

SJR

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BILL CONTACT/ACTION

| DATE | CONTACT/ACTION |
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| 4/22 | [Faint handwritten notes] |
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| 4/23 | [Faint handwritten notes] |
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| 1/24 | Ordered ads: Daily News 1/31 + 2/1 Times 1/31 |
| 1/27 | Notification to former A.G.A |
| 2/19 | ORDERED NEW FISCAL NOTE (86) FROM |
| | DICK PERLES (3672) GOES TO SENATE |
| | SEC. ON JANUARY |
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ALASKA STATE LEGISLATURE
SENATE JUDICIARY COMMITTEE

SENATOR PATRICK RODEY, CHAIRMAN
SENATOR TIM KELLY, VICE-CHAIR
SENATOR JAN FAIKS
SENATOR RICK HALFORD
SENATOR ROBERT ZIEGLER, SR.



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AD TO SAY:

PUBLIC HEARING

SENATE JUDICIARY COMMITTEE
Senator Pat Rodey, Chairman

SJR9 Proposing amendments to the Constitution of the State of
Alaska relating to the election of the attorney general.

SATURDAY, FEBRUARY 1
10:00 a.m.

Legislative Information Office
1024 W. 6th Avenue

They can use their best judgment as to format, etc.

THANKS, CAROL - - I OWE YOU

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LAW

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

OFFICE OF THE ATTORNEY GENERAL

January 31, 1986

The Honorable Patrick Rodey
Chair, Senate Judiciary Committee
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Senator Rodey:

Thank you for the opportunity to comment on the merits of Senate Joint Resolution 9. However, before beginning discussion of the issue of whether the voters of the State of Alaska should decide to amend the State's Constitution to provide for the election of the attorney general, I believe a number of the considerations involved in the issue need to be placed in perspective.

First, let's not forget that the 49th State is also 49th in population; with a population recently estimated at just over 525,000 people, Alaska has less residents than many cities outside. Yet, on the other hand, the State of Alaska is first in size; the nation's geographically largest State serves the needs of residents who range from Ketchikan all the way to Barrow. No other State must have a government capable of responding to and mastering such extremes.

Second, let's consider the history behind the formation of Alaska's particular form of government. Dr. Gordon S. Harrison, in A Citizen's Guide to the Constitution of the State of Alaska, provides the following insights:

A strong governor, and a strong legislature are dominant features of Alaska's state government, and these reflect a reaction to the weaknesses of Alaska's governmental institutions during the territorial period. When Alaska was granted territorial status in 1912, a legislature was authorized. However, [the U.S.] Congress limited its powers and retained control over matters of vital interest to the residents of the territory. Congress, for example, restricted the

legislative power to raise revenue through bonding and taxation. It also withheld from the legislature the responsibility for management of the territory's commercial fish and minerals. Executive authority in the territory was similarly weak and ineffective. The governor and secretary of state were federal appointees, and administrative rulemaking and authority were dispersed among many independent boards and commissions.

This territorial scheme partly reflected the notion in Washington, D.C. that Alaska was too remote and too sparsely settled to warrant a greater measure of self-government. However, it also served the interests of federal bureaucracies with long-standing jurisdiction over Alaska's resources, as well as the interest of absentee corporations that exploited these resources. Here the issue was mainly the management of Alaska's fisheries, which were dominated by Seattle and San Francisco canning interests, and Alaska's mineral industries, which were dominated by major East Coast corporations. Alaskans long suspected a silent conspiracy between the bureaucratic managers and the corporate interests; they considered the weak, poor, and decentralized territorial government a result of that conspiracy.

It is not surprising that when crafting their own charter for self-government, Alaska's constitutional convention delegates created extraordinarily strong legislative and executive branches of government. This meant avoiding limitations, prohibitions, and debilitating hedges on the power of the legislature to act; and it meant avoiding the diffusion of executive power through boards, commissions, and numerous elected officials. These principles of legislative and executive organization were considered necessary to make government effective, accountable to the public, and free from the grip of special interests. While they were compromised somewhat in the final document, these ideals guided the delegates in their work.

Alaska's constitution was written by territorial residents who reflected the unique political aspirations and experience of Alaskans. However, there is nothing parochial about the document. Indeed it embodies the most modern and progressive concepts of state constitutional draftsmanship. The delegates were aware of the current thinking of political scientists and state constitutional lawyers. They hired several experts from around the country to advise them, and they had at hand the "Model State Constitution" prepared by the National Municipal League. Contemporary theory matched well the ideas and inclinations of the Alaska delegates, but we cannot overlook the influence of this body of academic opinion on the shape of the final document. For example, much of the language used in the constitution was taken directly from the League's model constitution.

Finally, let's briefly look at the federal experience and the Office of the U.S. Attorney General before addressing Alaska's situation.

On the federal level, the U. S. Constitution provides that within the executive branch of government only the President is elected. The Constitution empowers the President to appoint the heads of all departments and they are responsible and accountable to the President. The U. S. Attorney General is the head of the Department of Justice and therefore a member of the President's Cabinet. The U. S. Attorney General appears on behalf of the government in all U. S. Supreme Court cases in which the federal government is interested and gives legal advice to the President and the heads of all federal departments. He is the supervisor of all federal prosecutors within the nation's criminal justice system. Language setting forth the U.S. Attorney General's duties was adopted as law in 1789 and still serves us well today. In all this time there has never been a serious suggestion raised that the U. S. Attorney General should be an elected official.

