted for compensation or personal advantage

    f. Use of judicial position to extort or embezzle private funds

    g. Misconduct in the permitted practice of law

    h. Improprieties in personal debts and loans

12. Political and campaign activities - own campaign or other politicians'

13. Abuse of prestige of office

14. Obstruction of justice, perjury, filing false document

15. Criminal behavior

16. Failure to disqualify self

17. Ticket fixing

ALASKA COMMISSION ON JUDICIAL CONDUCT
STAFF MANUAL

POLICY 2 - INVESTIGATIVE GUIDELINES

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B. Where applicable, reference shall be made to the authority by which the commission conducts its investigations, specifically, Alaska Const., Art. IV, Sec. 10, and AS 22.30.011.

C. Clear and emphatic reference shall be made to the strict confidentiality of the investigation, and reference made to the prohibition imposed on the commission and its staff regarding disclosure of the existence or content of the investigation.

D. A request shall be made that the witness, in turn, keep the interview confidential.

E. No admission is to be made by the investigator regarding the subject of the investigation and the witness is to be admonished that no inference regarding the subject of the investigation should be drawn from the questions asked.

F. The investigator shall indicate that the statement given by the witness will remain confidential as a part of the commission's investigative file until such time, and only if and when, the commission files a formal complaint pursuant to Rule 10E(4) of the commission's Rules of Procedure.

G. Further caution shall be given that in the event of an ensuing hearing, the witness may be called to testify and the present statement given by the witness could be used to refresh his or her recollection or point out any material contradiction in his or her later testimony.

H. Unless otherwise approved by the commission, only those witnesses who are believed to have specific knowledge of the subject matter of the investigation are to be contacted and interviewed.

I. During the course of the interview, generalized questions shall be employed regarding the alleged misconduct of a particular judge, which would not reveal the source of previously supplied information.

J. During the course of the interview, factual or leading questions shall be employed only for the purpose of attempting to refresh the recollection or seek clarification of a prior contradictory response.

K. The interview shall be immediately terminated upon the expression of the witnesses' reluctance or refusal to participate in the interview or to answer further questions.

L. Generally, the investigation should be limited to the initial scope of the inquiry.

M. If there is indication of possible criminal involvement, the witness should be advised that the commission may refer the matter to the proper law enforcement authority for further investigation.

N. All witnesses may be interviewed by members of the Commission staff or by other individuals appointed in writing by the Commission or its Staff Assistant.

O. In an interview with the Respondent, counsel for the Respondent may be present during the course of the interview if the Respondent so desires.

P. A witness may be accompanied be legal counsel during the course of an interview.

Q. If deemed necessary, an interview can be preserved by means of a stenographic record or taped recording, subject to the prior approval of the staff assistant and with the initial indication to the witness that the interview will be so preserved.

R. Under normal circumstances, a witness is to be interviewed at a location convenient to the witness.

S. An investigative report should contain a summary of all pertinent facts.

T. Staff investigations are to be completed as expeditiously as possible with cumulative evidence sought only where necessary to establish a continuing pattern of misconduct.

U. In analyzing judicial conduct the staff assistant and investigator(s) shall be guided by Art. IV Sec. 10 of the Alaska Constitution and AS 22.30.011.

Filing a Complaint

To file a complaint, contact the Commission office in person, by telephone, or in writing. The address and telephone number is on the back of this brochure.

Investigating a Complaint

The Commission will review the complaint, a step which usually involves an interview by Commission staff with the person who filed the complaint. The person who has alleged the misconduct must submit facts surrounding the incident to the Commission. No complaint will be decided solely on the basis of claims made by the complainant. All allegations will be thoroughly investigated.

The Commission has the authority to initiate its own inquiry into possible judicial misconduct.

After the initial inquiry, the Commission may dismiss the complaint or conduct a full investigation, including formal hearings. A complaint against a judge may be dismissed by the Commission at any time during the investigation, if the charge is found to be without merit.

Complaints filed with the Commission and all Commission inquiries, investigations, and hearings are confidential. They become public when Commission recommendations are filed with the Supreme Court.

Powers of the Commission

The Commission only has the power to investigate charges of judicial misconduct or disability. After a formal hearing, the Commission may:

- Exonerate the judge of the charge or charges.
- Reprimand the judge publicly or privately.
- Recommend that the Supreme Court take one of the following actions against the judge:

  Suspension
  Removal
  Retirement
  Public Censure
  Private Censure

Powers the Commission Does Not Have

The Commission does not have the authority to hear an appeal for judicial error, mistake, or other legal reasons for appeals. That is the role of the state's appellate courts.

The Commission cannot supervise any local court administration.

The Commission has no authority to evaluate judges for retention elections.

For Information/ To File a Complaint

Alaska Commission on Judicial Conduct
Boney Memorial Court Building
303 K Street
Anchorage, Alaska 99501
(907) 264-0528

THE ALASKA COMMISSION ON JUDICIAL CONDUCT

The Alaska Commission on Judicial Conduct

Complaints from the public about the conduct of judges in Alaska are handled by the constitutionally created Alaska Commission on Judicial Conduct. The Commission provides an open channel for any individual who feels he or she has a legitimate complaint about the conduct of any state judge in Alaska.

In addition to reviewing complaints against judges, the Commission helps promote compliance with established codes of conduct for judges.

The Commission consists of nine members:

- Three justices or judges of state courts elected by fellow justices and judges.
- Three attorneys who have practiced law in Alaska at least 10 years. The attorneys are appointed by the Governor from nominations made by the Alaska Bar Association. The appointments must be confirmed by a majority of both houses of the state legislature meeting in joint session.
- Three members of the public who are not attorneys, judges or retired judges. The public members are appointed by the governor and must be confirmed by a majority of both houses of the state legislature meeting in joint session.

Complaints Against Judges

A complaint can be filed by a member of the public against a justice of the supreme court, a judge of the court of appeals, a superior court judge, or a district court judge.

Complaints against magistrates can be filed with Magistrate Services, Boney Memorial Court Building, 303 K Street, Anchorage, AK 99501. These complaints will be referred to the appropriate presiding superior court judge for investigation.

Types of Complaints

The Commission has the authority to handle a wide range of complaints against judges for alleged misconduct both inside and outside the courtroom, or because of a mental or physical disability that seriously interferes with judicial duties.

Judicial Misconduct

Alleged judicial misconduct can include, but is not limited to:

Improper Courtroom Decorum

- Improper consideration and treatment of counsel, witnesses, and others.
- Improper or eccentric bench conduct, such as sleeping or drunkenness.
- Failure or refusal to dispose of judicial business promptly, enter orders, or cooperate in court administration.

Improper or Illegal Influence

- Allowing family, social, or political relationships to influence any judicial decision, making appointments, or other matters relating to the administration of justice, such as transferring cases or reducing charges.
- Conflict of interest.
- Giving or receiving gifts, bribes, loans, or favors.

Impropriety Off the Bench

- Misappropriation or misuse of public employees, property or funds.
- Improper comments, accusations, associations, or connections.
- Interference with or influence on a pending or impending lawsuit.
- Lewd or corrupt personal life.
- Use of judicial position to extort or embezzle private funds.

Other Improper or Illegal Activities

- Conducting proceedings or engaging in discussions involving one side or in the interest of one party only.
- Interfering with the attorney-client relationship.
- Improper use of judicial authority.
- Bias.
- Improper political campaign activities involving the judge or any political candidate.
- Abusing the prestige of the judicial office.
- Obstruction of justice, perjury, filing a false document.
- Criminal behavior.
- Failure to disqualify self.
- Ticket Fixing.

Physical or Mental Disability

Physical or mental disability can include, but is not limited to:

Alcohol or drug abuse
Senility
Serious physical illness
Mental illness

N.B. Tread
Cleve Bd. Edu. v.
Loudermill
53 USLW 4306 (1985)
pub ees entitled to hrg. before being fired

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY,

Plaintiff,

vs.

HONORABLE JUDGE S. J. BUCKALEW;
HONORABLE JUDGE RALPH E. MOODY;
and STATE OF ALASKA,

Defendants.

No. 3AN-77-8145 CIV

PLAINTIFF'S REPLY MEMORANDUM AND MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In their memorandum in opposition to plaintiff's motion for summary judgment and in support of defendants' motion for summary judgment, defendants make several points that will be dealt with sequentially. However, plaintiff notes that defendants' position completely overlooks and ignores the critical and central point made by plaintiff in his submission--that under the Supreme Court's decision in this case, Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979), the presiding Superior Court Judge's statutory power to remove a judge--notwithstanding the "serves at the pleasure" language--was narrowly interpreted so as to provide a means of quickly removing a magistrate when, and only when, such action was justified on the basis of judicial unfitness. By totally ignoring this argument, and presenting nothing to dispute the correctness of it, defendants are able to argue their position on a rationale that makes it wholly irrelevant that the officerholder in question is a judge rather than a political appointee serving at the whim of some elected official.

Defendants cite several cases to the effect that one who "serves at the pleasure" of another has no right to a hearing before being terminated. These cases involve officials such as

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city managers, deputy sheriffs, and officers of legislative bodies. Plaintiff will concede at the outset that if the language "serves at the pleasure" in A.S. 22.15.170(c) relegates the tenure of magistrates to that of purely political functionaries, he has no case. Plaintiff's argument, which is determinative of the case if plaintiff prevails on it, and which the defendants have ignored, is that it was plainly held not to mean the same thing by the Alaska Supreme Court.

Defendants argue that plaintiff had no "property interest" or "liberty interest" and consequently there are no due process implications to his summary dismissal. They further argue that no "stigma" attached to his dismissal, that his dismissal was in any event proper because of his acknowledgement that he had used marijuana, and that he somehow waived his right to a hearing because he did not specifically request one after he had been informed of a fait accompli--his summary termination. If plaintiff's argument that he could only be removed for judicial unfitness is accepted hypothetically, it becomes clear that the defendants position crumbles. Clearly, if judicial unfitness is the only criterion that justifies removal, he had a "property interest"--an expectation of continued employment so long as he performed his duties and was fit, at least during the two-year period that he was expected to commit to the job. Similarly, the cases cited by both parties make it clear than an officeholder's "liberty interest" is involved where his termination stigmatizes him, thereby entitling him to a hearing. If judicial unfitness is the only legitimate basis for removing him, his summary removal necessarily implies--whether the actual reasons are publicly stated or not--that he is unfit and he has, ipso facto, been stigmatized by his removal.

Finally, if "judicial unfitness" is the only basis for removal, Holloway's acknowledgement about marijuana use can

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1 hardly obviate the need for a hearing directed at determining
2 whether, and to what extent, such conduct affected his fitness or
3 performance of duties as a judge. Private marijuana use is
4 constitutionally protected in Alaska, and could not, in and of
5 itself, justify his removal.[1/]

6 The Waiver Question

7 Defendants' argument that plaintiff somehow waived his
8 right to a hearing is based upon portions of an answer to a
9 request for admission that are taken out of context, and is
10 totally inconsistent with defendants' position in this lawsuit.
11 Defendants rely upon an admission that, as quoted in their memo-
12 randum at page 3, Judge Holloway "did not specifically request a
13 hearing prior to the issuance of the order which terminated [his]
14 appointment. . . ." The answer, in its entirety, states as
15 follows:

16 Admit that I did not specifically request
17 a hearing prior to the issuance of the order
which terminated my appointment, since I
18 had assumed that some kind of hearing would
be held as a matter of course prior to such
19 action. Deny that I had a full opportunity
to make a comprehensive and detailed pre-
20 sentation of my views prior to the order of
termination, since I was not on notice that
21 such order would be issued swiftly and with-
out utilization of a hearing process.

22 See Responses to Request for Admission, December 27, 1977.

23 The circumstances leading up to Judge Holloway's termi-
24 nation are that on August 19, 1977 he received a call from Jim
25 Arnold advising him that various charges had been leveled against

26 ______________________

27 1/ In fact, the original reason for his suspension was not
marijuana use at all, but rather the fact that he was living
28 in the same house as a woman to whom he was not (although
now is) married. In fact, Judge Holloway believes that he
29 was removed as the culmination of a process that was started
by the District Attorney because of dissatisfaction with
30 certain judicial actions he had taken that were wholly
unrelated to his personal life. Complaint, para. 5(c).
31 These issues need to be resolved at a hearing directed at
the sufficiency of grounds for his removal. See discussions,
32 *infra*.