The U. S. Attorney General performs duties exactly equatable to those of this State's attorney general. In Alaska, the attorney general's civil division acts as advisor to the Office of the Governor and the other state departments; he or she also supervises the State's criminal section, appointing the chief of that section and the district attorneys.

Yet since we have never heard any responsible, reliable source on the national scene suggest that the government of the United States would be better off if the U.S. Attorney General were elected, why do we now hear a call for the election of Alaska's attorney general?

Before we begin to answer that question, we must also remember that between 1913 and 1959, some forty-six years, the citizens of the Territory of Alaska did, in fact, elect the attorney general. Given an opportunity to review the issue during Alaska's Constitutional Convention in 1955 and 1956, the elected delegates to that Convention - on the basis of the debate held and the information learned -- voted against establishing the head of the Department of Law of the new State of Alaska as an elective position (12 "yes" votes, 40 "no" votes).

Thus, after the experience of forty-six years under an elected attorney general, the citizens of Alaska, in approving the State Constitution in April of 1956, rejected that notion and returned to the model of the federal Constitution. Why? Let's list some of the reasons.

Accountability. As stated, the Alaska (and the U. S.) Constitution favors a strong executive. All executive power is vested in the governor. As a result, the people of Alaska know to whom they should turn when they are displeased with or distrustful of the administration of its government, and whom to thank when the government is functioning well. In states where executive branch officials other than the governor hold independent, elective office, it is the often divisive habit of the governor to blame the elected attorney general (and any other elected department heads) for many of that state's problems, and the other elected executive branch officials to similarly blame the governor and each other for the state's errors. For example, in states which elect the governor, the attorney general, and a treasurer, these officials are often at odds over revenue policies and methods of taxation, leading to serious public financing problems.

This division of public responsibility among various elected executive branch officials makes it difficult for the citizenry to feel confident in assessing which officials should, in fact, be called to task for perceived problems within the administration. The resulting confusion is very harmful to the development of accountability in government. As you know, it is hard to pin responsibility on a passing buck.

In the development of a model state constitution which, among other things, recommended the appointment of the attorney general, the National Municipal League stated:

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

Studies on administrative reorganization usually argue that fragmentation of authority leads to irresponsibility; a single chief executive, however, who is held directly accountable through the electoral system, will -- as a consequence -- make his or her administration more responsive. As one delegate to Alaska's Constitutional Convention put it: the purpose of vesting the power of the executive branch in a single person was very basic: "we would know who to blame and could vote accordingly at the next election." Such direct responsibility to the public within the Executive Branch is at the core of our nation's system of representational democracy.

Efficiency. The operation of state government in Alaska is highly unified and coordinated; our small population both mandates and justifies this high degree of centralization. Alaska's attorney general, appointed by the governor as the head of the Department of Law, is the legal advisor to both the governor and other state officers. The governor and department heads request and receive advice only from attorneys within the Department of Law. All legal services are coordinated and centralized within the one department.

Experience in other states with elected attorneys general has shown that the governors in such states generally hire their own attorneys to advise the governor, rather than depend on the advice of an elected attorney general who may be of a different political or philosophical bent than the state's chief executive. In addition, the heads of the various departments within the executive branch also frequently hire their own attorneys, leading to a proliferation of "in-house" counsel to the staff of all major departments. Such counsel are employed by executive branch agencies to give department heads a

"second" opinion in controversial matters where the elected attorney general is known to hold opinions contrary to the policies of the governor and his or her administration. These "in-house" counsel usually do not have authority to litigate, but they do provide legal advice to department heads.

Without the centralized legal services and advice that occurs in Alaska, agencies in states with elected attorneys general rely on advice from their own lawyers and, therefore, the states receive differing interpretations regarding the legal issues that are daily raised. This, in turn, makes consensus on important issues among different agencies much more difficult to achieve. In states with elected attorneys general, public policy decisions by the executive branch are often delayed, to the detriment of both the public and the legislature.

In addition, counsel for the various departments frequently submit amicus briefs in litigation affecting their department's programs. It is not unusual in states with an elected attorney general to see four or five separate briefs filed in a single matter, each brief representing the varying viewpoints of the different agencies involved and all of them purporting to represent the state's position! If nothing else, this needless duplication insures that the courts and the public are confused about the state's policy on important issues.

The purpose of a strong, accountable executive is to specifically avoid such confusion in matters of policy; the State of Alaska must speak with one voice if its concerns are to be heard forcefully and clearly.

Cost. Inefficiency and lack of accountability add up to one thing: increased costs to the state. If Alaska were burdened with an elected attorney general, it has been estimated that the cost to the taxpayers of the additional legal counsel the governor and various State agencies and departments would require would easily exceed \$1.0 million and . . .

Even more costly, however, would be the expense to the State of setting up the attorney general's office as an "independent" department within the executive branch. Currently, many of the administrative services necessary and common to running the numerous departments and agencies of the State of Alaska are centralized, to avoid duplication of effort. If it was determined to fully isolate the elected attorney general's office from the organizational and supervisory control of the governor, in order to assure the office's independence, it would be necessary to provide special funds to the Department of Law

for it to separately perform the administrative functions now collectively administered (e.g., purchasing; leasing and supply; personnel; duplicating services; data processing). It is estimated that it would cost an additional \$2.5 million to provide the degree of institutional independence that experience indicates is sometimes demanded of taxpayer's pocketbooks in states with elected attorneys general. Such a sum is an enormous increase over the Department of Law's current administrative overhead of less than \$725,000.

Taken together then, the cost of the additional legal counsel required by the governor's office and other executive branch agencies, plus the additional administrative overhead resulting from the creation of an independent department approximates \$3.5 million! Such is the cost that would have to be borne by Alaskans if a proposal to have an elected attorney general were adopted by the voters. This added expense would occur at a time of declining oil revenues and in a State where size and population necessitates a unified administration if our government is going to function cohesively and efficiently.

Political In-Fighting. The delegates to the U. S. Constitutional Convention held a little less than 200 years ago recognized that a strong, centralized presidency was needed to guide a country as large and diverse as America. Similarly, the delegates to Alaska's much more recent Constitutional Convention recognized that our vast State, with its disparate interests and unique citizenry, required the unifying leadership that a strong executive would provide.

This holds true today more than ever. The last thing our State needs is an elected attorney general who may have a personal or political agenda which varies from the position of the governor. The friction between two elected administration officials could lead to a less responsive bureaucracy and to debilitating executive branch in-fighting.

In the Federalist Papers, number 70, written by Alexander Hamilton in 1783, he stated: "Energy in the executive is a leading character in the definition of good government." Energy, as used here, refers to the capacity of the the executive to make a decision and carry it out. If you elect the attorney general (or any other department head, for that matter), you will deprive the governor of that energy. His energy will be directed to the conflict within his cabinet that is generated by having an independent voice there.

The situation can be likened to having two governments in one municipality, like the former City and Borough of Anchorage or the City and Borough of Juneau. The history of Alaska's local governments shows that most of our major communities have wisely consolidated their cities and boroughs into one entity, so that the energy of the people that run them is not spent fighting each other but in addressing the principal problems of the community as a whole. You will deprive the executive branch of its capacity for effective leadership if you saddle the governor with an opponent within the system.

Experience shows that if the attorney general is an elected official, conflict with the governor is inevitable; rarely are relations cooperative and cordial. Wherever the governor and elected attorney general have differing viewpoints, opinions from the attorney general's office will be affected by the attorney general's desire to be viewed in the best possible public posture, rather than by those considerations that assist the executive branch and the public policy issues it is attempting to implement. An elected attorney general often has an ambition to be the governor and may therefore be in regular, fractious confrontation with the chief executive.

While political debate is a healthy and necessary part of our democracy, it can also be time-consuming and inefficient. This nation's Founders established a strong legislative branch, with its multitude of elected representatives, as the rightful forum for such political debates -- debates which generally lead to the passage of meaningful and beneficial laws. The executive branch, which is created to implement those laws, must -- of necessity -- be more efficient and less debilitated by internal debate or nothing would be accomplished. The pressing needs of Alaskan citizens demand that the State's executive branch remain accountable to the people through a single elected official, not through two (or more) officials vying for public popularity at the expense of responsiveness and responsibility.

Inappropriate, Political Influences. Unfortunately, the real world of politics makes it difficult for an attorney general elected to office to be free from political pressures. An elected attorney general is often criticized because, in framing legal opinions, his or her reading of the law is unduly influenced by the current political climate within the state and his or her desire to give "popular" advice.

There is also the concern that an elected attorney general is further inappropriately influenced by the need to be seen as responsive to the contributors to his or her campaign for

elected office. Even on its face it is clear that a very real conflict exists if an attorney general is placed in the position of attempting to balance legal considerations with the expressed desires of the contributors to his or her campaign for public office: such contributors might not be willing to provide financial support in the next election should the office's advice run counter to their private interests in a particular matter.

It is thus important to ask: is it appropriate for Alaska's top legal advisor to have a constituency to which he or she is responsive?

To illustrate: As you know, oil companies contribute heavily to political campaigns in Alaska. Let's assume -- for the moment -- that Alaska elects its attorney general and, like most other elected officials, that the attorney general received many contributions from oil industry interests during his or her campaign for the office. Alaska's Department of Law recently successfully defended from an attack by oil companies an oil tax program adopted by the Legislature some years back. The Department's aggressive defense of the tax legislation saved the state from having to refund a total of \$1.8 billion dollars to a number of oil companies!

What if, while under an elected attorney general, the State had lost the case? In that instance, couldn't taxpayers have legitimately questioned whether the case had been forcefully and competently defended, knowing that the attorney general's campaign for elective office had been heavily financed by oil industry money? Citizens of this State must ask themselves why, in the light of such probable conflicts, there is mounting pressure among certain groups and by certain individuals to place the attorney general in such ethical binds by requiring a political campaign for the office. Who will really benefit?

Before concluding, there are a number of matters that are routinely raised by critics of our current system of government which need to be addressed.