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him and that he and Judge Moody were scheduled to leave on vacation and that Judge Holloway had to respond promptly so that the matter could be cleared up before the impending vacations. Judge Holloway denied the serious charges, admitted to living in the same dwelling unit with other persons, one of whom was his girlfriend, and admitted that he "sometimes used marijuana." Affidavit of James Holloway, April 1983, para. 8. Judge Holloway requested the names of the individuals making the charges, which information was denied. Shortly thereafter, he received a telephone call from Judge Buckalew demanding his resignation, which Holloway refused to give, whereupon Judge Buckalew orally suspended him "on the grounds of living with the woman without a license." Ibid., para. 9. Five days later he received a copy of an order signed by Judge Buckalew terminating his appointment. Ibid., para. 10. Judge Holloway asked, through his attorneys, that he be afforded a due process hearing. Ibid., para. 11. He has never received an explanation of the charges, the names of the accusors, or any kind of a hearing. Id.

On the basis of the above, it is clear that Judge Holloway had no opportunity to obtain a hearing, because he was informed of the adverse action after it had been taken. Moreover, the defendants have consistently maintained throughout these proceedings that he has no right to a hearing, and there is no specific provision for a hearing in the statutes or regulations relating to magistrates. Consequently, a request for a hearing would plainly have been a futile act on his part and one already rendered moot by past events. In recognition of the unclear procedures to follow to obtain a hearing, counsel for Holloway contacted Judge Moody and Judge Buckalew on August 31, 1977 and stated as follows:

> At this stage of my research, it is unclear what person or forum Mr. Holloway's position

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should be communicated to and your advice in this respect would be greatly appreciated.

See Affidavit of John S. Hedland. It is clear that Judge Holloway did everything humanly possible to obtain a hearing, and it is equally clear that at no point did defendants have the slightest intention of affording him one. Under these circumstances, he cannot be held to have waived his right to a hearing.

Here Holloway was not aware of his pending termination until he was informed that he had in fact been terminated.

> What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner," . . . "for [a] hearing appropriate to the nature of the case." The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Boddie v. Connecticut, 401 U.S. 371, 378-9 (1971). [Citations and footnotes omitted; emphasis original]. It is indisputable here that Holloway was never afforded any opportunity for a hearing before or after he was terminated, and thus the argument the State makes that Holloway "waived" his right to a hearing is illusory.

It is well settled that:

> [t]o constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege--an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded. In no case will a

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> waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.

Chase v. National Indemnity Co., 278 P.2d 68, 72 (Cal.App. 1954). See also, Ed Black's Chevrolet Center, Inc. v. Melichar, 471 P.2d 172, 174 (N.M. 1970). In no way can Holloway's conduct be inferred as a waiver of his right to a hearing, and in no way can the State realistically contend that it has been prejudically misled into the honest belief that Holloway intended to waive his constitutional right to a hearing or consented to a relinquishment of that right.

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1 The Marijuana Question

2 The argument that Holloway is not entitled to a hearing
3 because he acknowledged having used marijuana is flawed in several
4 fundamental respects. Basically, defendants state that since 21
5 USC §844(a) makes possession of marijuana a federal offense and
6 because Canon 2 of the Code of Judicial Conduct states that a
7 judge should "respect and comply with the law", Judge Holloway's
8 acknowledgement that he had used marijuana ipso facto establishes
9 sufficient grounds for his removal. Therefore, the defendants
10 argue, there are no issues to be resolved at a hearing.

11 The answers to this contention are numerous. The most
12 obvious is the fact that, regardless of what Judge Holloway may
13 have acknowledged in his conversation with Judge Buckalew, he was
14 not removed because of marijuana use. In fact, Judge Holloway's
15 suspension, according to Judge Buckalew's statement to Hollo-
16 way,[2/] was predicated upon the fact that he lived with a woman
17 "without a license", i.e., he lived with a woman to whom he was
18 not married. No other grounds were set out in connection with
19 his removal (See Affidavit of James Holloway, April, 1983)
20 although Judge Moody apparently took the marijuana use question
21 into account in concurring in the termination.

22 Although the defendants have not, over a period of five
23 years, stated that marijuana use was the basis for removal, they
24 baldly assert that it was in the memorandum in opposition to
25 plaintiff's motion for summary judgment. If they wish to contra-
26 dict Judge Holloway's affidavit, they must do so by affidavit
27 themselves.[3/] See Civil Rule 56.

28 2/ The only statement of reasons that was given.

29 3/ The defendants wholly ignore in their reply memorandum what
30 the ostensible basis for firing Judge Holloway was--his alleged violation of a deadletter cohabitation statute that
31 appears to have never been enforced in Alaska; was always of doubtful constitutionality, State v. Harris, 475 P.2d 638,
32 644-47 (Alaska 1969); and has now been repealed. See, generally, Affidavit of John S. Hedland. Defendants are
33 obviously uncomfortable with the implications of their argument in the context in which this case actually deve-
34 loped--that the intimate details of a judge's private life

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Secondly, Holloway was never charged with or convicted of any offense whatsoever under the federal drug laws. Even if it is assumed, for the sake of argument, that his acknowledgement of having used marijuana establishes beyond argument that he had violated 21 USC §844(a), the State's conclusion--that this acknowledgement established judicial unfitness sufficient to warrant his summary removal without a hearing--is incorrect. The defendants cite no authority whatsoever for the proposition that judicial unfitness is established _per se_ through the establishment of facts which demonstrate the technical violation of some penal statute-even in the absense of prosecution or conviction. Indeed, in an analogous situation, the statutes of Alaska providing for discipline of a judge pursuant to Judicial Qualifications Commission action set out clearly what the Legislature regards as judicial unfitness.[4/] Judge Holloway could not have been disciplined under these procedures on the evidence of his acknowledgement of marijuana use without inquiry into its effect, if any, on his general judicial fitness.

A.S. 22.30.070 provides for automatic discipline in the event of conviction "of a crime punishable as a felony under state or federal law or of a crime that involves moral turpitude under state or federal law." A.S. 22.30.070(c) provides for

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3/ continued
are fair game for anyone wishing him to be removed because of dissatisfaction with the judge's official actions. The defendants' red herring marijuana argument should not be allowed to obscure the real issues that this case presents.

4/ In its decision, the Supreme Court reserved judgment on whether or not Judicial Qualifications Commission procedures applied to a magistrate. Buckalew v. Holloway, 604 P.2d 240, 246 (Alaska 1979). However, whether Judicial Council procedures are applicable or not, it is impossible to rationally conclude that the definition of judicial fitness should vary depending upon whether the judge in question is a magistrate, a district court judge, a superior court judge, or an appellate judge. Indeed, if any distinction is logical, it would require a lesser showing of unfitness of a judge occupying a higher level of responsibility and, presumably, possessing a greater potential for mischief in the event of unfitness.

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discipline of a judge in the event of a disability, or for action that "constitutes willful misconduct in the office, willful and persistent failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice, or conduct that brings the judicial office into disrepute." Judge Holloway was not convicted of any crime, and the offense referred to in the plaintiff's memorandum is only a misdemeanor, not a felony, under federal law[5/] and is not a crime of any type under state law. Moreover, mere possession of marijuana is not a crime that involves moral turpitude, even in states where it is a criminal act. See, generally, In re Kreamer, 535 P.2d 728 (Calif. 1975), cited in Matter of Preston, 616 P.2d 1, 5, n. 10 (Alaska 1980); In re Higbie, 493 P.2d 97 (Calif. 1972).

Consequently, the conduct acknowledged by Holloway relating to marijuana could not obviate the need for a hearing prior to his dismissal, whether it amounts to admission of a crime under federal law or not. Judge Holloway was not convicted of any offense, the offense which defendants claim he admitted committing is only a misdemeanor, and it does not involve moral turpitude. If reference is made to the only statutory standard available governing "judicial fitness", the specific statutory provisions enacted to govern discipline of judges, it is clear that the automatic provisions relating to conviction of a felony or a crime involving moral turpitude have not been met. While it is possible that use of marijuana could conceivably, under certain conditions, amount to evidence of unfitness under the more flexible standards A.S. 22.30.070(c), a finding of unfitness in the absence of a hearing could not be based upon mere acknowledgement of the use of marijuana. That provision requires that

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5/ Under 21 U.S. §844, a first conviction is punishable by up to one year in prison, meaning that it is a misdemeanor. 18 U.S.C. §1. Holloway had never been (and has never been) conficted of any drug law violations.

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the conduct in some manner interfere with a judge's ability to function as such or impair the integrity of the office. In this case, there has been no inquiry whatsoever into the frequency, circumstances, or other factors surrounding the use of marijuana. There has been no finding, inquiry, or development of any facts relating to how, if at all, it interfered with his performance of judicial duties, amounted to "habitual intemperance" or otherwise was prejudicial to the administration of justice or subjected the court system to disrepute. These are precisely the factors that a hearing would have to be directed at to justify Judge Holloway's removal.

Finally, defendants' argument wholly overlooks the import of the Supreme Court's decision in Ravin v. State, 537 P.2d 494 (Alaska 1975). In Ravin, the court considered the effect of State action interfering with an individual's private use of marijuana, 537 P.2d at 497-99, under Alaska's right to privacy amendment, Alaska Constitution Article I, Section 22, and held that "possession of marijuana by adults at home for personal use is constitutionally protected . . . ." 537 P.2d at 511. If, as the defendants now maintain, Judge Holloway was removed because of an acknowledgement that he had used marijuana, then it necessarily follows that his removal constituted State action that is constitutionally prohibited under the Ravin decision. There is absolutely no evidence, no showing, and as far as plaintiff knows, no contention, that Judge Holloway's use of marijuana interfered in the slightest with his effective and proper functioning as a Judge, or otherwise reflected upon his fitness.

The plaintiff is aware of the supremacy clause, and realizes that the Alaska Constitution and Supreme Court cannot abrogate a federal statute. On the other hand, the court can judicially notice that prosecutions of adults under the federal drug laws for mere possession of marijuana without intent to sell

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1 or distribute are, for all practical purposes, non-existent.
2 Cf., Ravin v. State, supra, 537 P.2d at 511, n. 70. More import-
3 antly, plaintiff is not requesting that this court attempt to
4 interfere with federal action or any federal prosecutions that
5 may be appropriate. The guarantees of the Alaska Constitution do
6 not confer any immunity from federal prosecution. On the other
7 hand, under the Ravin decision, state action that interferes with
8 private use of marijuana by an adult is prohibited. What plain-
9 tiff is asking is that this court recognize that, absent some
10 inquiry into its effect upon Judge Holloway's performance or
11 fitness as a judge, state action removing him from that position
12 for no other reason than an acknowledgement of private use of
13 marijuana is violative of the policy and constitution of Alaska
14 as pronounced by the Alaska Supreme Court. Consequently, absent
15 a hearing in which the marijuana use in question can be consid-
16 ered in the context of judicial fitness, his removal cannot
17 stand.
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Stigma

Defendants also argue that no "stigma" attached to Judge Holloway's termination because the reasons for it were not publicly announced. As noted above, this argument all but evaporates in light of defendants' argument that the summary removal power is necessary to provide for the removal of unfit judges, and the Supreme Court's clear constriction of the removal power to such situations. If summary removal was designed to eliminate unfit judges, the summary removal of a magistrate, with no statement of the reasons, obviously implies that the magistrate is unfit. It can hardly be questioned, under such circumstances, that summary removal stigmatizes the reputation of a magistrate.

The court can judicially notice the fact that employment application forms routinely request prior employment and the reasons for termination thereof. Faced with such a question, Judge Holloway has the option of remaining silent, which would probably preclude obtaining employment and would, in any event, imply that he had been removed for unfitness or, on the other hand, disclose that he had been removed on the basis of various allegations against him as to which he has never had the opportunity for a hearing to refute or explain them. Clearly, defendants can seek no refuge in their failure to publicize their reasons for his termination insofar as the stigma question is concerned.

Moreover, although the precise reasons for Holloway's termination were not publicized by defendants, Judge Moody responded to an inquiry as to the reasons by a member of the public by implying, in substance, that Holloway's removal was for improper activity on his part. The letter states, in pertinent part, as follows:

> At this time, I believe it sufficient to say that Mr. Holloway made certain commitments to me as to what I could expect of him as a magis-

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> trate at Dillingham. He has admitted the truth of facts I gave him as the reasons for my terminating his employment. True, he disagreed as to the reasons being sufficient cause to warrant his termination. However, I felt otherwise since he accepted the position with the understanding that he could not retain the position if such facts develop.

See Affidavit of John S. Hedland, Exhibit "E".

As extensively discussed before, it is neither customary, good policy, nor, in plainiff's view, legal for a judge to be subjected to arbitrary termination for political or other reasons. While it does not stigmatize a political appointee to be summarily removed from appointive position, because such removal is part of the rough and tumble of politics and implies no wrongdoing on his part, the same is not true where a judge in a small town is removed. The public will naturally believe that some impropriety on his part is the cause of the removal. Both the Supreme Court and the defendants in this case have vigorously argued that remedying judicial unfitness is the precise reason why the power of summary removal is necessary. Under these circumstances, it is obvious that Judge Holloway's removal is going to be construed as reflecting on his fitness whether the reasons are publicly stated or not.