First, because Alaska's attorney general is appointed by the governor, this question is often asked: "Can the attorney general be objective in providing legal advice that might affect the interest of an incumbent governor?" Which is to say, are those who support the status quo so naive as to believe the attorney general doesn't bend the law too far sometimes in giving the nod of approval to some action by the governor who appointed him or her to office?

John Havelock, a former Alaska Attorney General, recently discussed this issue. His first-hand comments are perceptive:

Now certainly a lawyer is always anxious to please his client. A client who chooses a lawyer not anxious to please is a fool indeed. But the interest in pleasing lies in showing the way through and around the labyrinth of the law, not in breaking it. Moreover, the attorney general is counsel to the office, not the person. Private sector lawyers are familiar with the distinction between counsel to the corporation and private counsel to members of the board, the chairman or a chief executive officer. If a governor has a personal problem, including the possibility of criminal or civil liability for wrongdoing, he had better get his own lawyer. The attorney general will not advise him. Several (probably all) Alaska governors have sought their own counsel at one time or another for purposes public and private. Past investigations and indictments and convictions of the state's most powerful political figures, not to mention the very recent impeachment proceedings, are not indications of weakness in the system but examples of how well it works. If an elected attorney general was making this kind of investigation much of the public would write it off as partisan politics.

The State Attorney General, like his federal counterpart, is a direct descendant of the chancellor Sir Edward Coke, who drove James the First of England up the wall in the Seventeenth Century with his firm adherence to the proposition that even a king ruling under divine ordination cannot change the law. As a governmental officer, Coke saw his loyalty as running to the Crown, not to the person of the king, and so it is with Alaska's Attorney General. His first duty is fixed by oath - to support the constitutions and laws of the United States and of the State. The governor's writ extends no further than the law allows.

Though the public routinely supports the popular election of judges, the attorney general, and DAs, two to one, lawyers in this state oppose election

in inverse proportion. I suspect because they can see that the current Alaskan system produces a style of legal services obedient to the law, not to the appointing officer, and not to shifting popular majorities as would more likely be the case if these offices were elective. Elected and appointed attorneys general both struggle between the duty to the law and accountability to the people and popular opinion. But the accountability of an elected attorney general is more problematic than that of an appointed one. (Emphasis added.)

Practically speaking, as Mr. Havelock was, it is clear that the issues of public accountability and ethical conduct are tantamount. (Remember our State's experience during Territorial days.) Elected attorneys general have too many masters: first, there is political ambition; second, there is the consideration that must be given to the specific interests of their contributors; and third, there is the desire to issue opinions that are popular with the voters, decisions which are not necessarily the right -- or best -- advice to give to the executive.

The appointed attorney general needs only to balance his or her advice to the governor against the laws he or she has sworn to uphold, and in that manner assist the executive branch in going about its business lawfully.

Another argument often raised in this debate is that an elected attorney general would be an attorney "for the people." It is a very fundamental error to believe that an attorney general, whether appointed or -- in particular -- elected, is an attorney "for the people." An attorney general is the attorney to the executive branch (but does give advice to the legislature and the judicial system when asked). No citizen of any state can go up to the attorney general's office and say: "I want an opinion on a particular matter." The attorney general, whether appointed or elected, will, of necessity, tell that citizen: "we don't issue opinions for individual citizens; we can only give legal advice to state agencies."

It is easy to be cynical and note, however, that in one very real sense we will get an attorney "for the people" if the attorney general is elected. Experience in other states has shown that an elected attorney general is very much for the people: as long as you are one of the people who supported the attorney general, he or she will definitely be for you!

But do citizens want or really deserve a partisan attorney general? Although elections for attorneys general are usually called "non partisan," just as many mayoral elections in Alaska are "non partisan," the need to conduct a political campaign creates a partisan atmosphere that only the most naive would fail to acknowledge.

Nevertheless, it is also true, nationwide, that the state attorney general has become much more of a public advocate. Since the early 1970's in almost every state, including Alaska, the office of the attorney general has broadened the scope of its authority to include a range of activities that are firmly rooted in public advocacy and are now considered by the public to be a normal part of an attorney general's responsibilities. Offices previously content to serve merely as in-house counsel and advisors to executive branch officials have become more involved in consumer protection cases, anti-trust investigations, and intervention in utility rate cases.

It is no doubt the increase in these advocacy functions which has given rise to the impression that the attorney general is the "people's attorney." And while it appears that the attorney general is less a "company" person when cast in the role of advocate protecting the public's interest, it is no less true today than fifteen years ago that the attorney general is first -- and foremost -- counsel to the executive branch. Because, however, governors (and, hence, governments) respond to the demands of citizens and citizen interest groups, the growth in consumer advocacy within Alaska's own Department of Law reflects effective, responsive public policy at work in the executive (and legislative) branch.

In closing, let's remember that the delegates to Alaska's Constitutional Convention framed our Constitution along the lines of the federal Constitution because of the proven strength of the U. S. Constitution. A strong executive makes for a centralized and efficient government that is directly accountable to the people. Before amending Alaska's Constitution to provide for an elected attorney general, citizens should question what benefits will actually derive to the public from politicizing the office of the attorney general while forcing expensive and divisive realignments within the executive branch.

And it isn't as if the public had no say in the choice of the State's attorney general: the individual selected for the job in Alaska is appointed by a governor who is elected statewide by the voters, a governor whose political agenda has just been given the stamp of approval by the electorate. The appointment

The Honorable Patrick Rodey
Alaska State Legislature

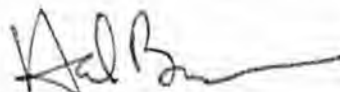
January 31, 1986
Page 13

of the attorney general must then be confirmed by the Legislature in joint session (a total of sixty men and women, also elected by the people). Confirmation hearings are held; the public gets a chance to hear about the person designated to serve as the attorney general; the Legislature can reject the appointment.

Surely the checks and balances are there. Surely the decision of the Founders in 1787 and Alaska's own delegates in 1956 deserve to be respected for the decisions they reached. Only substantial public need can justify amendments to our Constitutions. In this instance, I believe political whim or convenience should be turned down. Alaska is fortunate to have a strong executive form of government, and I believe we should keep it that way.

Please do not hesitate to contact me if you have any questions concerning this matter or if I can be of further assistance.

Sincerely yours,



Harold M. Brown
Attorney General

HMB/glg

8845 Gail Ave.
Juneau, Ak. 99821
2-26-86

Senators DeVries, Abood, Faiks, Rodey & Ray
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Senators:

My Wife and I support CS for Senate Joint Resolution #9.

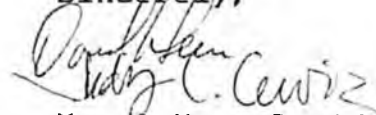
We need the checks and balance that having an elected AG
would provide.

We ask you to vote for this bill when it comes to the floor,
and to advise any other senators who need to know, of our
opinion.

If this bill comes to a vote, we would request our own
Senator, Bill Ray, to kindly send us a list of all the
senators and how they voted.

Thank you.

Sincerely,



Mr. & Mrs. David Lewis

file

P.O. Box 211248
Auke Bay, Ak. 99821
2-26-86

Senator Patrick Rodev
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Senator Patrick Roday:

My husband and I are asking you to vote for CS for Senate
Joint Resolution #9.

We feel it is imperative that the AG become accountable to
the people, if Alaska is to be the representative government
that our U.S. Constitution promises us we are to live under.

We respectfully request a reply as to how you have voted or
intend to vote if this bill comes to the floor this week.

Sincerely,

Mr. & Mrs. C. Dale Miller

Mr. & Mrs. C. Dale Miller

1/12

February 15, 1986

Honorable Patrick Rodley
Senator State of Alaska
Chairman, Judiciary Com.
Dear Editor; Senator Rodley

PEOPLE CHOSE A.G.

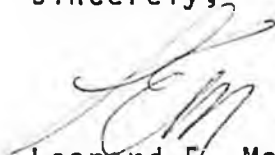
Governor Sheffield's efforts during the last session to get approval from the legislature of his choice for Attorney General cost the people untold thousands in cash as well as unknown time (money) diversion by the legislators from considering productive legislation.

The legislators should receive salaries in excess of the salaries received by those of the judicial branch, however, their valuable time should not be wasted on things the people can do, such as, selecting an Attorney General and other judicial officers.

A people-selected Attorney General would certainly attach sufficient importance to the job to complete his term and such selection would not distract the legislature from the work only it can do.

The persons seeking voter approval as Attorney General that have no ambition to consider some future higher office or other self improvements will probably be rejected by the voters as dead-bats.

Sincerely,


Leonard E. Moffitt
Box 748
Palmer, Alaska 99645
745-3384

STATE OF ALASKA 1986 LEGISLATIVE SESSION FISCAL NOTE

Revision Date : 2/20/86

REQUEST

Bill/Resolution No. : SJR 9
 Title : "...relating to the election of the attorney general."
 Sponsor : Sen. DeVries
 Requestor : Senate Judiciary Committee
 Date of Request : February 19, 1986

FISCAL DETAIL

Agency Affected : Department of Law
 BRU : Legal Services, Prosecution, Consumer Protection
 Components : Leg. Svcs. Opns., Admin. & Support, Leg. Svcs. D.P., Prosecution - Admin. & Support

EXPENDITURES/REVENUES : (Thousands of Dollars)

| OPERATING | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 | FY 91 |
|-------------------|-------|-------|-------|-------|-------|-------|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | | | | * | * | * |

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|---------|--|--|--|--|--|--|
| CAPITAL | | | | | | |
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| REVENUE | | | | | | |
|---------|--|--|--|--|--|--|

FUNDING : (Thousands of Dollars)

| | | | | | | |
|---------------|--|--|--|---|---|---|
| GENERAL FUND | | | | * | * | * |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | | | | | |

POSITIONS :

| | | | | | | |
|-----------|--|--|--|---|---|---|
| FULL-TIME | | | | * | * | * |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS : Attach a separate page if necessary

* Because expenditures would not begin until the latter part of FY 89 ^{1/}, actual costs cannot be determined at this time. Please see the attached analysis.