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1 The Due Process Rights Question

2 All parties agree that a hearing is a prerequisite to
3 termination where the terminated individual has a property or
4 liberty interest at stake. It is likewise clear that a property
5 interest is established where the officeholder has a reasonable
6 expectation of continued employment, whether by virtue of statute
7 or de facto practice. See, generally, Perry v. Sindermann, 408
8 U.S. 593 (1972). A liberty interest is implicated where the
9 officeholder, although having no property interest in continued
10 employment, is "stigmatized" by the termination. See, Owen v.
11 City of Independence, 445 U.S. 622 (1980). Plaintiff will not
12 set out in great detail his argument on this point, since the
13 plaintiff's essential premise--that the power of summary removal
14 cannot be legitimately exercised unless the magistrate is judi-
15 cially unfit--has not been challenged by the defendants and is
16 determinative of both the property interest issue and the liberty
17 issue. Unless Judge Holloway was unfit, he had an expectation of
18 continued employment. Since termination is a remedy for unfitness,
19 and not the exercise of a power of patronage, his removal by
20 definition stigmatized him. Accordingly, a hearing is plainly
21 necessary to determine whether or not the conduct with which he
22 was charged, and, only to a limited extent, admitted, was (a)
23 true and (b) sufficient to render him unfit.

24 The plaintiff notes that defendants apparently believe
25 that Holloway's liberty interest would, even if a hearing were
26 granted, only entitle him to "clear his name" and not to obtain
27 reinstatement or back pay. See Defendants Brief, p. 17. Defendants
28 state that a name-clearing hearing is designed only to refute
29 charges which damage one's reputation, and that in Perry v.
30 Sindermann, supra, the court stated that "proof of such an [interest]
31 would not, of course, entitle him to reinstatement." This passage
32 is confusing, and it should be noted that what the court was

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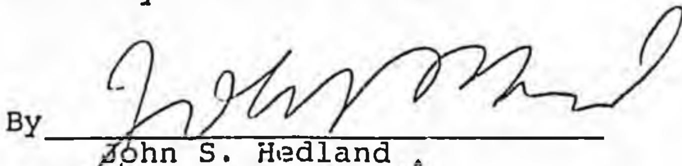
saying in the quoted passage was that the mere right to a hearing did not entitle the employee to reinstatement. It was not saying that, if he prevailed at the hearing, he would not be entitled to reinstatement. See Perry v. Sindermann, supra, 408 U.S. at 603. In that case, as here, there was no express statutory right to continued employment, but the court held that the teacher in question had a "de facto" right based upon past practice. Essentially the same situation is present here, given the Supreme Court's narrow constriction of the power of summary removal contained in the statute authorizing summary termination of a magistrate to situations where such action is necessitated by considerations of judicial fitness.

The State attempts to distinguish University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983), where a non-tenured teacher's application for tenure status was denied at a meeting that did not comply with the State open meeting law. The case is simply not distinguishable from the instant case insofar as the consequences of denial of a hearing are concerned. The court in Geistauts held that the teacher in question was entitled to reinstatement until such time as a proper hearing on his tenure application was held, notwithstanding the absence of any "property" or "liberty" interest such as the State asserts to be a prerequisite to a due process hearing. The holding of the case is clear; until proper procedures are followed, adverse action is null and void. See, also, Owen v. City of Independence, 445 U.S. 622, 632, n. 12 (1980).

DATED at Anchorage, Alaska, this 17th day of October, 1983.

HEDLAND, FLEISCHER & FRIEDMAN
Attorneys for Plaintiff

By ______________________
John S. Hedland



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1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY,)
Plaintiff,)
vs.)
HONORABLE JUDGE S. J. BUCKALEW;)
HONORABLE JUDGE RALPH E. MOODY;)
and STATE OF ALASKA,)
Defendants.)

No. 3AN-77-8145 CIV

AFFIDAVIT OF JOHN S. HEDLAND

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

JOHN S. HEDLAND, being duly sworn according to law, deposes and states:

1. Shortly after Judge Holloway's termination, he retained me as counsel to represent him in respect thereto.

2. No formal statement of grounds for his termination was ever given, and the statutes and regulations did not set out any procedure for obtaining a hearing except through the Commission on Judicial Qualifications, which had made no charges against him. I therefore contacted Judge Moody and Judge Buckalew by letter on August 31, 1977 to determine how to proceed. A copy of my letter is annexed hereto as Exhibit "A".

3. Subsequently, no action was taken and suit was instituted on Judge Holloway's behalf alleging, among other things, that he could not be terminated without a hearing, which we believed should be held before the Commission on Judicial Qualifications.

4. I also discussed the matter with Judge Moody and Jim Arnold. It was implicit in these discussions that the position of the court system was that Judge Holloway was not entitled

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ANCHORAGE, AK 99501

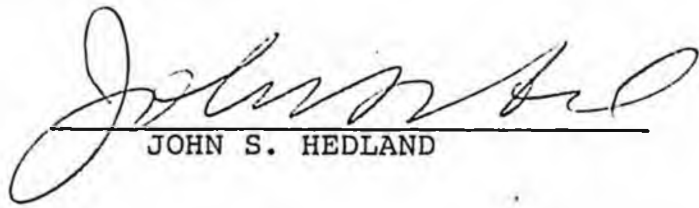
to a hearing, and was not going to get one. I was totally flabbergasted, and still am, at the defendants' suggestion that Judge Holloway had somehow waived his right to a hearing by allegedly not requesting one.

5. On June 23, 1983 I sent the letter annexed hereto as Exhibit "B" to Madeleine R. Levy, attorney for defendants. Included therewith was a proposed stipulation that is annexed hereto as Exhibit "C". Among other things, the proposed stipulation incorporates a summary of a conversation which I had with Jim Arnold on September 20, 1977. A copy of my memorandum of the conversation, with certain portions excised as set out in my letter to Madeleine Levy, is annexed to the proposed stipulation. Exhibit "D". The memorandum is a true and correct statement of what was said during the conversation.

6. So far as I know, defendants do not deny the correctness of the stipulation except as to a question about a possible prosecution within the ambit of paragraph 4, but have not entered into it. Accordingly, we are filing the substance of the stipulation in the form of a request for admissions.

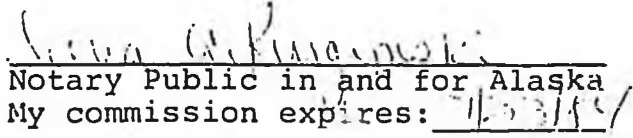
7. Exhibit "E" hereto is a copy of a letter forwarded to me and apparently sent by Judge Moody to Mr. Paul Post.

DATED: October 17, 1983.



JOHN S. HEDLAND

SUBSCRIBED AND SWORN TO before me this 17th day of October, 1983.



Notary Public in and for Alaska
My commission expires:

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528

Law Offices

RICE, HOPPNER & HEDLAND

1016 WEST 6TH AVENUE
ANCHORAGE, ALASKA 99501
(907) 279-5528

FAIRBANKS OFFICE
330 WENDELL STREET
P. O. BOX 2551 (99707)
(907) 452-1201

JULIAN C. RICE
LLOYD I. HOPPNER
JOHN S. HEDLAND
HUGH W. FLEISCHER
MILLARD F. INGRAHAM
SAUL R. FRIEDMAN
PATRICK T. BROWN
LINDA L. WALTON
MARK I. WOOD
NIESJE J. STEINKRUGER
ROGER BRUNNER
STEPHANIE J. COLE
JAMES T. BRENNAN
JANALEE R. STRANDBERG

CHARLES J. CLASBY
OF COUNSEL

August 31, 1977

Honorable Ralph E. Moody
Presiding Judge
Superior Court, State of Alaska
Third Judicial District
303 K Street
Anchorage, AK 99501

Honorable S.J. Buckalew
Acting Presiding Judge
Superior Court, State of Alaska
Third Judicial District
303 K Street
Anchorage, AK 99501

Dear Judges Moody and Buckalew:

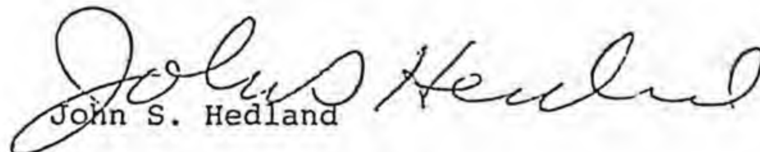
This office has been retained by James Holloway in regard to his reported termination as a magistrate in Dillingham. I would therefore appreciate being advised of any further steps that are taken in this matter, and request that any communications in regard thereto are directed to me.

At this stage of my research, it is unclear what person or forum Mr. Holloway's position should be communicated to, and your advice in this respect would be greatly appreciated. He will be in town on Friday, September 2, and an informal meeting after that date may be beneficial to all concerned.

Thank you very much for your attention.

Sincerely,

RICE, HOPPNER & HEDLAND



John S. Hedland

JSH/rl

Exhibit "A"

((

June 23, 1983

Madeleine R. Levy
Assistant Attorney General
State of Alaska
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501

Re: Holloway v. Buckalew, et al.
Superior Court No. 77-8145 CIV

Dear Lonnie:

Pursuant to our conversation of June 22, 1983, I enclose for your consideration a copy of a proposed stipulation as to facts which I do not believe to be in dispute in this case. If your clients are agreeable to the stipulation, in whole or in part, it will probably save all parties a good deal of time that would otherwise be spent in discovery. I am particularly reluctant to take Joe Arnold's deposition because of his health. Moreover, if I am going to have to be a witness to the conversation with him, I might as well know it now to be able to consider what, if any, effect it may have on my continued representation of Mr. Holloway. If it is not possible to stipulate to the contents of the converstion, perhaps we could at least stipulate to some of the facts reflected in the memorandum.

I obviously do not have first-hand knowledge as to the policies and practices of the Department of Law referred to in paragraphs 4 and 5 of the stipulation. However, the stipulation correctly states the facts based upon anything I have seen during 15 years of practice here, and the fact that there are no annotations to the statutes in question which would suggest that they had ever been enforced. Judge Moody and Judge Buckalew, given their background in politics, law enforcement, prosecuting and on the bench, and the Department of Law, should be aware of any information that indicates that the proposed paragraphs in the stipulation are incorrect, if such is the case.

Please note that the memorandum reflecting the phone call with Jim Arnold that I am forwarding contains two paragraphs

Exhibit "B"

of a three-paragraph memorandum. The other paragraph does not relate or refer to the conversation with Mr. Arnold or bear upon its contents. The memo has been Xeroxed so that only the first and last paragraphs are included and the unrelated paragraph excluded. I will be happy to provide the entire memo to Judge Johnstone for in camera inspection if you would feel more comfortable handling it that way.

Thank you for your cooperation.

Sincerely,

John S. Hedland

JSH:jp
Enclosure

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY,

Plaintiff,

vs.

HONORABLE JUDGE S. J. BUCKALEW;
HONORABLE JUDGE RALPH E. MOODY;
and STATE OF ALASKA,

Defendants.

No. 3AN-77-8145 CIV

STIPULATION

The parties hereto, by their undersigned attorneys, stipulate and agree as follows:

1. The annexed memo to the file accurately reflects the substance of a conversation between Jim Arnold and John Hedland on September 20, 1977.

2. The decision to terminate James Holloway as a magistrate was not predicated upon any determination that James Holloway had violated any criminal statute of the State of Alaska relating to the use of marijuana or controlled substances.

3. The termination of James Holloway as a magistrate was not based upon a determination that he had committed any act relating to marijuana that was not within the constitutional protections set out in Ravin v. State, 537 P.2d 494 (Alaska 1975).

4. Up to and including the date of the termination of James Holloway as a magistrate, and since at least the admission of Alaska as a state, no prosecutions were being instituted throughout the State of Alaska against any per n for alleged private, noncommercial, sexual conduct between onsenting adults, including acts within the ambit of former A.S. 11.40.010 (adultery); .040 (cohabiting in state of adultery or fornication); .120 (unnatural crimes); unless such charges resulted from the fact

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Exhibit "C"

1 that such offenses were included within other charged conduct
2 that was commercial, forcible, or involved children, or unless
3 said charges arose out of plea bargains or negotiated resolutions
4 of cases in which the charged or alleged conduct was commercial,
5 forcible, or involved children.

6 5. At the time of James Holloway's termination as a
7 magistrate, there existed within the Department of Law of the
8 State of Alaska a policy not to prosecute or charge individuals
9 under the statutes set out above or under any other statutes
10 prohibiting private, noncommercial sexual conduct between con-
11 senting adults, unless such charges or prosecutions were for
12 conduct that was included within or resulted from plea bargains
13 arising out of charges of conduct that was commercial, forcible,
14 or involved children.

15 6. Except for statements by Holloway acknowledging
16 the use of marijuana and living with a woman to whom, at the time
17 of his termination, he was not married, his termination was not
18 predicated upon any determination that he had done any act that
19 reflected negatively on his fitness as a magistrate, or otherwise
20 was unfit as a magistrate. The parties do not, by this paragraph,
21 intend to stipulate as to whether or not the acknowledgements by
22 Holloway referred to herein establish his unfitness as a magistrate,
23 or reflect upon his fitness as a magistrate.

24 7. At no time, prior or subsequent to James Hollo-
25 way's termination as a magistrate, was he afforded or offered the
26 opportunity for a hearing as to any charges made against him in
27 connection with or leading up to his termination as a magistrate,
28 or as to the decision to terminate him, and at no time was he
29
30

32
33
34
HEDLAND, FLEISCHER
& FRIEDMAN
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ANCHORAGE, AK 99501
(907) 279-5528

afforded the opportunity to confront or cross-examine anyone who may have made allegations or charges against him.

DATED: June 23, 1983.

HEDLAND, FLEISCHER & FRIEDMAN
Attorneys for Plaintiff

By [signature]
John S. Hedland

DATED: June ___, 1983.

STATE OF ALASKA, DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
Attorneys for Defendants

By ______________________
Madeleine R. Levy

The undersigned hereby swears that on the 23 day of ____________, 19__, the attached documents were mailed to the attorneys of record.

[signature]

Subscribed and sworn to before me the date last written.

[signature]
Notary Public
My Commission Expires [illegible]

HEDLAND, FLEISCHER & FRIEDMAN
ATTORNEYS AT LAW
SUITE 400
1016 WEST 6TH AVENUE
ANCHORAGE, AK 99501
(907) 279-5528

MEMO TO THE FI[illegible]

RE: Jim Holloway

FROM: John Hedland

On September 20, 1977, at approximately 4:45 p.m. I contacted on the telephone Jim Arnold. I was in Jim Brennan's office and he was able to hear my side of the conversation although I believe he left the office for a brief period while it was going on. Mr. Arnold confirmed that he had contacted Mr. Holloway and reported to him that five complaints had been lodged against him, that he was living with a girl, that he held pot parties, that he smoked pot, that one or more occasions he had repeatedly talked defendants out of pleading guilty and that he was contributing to the delinquency of a minor. He said that Holloway had admitted to living with the girl and smoking pot, and had denied the other allegations. He said that all of his information had come from Judge Madsen, and that it was his information that the allegations relating to talking defendants out of pleading guilty were the result of complaints by the district attorney to Judge Madsen. He then said that he may have on one occasion discussed the guilty plea question with Bill Mackey, but that this had been a couple of months earlier and was in addition to the conversation with Judge Madsen. He also said that Judge Madsen had expressed his concerns about Holloway to him on many occasions, and was "very concerned". He also said that Judge Madsen had the highest regard for Judge Holloway as a Judge. Arnold specifically said that Madsen had discussed the matter with Judge Buckalew and Judge Moody but did not recommend that Jim be fired, or make the decision that he be fired. He said the decision had been made by Judge Buckalew and concurred in by Judge Moody. He said he had asked Jim Holloway to "recant" and ~~apply~~ to me that he could have kept his job had he done so. He denied knowing that Jim was living with a girl at the time Jim was hired and said that Judge Moody also did not know. I pointed out to him that Judge Moody had said to me that he was aware that Jim was living with a girl, but had told me that he (Judge Moody) was under the impression that Jim had agreed to stop doing so. He said that when Holloway was hired he had requested a two year commitment and that Jim had expressed the intention to stay for that long but had failed to make an ironclad promise to that effect.

In my conversation with Arnold I asked him what new facts had come to light between the suspension and firing to justify the more drastic action. Arnold said he was not present when the decision was made but believed the decision to fire rather than to suspend was not based upon any new information. He also denied that the question of talking people out of guilty pleas played any part in the decision to terminate Holloway.

Exhibit "D"

Trial Courts
State of Alaska
THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

RECEIVED
1977
Rice, Hoppner, & Hedland

RALPH E. MOODY
Presiding Judge

September 22, 1977

Mr. Paul Post
Box 348
Bethel, Alaska 99559

Dear Mr. Post:

This is in response to your letter of September 1, 1977, regarding the termination of Mr. James Holloway as magistrate at Dillingham.

As Presiding Judge, it is my policy not to release the reasons for terminating a magistrate's services unless the magistrate requests me to do so or the magistrate makes a release as to the cause of his termination which is not in conformity with the reasons stated to him by me for his being terminated.

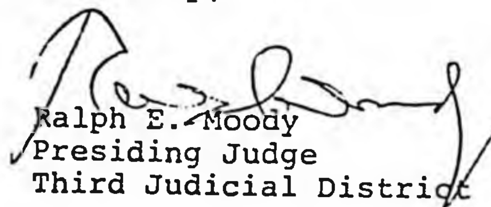
Your letter does not indicate that Mr. Holloway has released the reasons given him for terminating his services, and he has not asked me to release the reasons I gave for his termination. Until such time as I have cause to release the reasons for his termination because of his request to me to do so or he publicizes reasons different from what I gave, I do not propose to comment upon the speculated cause or causes you have advanced in your letter.

At this time, I believe it sufficient to say that Mr. Holloway made certain commitments to me as to what I could expect of him as magistrate at Dillingham. He has admitted the truth of the facts I gave him as the reasons for my terminating his appointment. True, he disagreed as to the reasons being sufficient cause to warrant his termination. However, I felt otherwise since he accepted the

Exhibit "E"

position with the understanding that he could not retain the position if such facts developed.

Sincerely,



Ralph E. Moody
Presiding Judge
Third Judicial District

REM:dpd

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY,	)
Plaintiff,	)
vs.	)
HONORABLE JUDGE S. J. BUCKALEW; HONORABLE JUDGE RALPH E. MOODY; and STATE OF ALASKA,	)
Defendants.	)

RECEIVED
1983
Clerk of the Trial Courts
3rd Judicial District

No. 3AN-77-8145 Civ.

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants respectfully move this Court for summary judgment as follows:

1. A judgment that plaintiff was not entitled to a pre-termination hearing prior to his dismissal as magistrate; and

2. An order that plaintiff's dismissal was valid.

This motion is based upon the attached Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment and In Support of Defendants' Cross-Motion for Summary Judgment and the pleadings on file in this case.

Respectfully submitted this 30th day of August, 1983, at Anchorage, Alaska.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the [illegible] day of [illegible] 19[illegible] a true and correct copy of [illegible] was served [illegible] on the following attorneys: [illegible]

By [illegible]

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: [signature]
Madeleine R. Levy
Assistant Attorney General

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY,
Plaintiff,
vs.
HONORABLE JUDGE S. J. BUCKALEW;
HONORABLE JUDGE RALPH E. MOODY;
and STATE OF ALASKA,
Defendants.

RECEIVED
1983
Clerk of the Trial Courts
3rd Judicial District

No. 3AN-77-8145 Civ.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff James Holloway has moved this Court for partial summary judgment seeking a declaration that his termination as a magistrate was void because no pre-termination hearing was held, and requesting this Court to order the defendants to hold such a hearing. Holloway claims that he is entitled to a pre-termination hearing under the due process clauses of the state and federal constitutions.

The effect of the relief requested would be to reinstate Holloway as a magistrate and to award him back pay from August 1977 to the present. Holloway is not entitled to summary judgment as a matter of law. For the reasons more fully stated below, his motion for partial summary judgment should be denied and defendants' cross-motion for summary judgment should be granted.

FACTUAL BACKGROUND

On January 31, 1977, James Holloway was appointed magistrate of the Third Judicial District, in Dillingham, Alaska, by presiding Judge Ralph E. Moody. The statute which authorized this appointment is AS 22.15.170(c) which reads:

> The presiding judge of the superior court in each judicial district shall appoint the magistrates for the judicial district. Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed.

(Emphasis supplied).

In August of 1977, acting Presiding Judge Buckalew and Trial Court Administrator James E. Arnold had conversations with Holloway concerning his use of marijuana. 1/ Holloway admitted to them that during the course of his service as magistrate he used marijuana. 2/ On August 22, 1977, Judge Buckalew issued an order removing Holloway from the Dillingham magistrate post. Judge Moody later approve this termination action.

The order terminating Holloway's appointment, like the order appointing Holloway to the magistrate post, was based upon AS 22.15.170(c).

On September 23, 1977, Holloway filed a Petition for Review in the Nature of Prohibition in the Supreme Court of the State of Alaska challenging the authority of defendants Judges Buckalew and Moody to terminate him as a magistrate. On November 8, 1977, the court granted the defendants' motion for remand and remanded the case to the superior court for consideration.

Holloway challenged the termination order on two distinct grounds. First, Holloway claimed that AS 22.15.170(c), the statute under which he was terminated, violated the provisions of article IV of the Alaska Constitution governing appointment and removal of judges. Second, in the alternative, Holloway claimed that even if the presiding judge of the superior court had the constitutional power to appoint and remove a magistrate at his pleasure, Holloway's termination was nonetheless invalid for failure to give him a pre-termination

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1/ Defendants' Request for Admission No. 7 and Plaintiff's Response thereto, attached as Exhibits A & B respectively; Plaintiff's Affidavit in Support of his Motion for Summary Judgment filed on April 26, 1982 (Affidavit) at ¶ 8. That motion was subsequently withdrawn, n.4 *infra*, but the affidavit remains on record.

2/ *Id.*, No. 14; Holloway Affidavit at ¶ 8.

hearing. 3/ Based on these two grounds, Holloway sought relief in the form of reinstatement with back pay.

On November 28, 1977, the defendants served Holloway with a request for admissions, attached as Exhibit A. Holloway's response admitted that he "did not specifically request a hearing prior to the issuance of the order which terminated [his] appointment. . . ." See Response No. 8, attached as Exhibit B.

Holloway moved for summary judgment on the sole ground that AS 22.15.170(c), the statutory authority for the presiding judge to remove a magistrate, violated article IV of the Constitution of the State of Alaska.

The Superior Court granted summary judgment in favor of Holloway. On appeal, the Alaska Supreme Court reversed. Buckalew v. Holloway, 604 P.2d 240 (Alaska 1979).

The Supreme Court held that although a magistrate is a judge within the meaning of article IV, section 4 of the state constitution, a magistrate, unlike other judges, serves for no fixed term. 604 P.2d at 243-44. The fact that magistrates serve at the pleasure of the presiding judge, rather than for a term fixed in time, neither violates the establishment of an independent judiciary nor impugnes the administration of justice:

> The legislature's intent in creating the office of magistrate was "to meet the immediate requirements of justice in the less populated areas of the state". . . .Magistrates normally serve in communities in which no superior or district court judges sit permanently, making day to day supervision impossible. It is apparent that the broad power vested in the presiding superior court judge to dismiss magistrates is intended to provide an unencumbered means of quickly remedying any situation in which judicial unfitness is

---

3/ On November 28, 1977, the defendants served Holloway with a request for admissions, attached as Exhibit A. Holloway's response admitted that he "did not specifically request a hearing prior to the issuance of the order which terminated [his] appointment. . . ." See Response No. 8, attached as Exhibit B.

> impairing the administration of justice in rural Alaska.

604 P.2d at 245 (footnotes omitted) (emphasis supplied).

The Court specifically reserved judgment upon the claim which is now presented by plaintiff's motion for partial summary judgment:

> All other questions, such as whether Holloway's summary dismissal comports with due process, were expressly held in abeyance by the parties at the trial level, and we intimate no view on the merits of claims not yet litigated.

604 P.2d at 241 n.1.

On June 20, 1983, some three and one-half years after the Supreme Court rendered its decision, Holloway moved for partial summary judgment seeking reinstatement on the ground that his dismissal did not comport with procedural due process. [4]

Holloway claims that his "property" interest in his continued employment as a magistrate, along with his "liberty" interest in his reputation, required a termination hearing to be held prior to his dismissal. Holloway then argues that his dismissal without a hearing entitles him to re-instatement. He is wrong on both assertions.

I. SUMMARY JUDGMENT IS PRECLUDED BY THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT.

This motion is supported by an affidavit from Holloway, a petition allegedly signed by residents of the Bristol Bay Recording District, and an affidavit of publication of a newspaper article relating to Holloway's dismissal. [5] Taken as a whole, the motion and supporting documentation fail

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4/ Holloway initially moved for a summary judgment on April 26, 1982, but withdrew this motion after defendants' filed their opposition.