^{1/} It is not clear from the resolution whether an incumbent or newly appointed attorney general, appointed prior to the first Monday in December, 1988, could assume independent status if a constitutional amendment conferring such status is approved in 1986.

Prepared by : Richard I. Pegues, Director Phone : 465-3672
 Division : Administrative Services Division Date : 2/20/86
 Approved by Commissioner : Harold M. Brown, Attorney General Date : 2/20/86
 Agency : Department of Law

Distribution (by Agency preparing fiscal note):

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SJR 9

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

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It will be very expensive for an elected attorney general to provide all or most of these services in-house. Although an attorney general may decide to use some of the centrally provided services, key areas such as: personnel; professional services contracting; purchasing, supply and leasing, data processing; and budget preparation and management, would have to be provided in-house if the attorney general's functions are to be at least reasonably free of the governor's supervision.

Additional costs, expressed in FY 85 dollars, that will provide for complete independence from the organizational and supervisory control of the governor are shown below. Even if the attorney general were to forego a part of this independence, the savings would only amount to 20 or 30% of the total cost because of the necessity to retain in-house control over the essential support services that would determine an independent department's freedom of action.

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CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SJR 9

and duplication services. Also costed in is \$200 per month per employee for contractual services to cover telephone, copying and postage. Ongoing commodities are estimated at \$150 per month, per employee. New position costs include \$1,500 per employee for one-time commodities (furniture and equipment costing less than \$500 per item), and \$1,200 per employee for new position equipment costing more than \$500 per item. Special items include \$15,000 for employee recruitment advertising for non-attorney job applicants, \$25,000 for personnel system printing. Word processors will cost \$14,500 each for a total cost of \$72,500. Records management equipment include storage devices and microfilm/graphics equipment totalling \$95,000. Duplication equipment will cost approximately \$170,000. DP costs will probably total about \$150,000 for computing time and storage and about \$150,000 for existing systems program maintenance.

The total additional cost of \$2,554,937 is an enormous increase over the department's current administrative overhead of \$424,600 projected for FY 86. It is, however, part of the price that will probably have to be paid if the proposal to have an elected attorney general is adopted by the electorate during the 1986 general election.

Another major cost area that will eventually occur as a result of changing from an appointed to an elected attorney general, will be the proliferation of special counsel on the staffs of major departments. Historically, such counsel have been employed by executive branch agencies to give department heads a "second" opinion in controversial matters in states having an elected attorney general. Such counsel usually do not have the authority to litigate, but they do provide legal advice to department heads and submit amicus briefs in litigation affecting their department's programs. It is not unusual in these states to see four or five separate briefs filed in a single matter, in addition to the attorney general's brief, representing the varying viewpoints of different agencies. Costs for just a single special counsel, including secretarial assistance, total about \$150,000 per year in 1985 dollars. Although it is impossible, at this time, to accurately say how extensive the use of in-house counsel will be if there is an elected attorney general, the additional cost for such counsel could easily exceed \$1.5 million annually, within just a few years.

| <u>Function</u> | <u>Positions</u> | <u>Salary/ Benefits</u> | <u>Other Position Costs</u> | <u>Total</u> |
|--------------------|----------------------------|-----------------------------|-----------------------------|--------------|
| Director's Office | (1) Budget Analyst R19 | 51,365. | Travel 2,500. | |
| | (1) Admin. Officer R17 | 44,923. | Contractual 24,100. | |
| | (1) Clk. Typist R8 | 27,143. | Commod.-ongoing 5,400. | |
| | | | Commod.-one-time 4,500. | |
| | | | Equip.-one-time 18,100. | |
| | (3) | 123,431. | 54,600. | 178,031. |
| Personnel | (1) Personnel Mgr. R21 | 58,195. | Travel 10,000. | |
| | (2) Personnel Analysts R16 | 42,103. X 2 | Contractual 54,200. | |
| | (1) Training Officer R18 | 48,107. | Commod.-ongoing 14,400. | |
| | (2) Personnel Tech.'s R12 | 33,820. X 2 | Commod.-one-time 12,000. | |
| | (1) Payroll Clerk R10 | 30,284. | Equip.-one-time 24,100. | |
| | (1) Clk. Typist R8 | 27,143. | | |
| | (8) | 315,575. | 114,700. | 430,275. |
| Property/Supply | (1) Materials Mgr. R21 | 58,195. | Travel 7,500. | |
| | (1) Purchasing Agent R18 | 48,107. | Contractual 19,600. | |
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| | (1) Clk. Typist R8 | 27,143. | Commod.-one-time 6,000. | |
| | | | Equip.-one-time 19,300. | |
| | (4) | 175,548. | 59,600. | 235,148. |
| Finance/Accounting | (1) Finance Officer R21 | 58,195. | Travel 5,000. | |
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| | | | Equip.-one-time 15,700. | |
| | (5) | 188,009. | 70,300. | 258,309. |

Records Management

| | | | | |
|---------------------------------|-----------------|------------------|----------|----------|
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| (1) Records Supervisor R15 | 39,415. | Contractual | 81,200. | |
| (1) Records Handler R12 | 33,820. | Commod.-ongoing | 9,000. | |
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| <hr/> | | | | |
| (5) | 188,631. | | 204,500. | 393,131. |