5/ These documents were part of Holloway's earlier summary judgment motion, *supra* n.4, and have been adopted by reference in Holloway's instant motion.

to satisfy the standard for summary judgment which is articulated in Alaska Rule of Civil Procedure 56(c). Summary judgment may not be granted in this case because there are genuine issues of material fact, 6/ and the moving party is not entitled to judgment as a matter of law. Alvey v. Pioneer Oilfield Services, Inc., 648 P.2d 599 (Alaska 1982); State v. Jennings, 555 P.2d 248 (Alaska 1976); Nizinski v. Golden Valley Electric Association, Inc., 509 P.2d 280 (Alaska 1973); Braund, Inc. v. White, 486 P.2d 50 (Alaska 1971).

The burden of showing the absence of genuine issues of fact is squarely upon the party moving for summary judgment, Ransom v. Hanar, 362 P.2d (Alaska 1961). Inferences of fact will be drawn in favor of the party opposing the motion. Alvey v. Pioneer Oilfield Services, Inc., supra.

In this case, there are several genuine issues of material fact which preclude the entry of summary judgment. First, Holloway has admitted that he did not request a hearing prior to the issuance of the order which terminated his appointment. 7/ This raises the material issue of whether Holloway waived any right which he may have had to a hearing. Holloway has the burden of establishing that no waiver was tendered. Ransom v. Hanar, supra. His failure to do so requires this court to infer that a waiver was made. Alvey v. Pioneer Oilfield Services, Inc., supra.

Second, Holloway's motion is predicated upon the claim that his dismissal has damaged his good name, his reputation and his future employment opportunities. However, Holloway has merely alleged this damage, he has not supported his claim by

---

6/ See Defendants' Statement of Genuine Issues of Material Fact.

7/ N. 3, supra. Admissions may be used in support of and in opposition to a motion for summary judgment. Paulzer v. Serv-U-Meat Co., 419 P.2d 201 (Alaska 1966).

any facts. Holloway's affidavit does not even begin to meet the bare requirements for establishing these material facts.

For instance, he makes no representation concerning his efforts, much less his inability, to obtain employment after the dismissal. In his affidavit, he makes only the conclusory statement that his reputation and good name have been impugned. These unsupported statements are clearly insufficient for purposes of summary judgment. Ault v. Alaska State Mortgage Association, 387 P.2d 698 (Alaska 1964).

Holloway, in effect, asks this Court to take judicial notice of the alleged damage to his name and reputation and future employment. However, this is precisely the sort of "fact" of which a court will not take judicial notice. See Alaska Rule of Evidence 201. As the commentary to Rule 201 indicates, judicial notice should not extend to facts "normally decided by the trier of fact after being proved." There is ample reason for refusing judicial notice for such facts:

> As Professor Davis says: The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either oral or written or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination and argument) to meet adverse materials that come to the tribunal's attention. "A System of Judicial Notice Based on Fairness and Convenience", in Perspectives of Law 69 at 93 (1964).
>
> Rule 201 is based on the belief that wherever a lawmaking authority conditions the applicability of a law on the proof of facts, these considerations call for dispensing with traditional methods of proof only in clear cases regardless of what label is attached to the facts. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject

to the requirements of procedural fairness. Id. 94.

Evidence Rules Commentary at 38-39. The question of whether Holloway suffered any damage or stigma to his name or reputation is one which can only be decided by a trial-type hearing.

In addition, the defendants have specifically denied in their answer to Holloway's complaint that his termination was ordered without affording him a right to an evidentiary hearing. See Complaint at ¶ 5 and Answer. The allegations in the complaint have been put at issue by the defendants' answer, and they are still at issue. They cannot be resolved by judicial notice or by plaintiff's affidavit.

To summarize, there are genuine issues of material fact which remain to be resolved prior to any grant of summary judgment on these issues. For these reasons alone, the motion for summary judgment should be denied.

Assuming arguendo that this Court finds no genuine issues of material fact to exist, plaintiff is still not entitled to summary judgment as a matter of law.

II. A PUBLIC OFFICIAL WHO HOLDS HIS OFFICE "AT THE PLEASURE OF" HIS SUPERIOR DOES NOT HAVE A "PROPERTY INTEREST" IN CONTINUED EMPLOYMENT AND IS NOT ENTITLED TO A HEARING PRIOR TO DISMISSAL

Holloway claims that his dismissal was void for failure to provide him with a pre-termination hearing. The fundamental flaw in this argument is that procedural due process protection becomes due only when there is a "property interest" in continued employment. Absent such an interest, there is no entitlement to procedural due process prior to dismissal.

As is more fully explained below, procedural due process is important not for itself but only as a means to protect rights which rise to a certain value. If there is no sufficiently valuable right at stake, the procedures, by themselves, have no value. Procedural due process, unlike Beauty, is not its own excuse for being.

Defendants do not disagree with the proposition that an individual has an "property interest" in his job which is protected by due process if he has a "legitimate expectation" of continued employment. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). However, a mere unilateral anticipation of continued employment, not guaranteed by statute or contract, does not confer a "property interest" which will be protected by due process. Bishop v. Wood, 425 U.S. 341, 344-45 (1976).

Roth established that government employment is "property" protected by due process only if the recipient has a legitimate expectation, grounded in state law, that his job will continue. Perry held that when such a "legitimate expectation" exists, the courts will determine the need for and sufficiency of procedural protections which attach to that expectation.

Roth was an untenured teacher at a state university. State law provided that untenured teachers who had not been hired for four continuous years were on probationary status. When Roth's one year teaching contract was not renewed he sued, claiming he had a due process right to a hearing before the non-renewal decision was made. The Supreme Court held that his probationary status, as a matter of state law, did not confer a fourteenth amendment "property interest" in his job. Therefore, no pre-termination hearing was required by due process. 408 U.S. at 577-78.

Perry was also an untenured state university teacher whose contract was not renewed. However, Perry, unlike Roth, was entitled by state law to continuing employment by a de facto tenure process. The Supreme Court held that Perry would be entitled to a hearing on his nonrenewal only if substantive state law gave him "a contractual or other claim to job tenure". 408 U.S. at 602 n.7.

By contrast, Bishop's employment as a policeman was terminated without a hearing to determine the sufficiency of the

charges against him. Although Bishop was classified as a permanent employee, the Supreme Court rejected his claim of entitlement to a pre-termination hearing because state law required an actual guarantee of continued employment, either by virtue of statute or contract, in order to create an enforceable expectation of continued employment. 426 U.S. at 345.

From these seminal cases and their progeny emerge the principle embraced by the Alaska Supreme Court that:

> A person who is employed 'at the pleasure' of his employer has no 'property' interest in continued employment that is protected by due process. Bishop v. Wood, 426 U.S. 341, 345 n.8, 96 S.Ct. 2074, 2078 n.8, 48 L.Ed.2d 684, 690 n.8 (1976); Arnett v. Kennedy, 416 U.S. 134, 167 n.2, 94 S.Ct. 1633, 1650 n.2, 40 L.Ed.2d 15, 40 n.2, reh. denied, 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 (1974) (Powell J., concurring).

Breeden v. City of Nome, 628 P.2d 924, 926 (Alaska 1981). Breeden is on all fours with this case and supplies the controlling rule of law.

Breeden was the city manager of Nome. The statute governing his term of office provided that "subject to the contract of employment, the manager holds office at the pleasure of the assembly or council." His contract stated that Breeden's employment could be terminated upon 30 days written notice by either party. Breeden had resigned on April 14, 1978, after some financial disputes with the city council. His resignation was to become effective in 30 days. Id. at 925-26.

On April 16, 1978, the city council fired Breeden, effective immediately. When the city sued to recover certain funds appropriated by Breeden, he counter-claimed that he had been denied due process because he was fired without proper notice and a hearing.

The Supreme Court held that since Breeden served at the pleasure of his superiors, he had no "property interest" which was protected by due process. The only "property" interest which the Court found was that which was created by

Breeden's employment contract. Without that contract, Breeden was entitled to no due process protections at all. Id. at 926.

Holloway served at the pleasure of the presiding judge. Unlike Breeden, he had no employment contract, and he had no "property interest" in his job. Holloway took his seat as magistrate with no statutory requirement that he be entitled or permitted to keep it for as long as a single day. Compare Delahey v. State, 476 P.2d 908, 911 (Alaska 1970) with Nichols v. Eckert, 504 P.2d 359 (Alaska 1973), and Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Alaska Supreme Court has already found that Holloway had no "property" interest in his job by virtue of the fact that he served at "the pleasure of" the presiding judge. Buckalew v. Holloway, supra, 604 P.2d 244-45. See also Malone v. Meekins, 658 P.2d 351, 358 n.13 (Alaska 1982) (Speaker of the House who served 'at the pleasure of the body' has no property interest protected by due process in the office).

The rule of Breeden, supra, is the universal rule. If one's position is held "at the will and pleasure of" one's employer, and state law grants no independent right to continued employment, dismissal is not a deprivation of a "property" interest and there is no right to a pre-termination hearing. Bishop v. Wood, supra, 426 U.S. at 345-46. See also Guy v. Mohave County, 688 F.2d 1287, 1290 (9th Cir. 1982) (deputy sheriffs who served at the pleasure of their appointing officer had not acquired a property interest in their jobs and thus were not entitled to a termination hearing prior to their discharge); Enomoto v. Brown, 172 Cal. Rep. 778, 780 (Cal. App. 1981) (Director of Corrections who serves at the pleasure of the Governor is not entitled to a pre-termination hearing); Bogacki v. Board of Supervisors, 489 P.2d 537, 544 (Cal. 1971) (Building inspector who serves at the pleasure of the County Board of Supervisors may be dismissed without a pre-termination hearing).

Holloway attempts to repel the application to him of this undebatable principle by arguing that AS 22.15.170(c) itself creates a legitimate expectation of continued employment. Holloway Memorandum at 6-7. Specifically, Holloway claims that he has a "property interest" which derives from "the interest in protecting an independent judiciary from abusive removal." Id. at 7.

In the first place, Holloway has failed to establish by any facts offered to this court that his removal was "abusive". Holloway's removal resulted from his own admission, in response to questions from Judge Buckalew, that he smoked marijuana. Supra at 2. Use of marijuana constitutes a federal criminal offense under 21 U.S.C. § 844(a). Use of marijuana is, therefore, a violation of Canon 2 of the Code of Judicial Conduct which state in pertinent part: "A judge should respect and comply with the law. . . ." The Code of Judicial Conduct is. of course, applicable to magistrates. See Part II, ¶ 1 of the Code of Judicial Conduct.

If conduct which is not a criminal offense is sufficient to warrant removal of a state court judge, Napolitano v. Ward, 317 F.Supp. 83 (N.D. Ill.1970), aff'd., 457 F.2d 279 (7th Cir.), cert. denied, 409 U.S. 1037 (1972), reh. denied, 410 U.S. 947 (1973), removal for conduct which is a criminal offense is clearly not abusive.

Holloway seems to imply that his right to hold office somehow derives directly from the due process clause of the United States Constitution. However, it is clear that that venerable document does not guarantee him a right or privilege to retain state judicial office. Snowden v. Hughes, 321 U.S. 1 (1944); Gruenberg v. Kavanaugh, 413 F.Supp. 1132, 1135 (E.D. Mich. 1976); Peterson v. Knutson, 367 F.Supp. 515, 517 (D. Minn. 1973): Napolitano v. Ward, supra. His right to hold office derives from the same statute which provides that he can be removed at the pleasure of the presiding judge. Where, as here,

removal followed upon Holloway's admission of conduct which constitutes a federal criminal offense, that removal can in no way be characterized as "abusive".

Second, Holloway's claim that removal in this case threatens judicial independence was squarely rejected by the Alaska Supreme Court in Buckalew v. Holloway, supra 604 P.2d at 246:

> For a magistrate to serve 'at the pleasure of' the presiding superior court judge does not impair the independence of the magistrate to adjudicate cases impartially. The influence of the presiding judge simply cannot be equated with the undue influence potential in voter outrage or executive patronage. The latter may affect the outcome of particular cases in contravention of the dictates of the law, merely as a result of psychological pressure; the pressure that inheres in serving at the pleasure of the presiding judge, by promoting competency, tends to ensure precisely the opposite result, namely, that adjudication will be in conformity with the law.

(emphases added). The logical extension of Holloway's argument would be to invalidate the Alaska system of retention elections for judges: if a judge has a "property right" which stems from judicial independence, then judges could never be removed from office without a pre-termination hearing. This is clearly not the law in Alaska. Contrary to what Holloway states, "discontented litigants unhappy with the judge's official actions" can effect removal, and they often do by the power of the ballot.

Even if there were no retention election scheme, Holloway's nebulous claim of a "property interest" stemming from the notion of judicial independence has no validity. In Kalaris v. Donovan, 697 F.2d 376 (D.C. Cir. 1983), members of the United States Department of Labor Review Board, which performed the same judicial functions exercised by the United States District Courts prior to 1972, and who served at the pleasure of the Secretary of Labor, sued when they were removed from office without a pre-termination hearing. They claimed, inter alia, that removal at will and without a hearing inhibited their

judicial independence in adjudicating private disputes. The Court of Appeals for the District of Columbia found that there was no constitutional underpinning to support their argument. 697 F.2d at 400-401 and n.102. Holloway's situation is undistinguishable from that presented in Kalaris, and the resolution of his claim here should be dictated by the result there.

For the reasons stated above, Holloway had no "property interest" in his job as magistrate. His procedural argument that he was entitled to a pre-termination hearing stands or falls with the substantive argument that he had "property right" to continued employment. Since no "property right" exists in this case, no pre-termination hearing was required.

III. HOLLOWAY WAS NOT ENTITLED TO A PRE-TERMINATION HEARING TO PROTECT HIS "LIBERTY INTEREST".

Holloway claims that his "dismissal, in and of itself, resulted in damages to his reputation and opportunities for re-employment." Holloway Memorandum at 13. He then argues that he was entitled to a hearing prior to his dismissal to determine whether or not the charges against him were true. Id. This argument suffers from two glaring errors.

First, Holloway has offered no factual support for his claim of damages to his reputation and opportunity for re-employment. See, supra at 6-7. Second, and more importantly, it ignores the fact that Holloway admitted that he was using marijuana. What purpose would be served by providing a hearing under these circumstances? In any event, Holloway is not entitled to a pre-termination hearing on the issue of his alleged deprivation of a "liberty interest".

Holloway essentially argues that his dismissal deprived him of a "liberty" interest in his good name and reputation, and that without a pre-termination hearing, the

dismissal is a nullity. This claim is on all fours with that asserted, and rejected, in Arnett v. Kennedy, 416 U.S. 134 (1974).

Kennedy was a civil service employee who was removed from office after charging that his immediate supervisor had tried to bribe another to make false statements against Kennedy. Kennedy claimed, inter alia, that since the charges against him affected his good name and reputation, he was entitled to a pre-termination hearing. In other words, Kennedy argued that a hearing was required before he could be deprived of his "liberty" interest in his good name.

Relying upon its earlier decision in Board of Regents v. Roth, supra (1972), the United States Supreme Court disagreed. The court held that a pre-termination hearing was not necessary to protect one's "liberty" interest.

> That liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause.

(Emphases supplied). 416 U.S. at 157. The United States Supreme Court has never retreated from this position.

Holloway has, in fact, cited no case law standing for the proposition that due process requires a "name-clearing" hearing to be held prior to termination or that failure to hold such a hearing vitiates the termination. The reason why he has not done so is, quite simply, that none exist.

In Nichols v. Eckert, supra, upon which Holloway relies, teachers who were dismissed midway through their contracts were held to have a "property" interest sufficient to trigger a due process pre-termination hearing. Holloway claims that his dismissal without a pre-termination hearing is a nullity, relying on language in Nichols, 504 P.2d at 1363.

However, a close examination of that language reveals that it is mere dicta and is limited only to those situations which, "in absence of a statute . . . permitting the removal of a teacher at pleasure, principles of justice require that a hearing should be given after notice to party to be removed". Since Holloway was serving "at the pleasure of," he cannot take succor in this mis-cited language. Compare Whaley v. State, 438 P.Ed. 718 (Alaska 1978) (employee serving "at the pleasure of" is not entitled to a hearing).

The other cases upon which Holloway relies for the proposition that failure to give him a "name-clearing" hearing before dismissal renders his termination a nullity, with reinstatement as the proper remedy, simply do not support him. In Board of Regents v. Roth, supra, the Supreme Court stated only that when non-renewal of a contract is based upon a charge implicating a person's good name, reputation, honor or integrity, due process requires an opportunity to refute the charge. 408 U.S. at 573. There is no suggestion whatsoever in Roth that failure to hold such a hearing prior to dismissal renders the termination a nullity, and requires reinstatement.

Indeed, the United States Supreme Court has specifically held that since the purpose of a "name-clearing" hearing is to refute charges which may damage one's reputation, the hearing may be held after the termination. Arnett v. Kennedy, supra. This ruling is hardly surprising; when a person is dismissed without a due process hearing, and alleges that he has an interest which entitles him to a pre-termination hearing, "proof of such an [interest] would not, of course, entitle him to reinstatement." Perry v. Sindermann, supra, 408 U.S. at 603 (emphasis supplied). In short, federal law is uniform on this issue: no pre-dismissal "name-clearing" hearing is required.

Holloway also relies upon Lubey v. City and County of San Francisco, 159 Cal. Rptr. 440 (Cal. App. 1979) for the proposition that failure to grant a pre-dismissal

"name-clearing" renders his termination a nullity, with reinstatement as the proper remedy. This case is clearly distinguishable.

In Lubey, two probationary members of the San Francisco police force were summarily dismissed based upon unsworn charges of misconduct against them. They were advised that they would be barred from future employment with the city. The California Court of Appeals for the First District found that, on those facts, the dismissal stigmatized or seriously impaired their reputations and opportunity to earn a living. The court ordered reinstatement based upon provisions of the city charter, and, in part relying on language in Board of Regents v. Roth, 159 Cal. Rptr. at 444-45. Roth has, of course, been refined in this regard by Perry v. Sindermann, supra, and Arnett v. Kennedy, supra.

Here, the dismissal was based upon Holloway's admission of conduct which constituted a federal criminal offense and which, under the Code of Judicial Conduct, is clearly grounds for removal. The dismissal was accomplished pursuant to a statute which the Alaska Supreme Court has recognized was "intended to provide an unencumbered means of quickly remedying any situation in which judicial unfitness is impairing the administration of justice in rural Alaska". Buckalew v. Holloway, supra, 604 P.2d at 245 (emphasis added). A pre-termination "name-clearing" hearing is obviously inconsistent with the interest in expeditious removal of magistrates. See also Arnett v. Kennedy, supra, 416 U.S. at 168 (interest in expeditious removal of unsatisfactory personnel warrants removal without a hearing).

One additional factor remains to be addressed. Holloway has not, and could not, allege that the defendants in this case publicly disclosed the reasons for his dismissal. This lack of public disclosure is fatal to Holloway's claim of deprivation of a liberty interest. The United States Supreme

Court stated it plainly in Bishop v. Wood, supra: A public employee "whose position is terminable at the will of the employer" is not deprived of "liberty" when there is no "public disclosure of the reasons for the discharge." 426 U.S. at 348. There, as here, the reasons for the discharge were communicated orally and in private. "Since the . . . communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired." Id. (footnote omitted). If any impairment to Holloway's liberty interest was effected, it was not as a consequence of any actions taken by the defendants.

Finally, it is clear that one is not entitled to a hearing to refute the charges underlying the dismissal if the truth of those charges is not contested. This very issue was addressed in Codd v. Vegler, 429 U.S. 624 (1977). Vegler alleged a wrongful dismissal from the New York City police force and sought re-instatement and damages for the resulting injury to his reputation and future employment. The Supreme Court refused to even consider whether a hearing to refute the alleged stigma was necessary because Vegler could not, as Holloway cannot, refute the truth of the underlying reason for dismissal. "When we consider the nature of the interest sought to be protected, we believe the absence of any . . . allegation [that the reason for dismissal was false] is fatal to respondent's claim under the Due Process Clause that he should have been given a hearing." 429 U.S. at 627.

This result is mandated by the limited purpose of such a hearing -- to provide an opportunity to clear one's name. Since Holloway does not challenge the truth of the underlying reason for his dismissal, no hearing could undo what he has already admitted.

In sum, there is no due process entitlement to a pre-termination hearing for deprivation of one's "liberty"

interest. In this case, no hearing is necessary at all because lack of public disclosure by the defendants, combined with Holloway's admission of the essential reason for dismissal, render any hearing meaningless.

For the foregoing reasons, Holloway's claim that he was entitled to a pre-dismissal hearing to protect his "liberty" interest is devoid of merit.

Obviously, Holloway is not entitled to re-instatement. Re-instatement might be an appropriate remedy where a dismissal is found to be a nullity. See University of Alaska v. Geistauts, _______ P.2d _______ (Alaska Supreme Court, Op. No. 2691 at 16-17, June 17, 1983). But Holloway's dismissal is not void. He had no "property interest" in his job and therefore was not entitled to a pre-termination hearing. He has been deprived of no "liberty" interest; even if he had been, the remedy is not reinstatement. The only possible remedy might be a post dismissal name-clearing hearing. However, for the reasons set forth above, even this is unwarranted. Codd v. Vegler, supra.

Since Holloway's dismissal was accomplished in a valid manner, his motion for partial summary judgment should be denied and defendant's cross-motion for summary judgment should be granted.

Dated this 30th day of August, 1983, at Anchorage, Alaska.

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: [signature]
Madeleine R. Levy
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of ________, 19__ a true and correct copy of ________ was served ________ on the following attorneys: ________

By ________

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY,

Plaintiff,

vs.

HONORABLE JUDGE S. J. BUCKALEW;
HONORABLE JUDGE RALPH E. MOODY;
and STATE OF ALASKA,

Defendants.

RECEIVED
[illegible] 1983
Clerk of the Trial Courts
3rd Judicial District

No. 3AN-77-8145 Civ.

STATEMENT OF GENUINE ISSUES OF MATERIAL FACT

The following issues of fact are genuine and should be litigated in this action:

1. Did Holloway waive his right to any hearing?

2. Has Holloway, in fact, been stigmatized by his dismissal?

3. Has Holloway been barred from any other public employment in the State of Alaska?

4. Has Holloway's good name, reputation, honor or integrity been impeached by reason of his dismissal?

5. Has Holloway's dismissal affected his future employment prospects?

DATED this 30th day of August, 1983, at Anchorage, Alaska.

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: [signature]
Madeleine R. Levy
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of August, 19 83 a true and correct copy of above was served by mail on the following attorneys: Holland

By [signature]

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY,
Plaintiff,
vs.
HONORABLE JUDGE S. J. BUCKALEW;
HONORABLE JUDGE RALPH E. MOODY;
and STATE OF ALASKA,
Defendants.

RECEIVED
1983
Clerk of the Trial Courts
3rd Judicial District

No. 3AN-77-8145 Civ.

ORDER

The Court, having considered plaintiff's motion for partial summary judgment and defendants' opposition thereto, along with any reply, finds that there are genuine issues of material fact and that plaintiff is not entitled to judgment as a matter of law.

Furthermore, the Court finds that, as a matter of law, Holloway was not entitled to a pre-termination hearing and that his dismissal was valid and not in violation of due process.

The plaintiff's motion for partial summary judgment is, therefore, denied and defendants' cross-motion for summary judgment is hereby granted.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the [illegible] day of [illegible] 19[illegible] a true and correct copy of [illegible] was served [illegible] on the following attorneys: [illegible]

By [illegible]

Superior Court Judge

Date

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECEIVED
Department of Law
JUN 22 1983
Office of the Attorney General
Anchorage Branch
Anchorage, Alaska

JAMES HOLLOWAY,	)
Plaintiff,	)
vs.	)
HONORABLE JUDGE S. J. BUCKALEW; HONORABLE JUDGE RALPH E. MOODY; and STATE OF ALASKA,	)
Defendants.	)

No. 3AN-77-8145 CIV

MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff respectfully moves this court for partial summary judgment as follows:

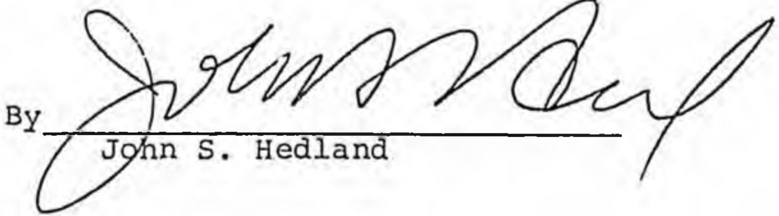
1. A judgment declaring that his termination as a magistrate was null and void in the absence of a hearing comporting with due process requirements; and

2. An order requiring that defendants afford him a hearing with respect to said termination.

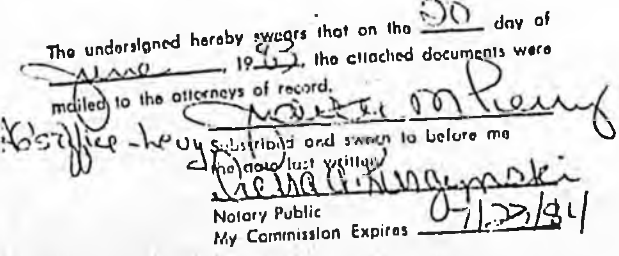
This motion is based on the annexed memorandum and the pleadings and affidavits and other documents on file in this case.

DATED this 20th day of June, 1983, at Anchorage, Alaska.