Data Processing/Communications

| | | | | |
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| (1) DP Mgr. R23 | 65,742. | Travel | 7,500. | |
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| <hr/> | | | | |
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Duplication Svcs.

| | | | | |
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| | | Equip!-one-time | 174,800. | |
| <hr/> | | | | |
| (4) | 163,928. | | 313,500. | 477,428. |

| | | | | |
|-------|------|------------|------------|-------------|
| TOTAL | (33) | 1,341,037. | 1,213,900. | 2,554,937.. |
|-------|------|------------|------------|-------------|

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SIR No. 9
 Title: "...relating to the election of the attorney general."
 Sponsor: Sen. DeVries
 Requestor: Office of the Gov./OMB
 Date of Request: April 22, 1985

FISCAL DETAIL

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

| | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 | FY 90 |
|------------------------|-------|-------|-------|-------|-------|-------|
| OPERATING | | | | | | |
| 100 PERSONAL SERVICES | | | | | | |
| 200 TRAVEL | | | | | | |
| 300 CONTRACTUAL | | | | | | |
| 400 SUPPLIES | | | | | | |
| 500 EQUIPMENT | | | | | | |
| 600 LAND & STRUCTURES | | | | | | |
| 700 GRANTS, CLAIMS | | | | | | |
| 800 MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | | | | | * | * |

| | | | | | | |
|----------------|--|--|--|--|--|--|
| CAPITAL | | | | | | |
|----------------|--|--|--|--|--|--|

| | | | | | | |
|----------------|--|--|--|--|--|--|
| REVENUE | | | | | | |
|----------------|--|--|--|--|--|--|

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---------------|--|--|--|--|---|---|
| GENERAL FUND | | | | | * | * |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | | | | | | |

POSITIONS:

| | | | | | | |
|-----------|--|--|--|--|---|---|
| FULL-TIME | | | | | * | * |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: Attach a separate page if necessary

* Because expenditures would not begin until the latter part of FY 89 ^{1/}, actual costs cannot be determined at this time. Please see the attached analysis.

1/ It is not clear from the resolution whether an incumbent or newly appointed attorney general, appointed prior to the first Monday in December, 1988, could assume independent status if a constitutional amendment conferring such status is approved in 1986.

Prepared By: Richard I. Pegues, Director Phone: 465-3672
 Division: Administrative Services Date: 4/23/85
 Approved by Commissioner: Norman C. Gorsuch Date: 4/23/85
 Agency: Department of Law

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

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

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It will be very expensive for an elected attorney general to provide all or most of these services in-house. Although an attorney general may decide to use some of the centrally provided services, key areas such as: personnel; professional services contracting; purchasing, supply and leasing; data processing; and budget preparation and management, would have to be provided in-house if the attorney general's functions are to be at least reasonably free of the governor's supervision.

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| (4) | 163,928. | | 313,500. | 477,428. |

| | | | | |
|-------|------|------------|------------|------------|
| TOTAL | (33) | 1,341,037. | 1,213,900. | 2,554,937. |
|-------|------|------------|------------|------------|

Bradley
2/3/86

Original sponsors: Devries, Abood,
Faiks and Rodey

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE JOINT RESOLUTION NO. 9 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 Proposing amendments to the Constitution
6 of the State of Alaska relating to the
7 election of the attorney general.

8 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. Article III, sec. 23, Constitution of the State of Alaska
10 is amended to read:

11 SECTION 23. REORGANIZATION. (a) Except as provided in (b) of
12 this section, the [THE] governor may make changes in the organization
13 of the executive branch or in the assignment of functions among its
14 units which he considers necessary for efficient administration.
15 Where these changes require the force of law, they shall be set forth
16 in executive orders. The legislature shall have sixty days of a
17 regular session, or a full session if of shorter duration, to disap-
18 prove these executive orders. Unless disapproved by resolution con-
19 curred in by a majority of the members in joint session, these orders
20 become effective at a date thereafter to be designated by the gover-
21 nor.

22 (b) The governor may not make a change in the organization or
23 function of any unit of the executive branch which is headed by the
24 attorney general.

25 * Sec. 2. Article III, sec. 24, Constitution of the State of Alaska is
26 amended to read:

27 SECTION 24. SUPERVISION. Except for any unit of the executive
28 branch which is headed by the attorney general, each [EACH] principal
29 department shall be under the supervision of the governor.

1 * Sec. 3. Article III, sec. 25, Constitution of the State of Alaska is
2 amended to read:

3 SECTION 25. DEPARTMENT HEADS. The head of each principal de-
4 partment shall be a single executive unless otherwise provided by law.
5 The head of a principal department [HE] shall be appointed by the
6 governor, subject to confirmation by a majority of the members of the
7 legislature in joint session, and shall serve at the pleasure of the
8 governor, except as otherwise provided in this article with respect to
9 the lieutenant governor and the attorney general [SECRETARY OF STATE].
10 The heads of all principal departments shall be citizens of the United
11 States.