HEDLAND, FLEISCHER & FRIEDMAN
Attorneys for Plaintiff



By ______________________
John S. Hedland



The undersigned hereby swears that on the 20 day of June, 1983, the attached documents were mailed to the attorneys of record.

Subscribed and sworn to before me this date last written

Notary Public
My Commission Expires 7/23/84

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& FRIEDMAN
ATTORNEYS AT LAW
SUITE 400

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY,)
Plaintiff,)
vs.)
HONORABLE JUDGE S. J. BUCKALEW; HONORABLE JUDGE RALPH E. MOODY; and STATE OF ALASKA,)
Defendants.)

No. 3AN-77-8145 CIV

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Background.

Article IV, Section 4, of the Alaska Constitution provides that:

> Judges of other courts shall be selected . . . for terms . . . prescribed by law. . . .

A.S. 22.15.170(c) provides as follows:

> Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed.

In earlier proceedings in this case, Judge Rowland initially held that plaintiff was a "judge" within the meaning of the constitutional provision, that service at the pleasure of a presiding judge did not constitute a term prescribed by law, and that A.S. 22.15.170(c) was unconstitutional. The Supreme Court upheld Judge Rowland's determination that plaintiff was a "judge" but held, in a 3-2 decision, that service at the pleasure of the presiding Superior Court Judge was a term prescribed by law. It therefore upheld the facial constitutionality of A.S. 22.15.170(c).

Plaintiff argued that service at the pleasure of a presiding judge did not comport with the constitutional command that a term be prescribed by law because, among other things, it

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would interfere with the independence of the judiciary. In dealing with the questions of whether service at the pleasure constituted a term prescribed by law, and the judicial independence question, the majority opinion of the Supreme Court made it clear that, although it was upholding the constitutionality of the statute on its face, it was doing so because of an implicit restriction on the presiding judge's "pleasure" that in effect limited his discretion to dismiss a magistrate to cases of abuse by the magistrate rendering him unfit to serve. In other words, it did not reduce a magistrate to the status of a political appointee serving "at the pleasure" of a superior, who is subject to dismissal on the basis of whim or caprice, for a good reason, a bad reason, or no reason whatsoever.

Only by such a construction could the antithical notions of service at the pleasure and legislative prescription of a term be harmonized.

The court stated as follows:

> Providing that magistrates serve "at the pleasure of the presiding judge of the superior court" is clearly designed to achieve an on-going guaranty of accountability. . . . It is apparent that the broad power vested in the presiding superior court judge to dismiss magistrates is intended to provide an unencumbered means of quickly remedying any situation in which judicial unfitness is impairing the administration of justice in rural Alaska. With respect then to the accountability demanded in the requirement that the legislature designate the 'terms' of judges, service 'at the pleasure of' constitutes a 'term.'

Buckalew v. Holloway, 604 P.2d 240, 244-45 (Alaska 1979). In a footnote, the court also stated as follows:

> We reject the appellee's suggestion that since 'service at the pleasure of' the superior court does not require a periodic accounting, it may result in a lifetime appointment without review of a magistrate's performance. The possibility that the presiding superior court judge will simply ignore the super-

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visory duty implicitly imposed by A.S. 22.15.170(c) is too remote to invalidate the scheme per se. (Second emphasis added)

604 P.2d at 245, n. 24. Thus, the court made it clear that in upholding a statute, it was doing no more than upholding it on its face, i.e., per se, not with respect to every exercise of a presiding judge's "pleasure." Likewise, the court made it clear that, not only was the intent of the statute to provide a check against judicial unfitness, there was an implicit (although not express) obligation under the statute that the presiding judge exercise supervisory responsibilities to assure judicial fitness of magistrates to further the statute's intent. If the statute implies a duty in the presiding judge to exercise his power of dismissal to insure judicial fitness, it just as surely implies an obligation on his part not to exercise it to remove a magistrate for reasons that are insubstantial or do not relate to in judicial fitness.

The court went on to state as follows:

> We recognize of course that a position of authority may be abused; however, the mere potential for abuse does not in this case render the statutory mechanism per se unconstitutional. Magistrates dismissed pursuant to A.S. 22.15.170(c) are not necessarily without legal recourse. Abuses in particular cases may still be subject to the dictates of other constitutional commands, such as due process, and in this case to the rule making and supervisory powers of this board. We presume that these issues will be explored at trial.

604 P.2d at 246 (footnote omitted).

Plaintiff respectfully submits that in upholding the statute, the court effectively construed it to impose an implied duty on the part of the presiding judge to exercise his power of dismissal in a manner that would remedy judicial unfitness, and to prohibit its exercise in situations where judicial unfitness

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does not warrant it. The reference to legal recourse against abuse of the power of dismissal would otherwise make no sense; there is no such thing as an "abuse of pleasure."

The statute in question, as construed by the Supreme Court in the prior opinion in this case, clearly created in Judge Holloway a legitimate expectation of continued employment for so long as his conduct did not amount to judicial unfitness rendering him subject to dismissal by the presiding judge. Moreover, the Supreme Court's clear holding that the statutory power of a presiding judge to dismiss a magistrate was intended to be used, and impliedly restricted to situations, where judicial unfitness demanded its exercise, means that stigma attaches, ipso facto, to his dismissal.

II. By summarily dismissing Holloway without hearing, defendants deprived him of property and liberty without due process of law.

Both the State and Federal constitutions provide that "no person shall be deprived of life, liberty, or property, without due process of law." U. S. Constitution, Amendment XIV; Alaska Constitution, Article I, Section 7. Increasingly, both State and Federal courts have recognized that due process rights attach to various dismissals from governmental employment. As the Alaska Supreme Court stated in Nichols v. Eckert, 504 P.2d 1359, 1363 (Alaska 1973),

> Although courts in the past have frequently held that public employees have no absolute right to a hearing on discharge, because government employment is a privilege and not a property right, courts recently have become more inclined to consider the causes of discharge and the methods and procedures by which it is effected, especially where the discharge affects reputation and the opportunity for employment thereafter.

As is further discussed below, it cannot seriously be questioned that Mr. Holloway's reputation and opportunity for later employ-

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ment as a magistrate or similar position were adversely affected by the unusual and extraordinary court administration action in summarily removing him from his office and duties as magistrate in Dillingham.

Moreover, as the U. S. Supreme Court noted in Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972),

> . . . the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights.

Instead, the Court will look to the nature of the interest at stake to determine whether it triggers a due process protection of liberty or property, or both.

A. Holloway was deprived of a property interest without due process.

An individual has a "property" interest in his position of employment where he has a "'legitimate expectation' of continued employment". Breeden v. City of Nome, 628 P.2d 924, 926 (Alaska 1981). Such expectations are ". . . created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Emphasis added.) Breeden, supra at 926, citing Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972). The Breeden case concerned the summary firing of a city manager who, under statute, served "at the pleasure" of his employer. This is similar to the statute (A.S. 22.15.170(c)) under which magistrate Holloway was terminated. While the Supreme Court held that such a statute, in itself, afforded no constitutionally protected "property" interest in continued employment to the city manager in Breeden, this did not end the Court's inquiry. It found an

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independent source of a legitimate expectation of continued employment in Breeden's contract with the city, which provided for thirty days' notice of termination. Id., 926.

In the case at bar, Holloway had a "legitimate expectation" of continued employment independent and distinct from the "service at the pleasure" language of the statute. As recognized by the Supreme Court in Buckalew v. Holloway, 604 P.2d 240, 243, a magistrate in Alaska is no less than a "judge" as referred to in the Constitution. The Court further recognized that judicial independence was a "paramount concern" to the drafters of the Alaska Constitution (Id., 245), and acknowledged that there could not ". . . be any doubt that a judge who serves at another's pleasure does not enjoy complete independence." Id., 245. Nevertheless, the Court held that the "serves at the pleasure of the presiding judge" statute (A.S. 22.15.170(c)) was not violative of the constitutionally intended independent judiciary, because abuses of such dismissal power ". . . may still be subject to the dictates of other constitutional commands, such as due process, ..." Id., 246.

Holloway had a legitimate expectation that he would continue to function as a judge, free from outside influences and from abuses of the summary dismissal statute; the Buckalew decision acknowledged this. He had an expectation that, at the very least, he would be entitled to a hearing prior to an effective dismissal, to ascertain whether or not the dismissal in fact resulted from such influences as would be abhorrent to concepts of judicial independence, or from other abuses of the statutory dismissal authority. Using the case at bar as an excellent example, where charges are leveled against a judge, which charges form the basis for his summary removal, concepts of judicial independence and protection against abusive removal require that the judge be apprised of the source of the charges and an oppor-

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tunity to present evidence discounting them as well as demonstrating that they were motivated by discontented litigants unhappy with the judge's official actions. A judge's expectation that he will not be discharged under circumstances abusive to his own and the citizenry's expectation of judicial independence is synonymous with a "property" interest in continued employment pending a proper removal process.

The parameters of such a property interest is defined by the interests of protecting an independent judiciary from abusive removal. This requires, at a minimum, an opportunity for a hearing, prior to removal, to ascertain (1) the precise nature of the charges upon which the removal was based; (2) the identities and motivations of the sources of the charges; (3) the extent to which the charges are true or false; (4) the extent to which the actions upon which the dismissal is based bear any relationship to competency or integrity in the performance of official duties; and (5) the extent to which the activities forming the basis for removal concern the exercise of constitutionally protected rights.

The Breeden case clearly holds that if there is anything upon which dismissal of a government employee must be conditioned, he has a property interest entitling him to a hearing to determine whether or not such conditions for dismissal have been met. The statute under which Holloway was dismissed does not grant totally unfettered authority to the presiding Superior Court judge. To the extent such authority is tempered by the dictates of the constitutional concept of an independent judiciary, Holloway was entitled to a hearing to determine whether such limits upon authority had been exceeded.

B. Holloway was deprived of a liberty interest.

The circumstances of Magistrate Holloway's dismisal also resulted in an infringement of his interest in liberty, such

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as to trigger his right to a hearing. In Board of Regents v. Roth, supra, the U. S. Supreme Court held that a nontenured teacher had no right to a due process hearing prior to a university's decision not to rehire him. Holding that such an individual had no property right in continued employment, the Court was careful to state that the University's actions, if coupled with injury to the individual's reputation, would have required a due process hearing:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (Citations omitted.) In such a case, due process would accord him an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor or integrity" is at stake.
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. (Emphasis added.)

Board of Regents v. Roth, supra at 573. Had such stigmatizing or reputational damage been present, the Court indicated that it would have constituted a deprivation of the individual's due process interest in "liberty", which

> . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to

> the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.

Board of Regents v. Roth, supra at 408, citing Meyer v. Nebraska, 262 U. S. 390, 399.

This concept was adopted by the Supreme Court of Alaska in Nichols v. Eckert, supra, where nontenured teachers were dismissed on grounds of incompetency. The Court's determination that such teachers were entitled to a hearing prior to dismissal was in part based upon its determination that they had a property interest in their present teaching posts. However, the language of the opinion reveals that it was also based upon the deprival of their "liberty" resulting from the damage to their reputations and opportunity for re-employment which was likely to result:

> Without an opportunity to be heard and to present their cases, they could be dismissed without good cause and with a serious charge of incompetency levied against them, a charge which is permanently on their records and a hindrance to re-employment. In any event, the dismissal of a teacher on grounds of incompetency is a serious matter. The accused teacher is desperately in need of a fair and impartial forum in which the issue may be settled.

Nichols, supra, 1363. Later in the opinion, the Court stated

> A dismissal for cause has an adverse effect upon appellants because it harms their professional reputations.

Id., 1364.

The U. S. Supreme Court more recently imposed a due process hearing requirement where high school students were suspended from school for periods of up to ten days based on charges of misconduct. Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). The Court noted that, if the charges against the s udents were sustained and recor led, they could

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seriously damage their standing with fellow pupils and teachers as well as interfere with later opportunities for higher education and employment; this was sufficient to trigger a right to due process prior to the suspension. Goss, supra, 575-5. In Paul v. Davis, 424 U.S. 693 (1975), the U. S. Supreme Court held that an individual who had not lost employment but whose reputation had been damaged by a police department's publishing his photograph and name as a known "shoplifter" was not entitled to a due process hearing, but reiterated the doctrine that, if the damage to reputation arises out of a termination of government employment, the requirements of due process would apply. At page 708 of the opinion, the Court cited its earlier opinion in Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168:

> Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.

(Emphasis in original opinion.) The Paul opinion continued to concentrate on the "because of what the government is doing to him" language to find that due process rights are triggered when the damage to reputation of an individual was created in the context of a dismissal from employment or other alteration of legal status. Paul, supra, 708-9.

The U. S. Supreme Court, in a 1975 opinion, held that the "liberty" interests of a public employee were not deprived without due process where he was terminated without public disclosure of the reasons for the discharge. Bishop v. Wood, 426 U.S. 341, 348 (1976). While the reasons for terminating Magistrate Holloway were not publicly disclosed at the time of his dismissal, the very fact of his dismissal, itself an extraordinary and unusual procedure, has damaged his reputation and opportunities for other employment, especially employment as a magistrate. A record of summary dismissal from the office of magistrate by

the presiding superior court judge carries with it inferences and conclusions which no prospective employer of Mr. Holloway could possibly ignore. To hold that such a dismissal would not be damaging to Holloway's good name, reputation or employment opportunities would be to engage in the purest fiction.

This was evidently recognized by the California Court of Appeals in Lubey v. City and County of San Francisco, 159 Cal.Rptr. 440 (Cal.App. 1979), where two police officers were summarily discharged on the basis of unsworn charges of misconduct made against each of them by a citizen. Some of the charges were never made known to the officers, even after they were dismissed. The Court cited Paul v. Davis, supra, and Board of Regents v. Roth, supra for the proposition that dismissal of a probationary employee on charges which stigmatize his reputation, seriously impair his opportunity to earn a living, or which might seriously damage his standing and associations in his community triggered a right to due process because of deprival of his "liberty interest". Lubey, supra at 443. The City argued that such interest was not triggered because it had not published the reasons for the dismissal. The Court rejected its argument:

> We are unpersuaded by the City's arguments that the police personnel files were confidential, that Officers Lubey and Hood have by their action now brought upon themselves the stigmatizing notariety of which they complain, ... It is unrealistic to assume that a citizen's charges of misconduct against police officer, investigated by the police department, found true by the police chief, and resulting in termination the reasons for which had been communicated to the civil service commission have nevertheless somehow retained their confidentiality. And we must also realistically assume that in the officers' future applications for employment, inquiry will be made of their prior job experience, and then into the reason for their termination as policemen.
>
> We conclude therefore that, however described, the "termination" or "dismissal"

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> of Probationary Officers Lubey and Hood did not comport with Fourteenth Amendment requirements.

Lubey, supra at 444.

It is at least as unrealistic as in Officer Lubey's circumstances to assume that the Court System's dismissal of Holloway would not besmirch his record and haunt him in future career opportunities. In determining whether or not to hire Mr. Holloway for any responsible position, no prospective employer would be satisfied with anything less than a determination as to why he was dismissed.

In Nichols v. Eckert, supra at 1366, three justices of the Alaska Supreme Court joined in a concurring opinion which appeared to recognize that the mid-year dismissal of a non-tenured teacher, whether or not accompanied by publicly announced charges, would result in injuries to reputation and employment opportunities:

> The suspension or discharge of a non-tenured teacher prior to the expiration of the term of his or her contract is a very serious matter and may cause substantial injury. Specifically, such suspension or discharge may cause economic hardship, create a stigma of incompetence and blemish the teacher's professional reputation, decrease the possibility of other educational employment opportunities, deny the teacher the opportunity to pursue a chosen professional activity, and disrupt an existing educational relationship between teachers and students. As the Eighth Circuit recently observed in Cooley v. Board of Education of Forest City School District,
>
> > given the ensuing economic hardship of a summary deprivation of the source of one's livelihood, and in view of the awesome and potentially stigmatizing effect of mid-year termination, such a case as this assuredly presents one of the clearest instances where the rule of procedural Due Process, properly applied,

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must operate to interdict injurious and reckless governmental treatment.

In view of the potentially serious injury which would result from an unjustifiable, arbitrary discharge or suspension of a non-tenured teacher, we would employ higher standards of procedural due process and would require the holding of a hearing prior to any suspension or discharge. (Footnotes omitted.)

If the Lubey opinion or Nichols v. Eckert concurring opinion constitute an extension of constitutional due process rights by state courts beyond that indicated as necessary by the U. S. Supreme Court in the Bishop case, such an extension was permissible and fully warranted.

In Shagloak v. State, 597 P.2d 142, 144 (Alaska 1979), the Alaska Supreme Court extended Alaska constitutional due process rights beyond those recognized by the U. S. Supreme Court, in the context of criminal sentencing. The Court stated:

> A state supreme court is not limited by the decisions of the United States Supreme Court or by the Federal Constitution when interpreting the provisions of the state constitution, since the latter may have broader safeguards than the minimum Federal standards. (Citations omitted.)

Shagloak, supra, at 144, n. 14. If Holloway's circumstances are not deemed to be factually distinguishable from those existing in Bishop v. Wood, supra, then this Court should recognize that the due process clause of the Alaska Constitution does not permit the use of fictionalized rationalizations in order to find no deprivation of liberty and resulting denial of due process. Holloway's dismissal, in and of itself, resulted in damages to his reputation and opportunities for re-employment as a magistrate which were at least as great as those suffered by the teachers in Nichols v. Eckert, supra. Accordingly, he was entitled to a hearing prior to dismissal to determine whether or not the charges were true.

1 III. Holloway is entitled to reimbursement for lost wages because of his wrongful termination without a hearing.

2 As stated in Mullane v. Central Hanover Bank and
3 Trust Company, 339 U.S. 306, 313, 70 S.Ct. 652, 656-7, 94 L.Ed.
4 865, 873 (1950) and in Aguchak v. Montgomery Ward Company, Inc.,
5 520 P.2d 1352, 1356 (Alaska 1974),

6 . . . deprivation of life, liberty or pro-
7 perty by adjudication [must] be preceded
8 by notice and opportunity for hearing ap-
propriate to the nature of the case.
(Emphasis added.)

9 See also Etheredge v. Bradley, 502 P.2d 146, 151-3 (Alaska
10 1972). And, as later stated in Fuentes v. Shevin, 407 U.S. 67,
11 81, 92 S.Ct. 1983, 32 L.Ed.2d 556,

12 If the right to notice and a hearing is
13 to serve its full purpose, then, it is
14 clear that it must be granted at a time
when the deprivation can still be pre-
15 vented. At a later hearing, an indivi-
dual's possessions can be returned to
16 him if they were unfairly or mistakenly
taken in the first place. Damages may
17 even be awarded to him for the wrongful
deprivation. But no later hearing and
18 no damage award can undo the fact that
the arbitrary taking that was subject to
19 the right of procedural due process has
already occurred.

20 This principle should apply with equal magnitude to deprivations
21 of property or liberty. As stated in Lynch v. House Finance
22 Corp., 405 U.S. 538, 552, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972),
23 due process distinctions between liberties and property rights
24 are false. Whether Holloway's summary dismissal deprived him of
25 liberty or property or both, he was entitled to a pre-termination
26 hearing.

27 In Nichols v. Eckert, supra, at 1363, the Alaska
28 Supreme Court favorably cited Tracey v. School District No. 22,
29 243 P.2d 932 (Wyo. 1952), for the proposition that dismissal of a
30 teacher without a hearing or notice was a nullity. However, the
31 opinion of the unanimous majority, written by Justice Connor, did
32 not find a need to reach the question of whether the failure to
33

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have the hearing prior to dismissal would, in itself, have required a reversal. Nichols, supra at 1364. In the concurring opinion joined in by three Justices, however, Justice Erwin stated:

> While we generally agree with the holding reached in Justice Connor's opinion for the Court, we would go further and require that except in certain extraordinary situations, the hearing necessary to satisfy the requirements of the due process clause of the Alaska Constitution must be held prior to the mid-term suspension or discharge of a non-tenured teacher.
>
> There may be certain exceptional instances in which the conduct of a teacher would present a serious and imminent threat to the physical or psychological well-being of the students. In such cases, the immediate removal of the teacher from the classroom would be justified. The requirements of due process would be met by a procedure which provided for the suspension of the teacher with pay pending the prompt convening of a full hearing. Absent such extraordinary circumstances, however, a hearing must be afforded a non-tenured teacher before suspension or discharge. (Emphasis added.)

Nichols v. Eckert, supra at 1366.

In Lubey v. City and County of San Francisco, supra, at 445, the Court ordered reinstatement of the police officers who had been denied due process in their dismissal, and awarded damages in the amount of lost benefits and net loss of salary from the date of the improper termination to the date of their reinstatement or until they were terminated after a proper due process hearing.

Similarly, in Board of Regents v. Roth, supra, the U. S. Supreme Court stated:

> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut,

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401 U.S. 371, 379. While "many controversies have raged about . . . the Due Process Clause,". . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . ., it must afford notice and opportunity for hearing appropriate for the nature of the case before the termination becomes effective." Bell v. Burson, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, e.g., Central Union Trust Co. v. Garvan, 254 U.S. 554, 566; Phillips v. Commissioner, 283 U.S. 589, 597; Ewing v. Mytinger v. Casselberry, Inc., 339 U.S. 594. (Emphasis in original.)

Board of Regents v. Roth, supra at 570, n. 7. Implicit in this language is a determination that, absent extraordinary circumstances, a dismissal does not become effective, and is a nullity, until accomplished in accordance requisite due process proceedings.

In a subsequent decision, the Supreme Court muddied the waters somewhat as to whether a post-termination hearing would be acceptable under Federal due process requirements. In Arnett v. Kennedy, 416 U.S. 134 (1974), a government employee was fired for making public statements to the effect that his immediate supervisor had attempted to give a bribe. Under the applicable civil service regulations, the employee, Kennedy, was entitled to only informal proceedings prior to termination; but the regulations provided for very elaborate post-termination hearing as well as the right to reinstatement with backpay should the employee prevail. Kennedy challenged these procedures, arguing that he was entitled to a full hearing prior to termination. By a 5-4 decision, the Court rejected Kennedy's challenge, though there was no majority opinion. Writing for a three-justice plurality, Justice Rehnquist stated that, where Congress had prescribed and paid close attention to the procedures that would be available

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when enacting the legislation that created the job tenure, the substantive right could not be divorced from the procedures provided for its enforcement:

> . . . where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.

Arnett, 153-4. In short, the Court was willing to defer to a Congressional definition of the due process right where Congress had obviously paid close attention to it, and where the employee took the job with knowledge of the precise due process procedures available in a termination. Thus, Kennedy was entitled only to a post-termination hearing, with an award of backpay if he prevailed.

In an opinion concurring in part written on behalf of two justices, Justice Powell rejected this abdication to the legislative branch to determine the sufficiency of constitutional due process procedures. However, in Justice Powell's view, the post-termination hearing procedure set forth in the regulations was consistent with constitutional due process as independently viewed by Justice Powell, because the government's interest in expeditious removal of an unsatisfactory employee was substantial and outweighed Kennedy's interest in continuation of his employment pending an evidentiary hearing. Arnett, supra, 167-9. However, in making this balancing test, Justice Powell put much stock in the fact that the civil service regulations provided for an award of backpay if the complainant prevailed on the merits of his claim. Id. at 169.

The remaining four justices would have required a pre-termination hearing.

Arnett obviously supplies no precedent for a determination that Holloway was not entitled to a pre-termination

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hearing. No legislatively-prescribed "due process" procedures exist for dismissal of magistrates, in Alaska, as they did for government employees in Arnett; thus, the basis for the Arnett plurality opinion is lacking in this case. Moreover, there is no provision for automatic award of backpay should Holloway prevail at a hearing on the merits of his contentions. Thus, a "balancing test" would show that the government's hardships in continuing to employ Holloway (he could have been suspended or assigned to no duties with full pay pending a hearing) does not outweigh the hardship to Holloway in being fully deprived of employment and compensation guarantee to a hearing, without even a statutory or regulatory right to an award of backpay should he prevail in a subsequent hearing.[1/]

An award of backpay until Holloway is afforded due process and properly terminated (if this is the ultimate determination) is appropriate because (1) Holloway is entitled to such compensation until he is properly terminated from his position and (2) an award conditioned upon Holloway's ultimately prevailing on the merits does not serve to discourage public employers from disregarding constitutional rights to a pre-termination hearing. If an employer can summarily dismiss an employee and possibly escape liability for payment of wages prior to a termination hearing, he may be inclined to do so, regardless of the dictates of the Constitution.

1/ Certainly this Court would have the power to award backpay upon Holloway's prevailing at a subsequent hearing; however, the point made here is that such an award should not be conditioned upon such an outcome in that the dismissal was a nullity in that it was not preceded by constitutionally-mandated due process. See Owen v. City of Independence, 445 U.S. 622, 632, n. 12 (1979).

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IV. Conclusion.

For the above reasons, the plaintiff's motion for partial summary judgment should be granted.

DATED at Anchorage, Alaska, this 20th day of June, 1983.

HEDLAND, FLEISCHER & FRIEDMAN
Attorneys for Plaintiff

By ____________________
John S. Hedland

By ____________________
James T. Brennan

The undersigned hereby swears that on the 20 day of June, 19__, the attached documents were mailed to the attorneys of record.

Subscribed and sworn to before me the date last written.

Notary Public
My Commission Expires 7/23/84

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