12 * Sec. 4. Article III, Constitution of the State of Alaska is amended
13 by adding new sections to read:

14 SECTION 28. ATTORNEY GENERAL: QUALIFICATIONS. There shall be
15 an attorney general. The attorney general shall be at least thirty
16 years of age and a qualified voter of the state. The attorney general
17 shall have been a resident of Alaska at least five years immediately
18 preceding the filing for office and shall have been a citizen of the
19 United States for at least seven years. The attorney general shall be
20 licensed to practice law in the state and shall possess additional
21 qualifications prescribed by law.

22 SECTION 29. ELECTION OF ATTORNEY GENERAL. The attorney general
23 shall be chosen by the qualified voters of the state at a general
24 election. The candidate receiving the greatest number of votes shall
25 be attorney general.

26 SECTION 30. LIMIT ON TENURE. A person who has been elected
27 attorney general for two full successive terms is not eligible to hold
28 that office until one full term has intervened.

29 SECTION 31. VACANCY. In case of a vacancy in the office of

1 attorney general for any reason, a successor shall be elected for the
2 remainder of the unexpired term at the first general election occur-
3 ring not less than six months after the office becomes vacant. The
4 governor may appoint a qualified person to fill the office between the
5 date it becomes vacant and the date it is filled by election.

6 SECTION 32. COMPENSATION. The compensation of the attorney
7 general shall be prescribed by law and shall not be diminished during
8 the term of office, unless by general law applying to all salaried
9 officers of the state.

10 SECTION 33. DUTIES. The attorney general shall be the legal
11 adviser of state officers, shall represent the state in all civil
12 actions in which the state is a party, shall prosecute all violations
13 of state law, and shall perform other duties prescribed by law.

14 SECTION 34. ELECTION AND TERM OF ATTORNEY GENERAL. The first
15 election for an attorney general required by the constitution to be
16 elected shall occur at the first general election occurring after the
17 office is established under the constitution. If a vacancy occurs in
18 the office of attorney general before the first general election held
19 after the office is established under the constitution, the office
20 shall be filled under the law as it existed before the office was
21 established under the constitution. Except as otherwise provided in
22 the constitution, the term of office of attorney general required by
23 the constitution to be elected begins at noon on the first Monday in
24 December following the general election for that office and it expires
25 at noon on the first Monday in December four years later.

26 * Sec. 5. The amendments proposed by this resolution shall be placed
27 before the voters of the state at the next general election in conformity
28 with art. XIII, sec. 1, Constitution of the State of Alaska, and the elec-
29 tion laws of the state.

Table 19
STATE ADMINISTRATIVE OFFICIALS: METHODS OF SELECTION

State or other jurisdiction

district in which election

of official sought to be

on for officer sought to be

ard of Equalization, and

ze of official sought to be

red and qualified to vote at

ll district or local officials;

nd qualified to vote at the

date offering for the office

vote in the last general elec-

officer was elected

tion for office of official

districts of less than 1,000

electoral district of officer

ral election is required, ex-

in which case 15% of the

election in that district is

eting official sought to be

on for governor

me court justice

in unit of government

governor within the district

ture or petition of legisla-

onal election. Referendum

's cast in last gubernatorial

e "yes"

ection or by 2/3 vote of

| State or other jurisdiction | Governor | Lt. governor | Secretary of state | Attorney general | Treasurer | Adjutant general | Administration | Agriculture | Banking | Budget | Civil rights | Commerce | Community affairs | Comptroller | Consumer affairs | Corrections | Data processing |
|-----------------------------|----------|--------------|--------------------|------------------|-----------|------------------|----------------|-------------|---------|--------|--------------|----------|-------------------|-------------|------------------|-------------|-----------------|
| Alabama | CE | CE | CE | GB | CE | G | ... | CE | G | CS | ... | G | G | AG | (a-1) | G | CS |
| Alaska | CE | CE | (a-4) | GB | (a-3) | GB | A | A | A | L | G | GB | GB | AG | (a-1) | A | A |
| Arizona | CE | CE | CE | GB | GB | G | ... | GS | B | GS | A | ... | ... | AG | (a-1) | GS | AG |
| Arkansas | CE | CE | CE | GB | GB | G | (a-10) | (a-11) | AG | AG | ... | (a-12) | G | (a-10) | (a-1) | GS | G |
| California | CE | CE | CE | GB | GB | GS | (b) | GS | GS | GS | G | GS | GS | CE | GS | GS | CS |
| Colorado | CE | CE | CE | GB | GB | G | GS | GS | ... | GS | B | A | A | (a-1) | GS | (a-8) | A |
| Connecticut | CE | CE | CE | GB | GB | CE | GE | GE | GE | OS | B | A | CE | CE | CE | CE | A |
| Delaware | CE | CE | GS | GB | GB | GS | GS | GS | GS | OS | GS | AG | AG | A | AG | GS | AG |
| Florida | CE | CE | CE | GB | GB | CE | CE | CE | CE | A | A | AG | GS | A | A | GS | A |
| Georgia | CE | CE | CE | GB | A | G | GS | CE | GS | ... | ... | B | G | CE | G | B | A |
| Hawaii | CE | CE | (a-4) | GS | ... | GS | ... | GS | (a-25) | GS | ... | (a-7) | GS | (a-25) | (a-3) | (a-22) | (a-5) |
| Idaho | CE | CE | CE | GB | GB | G | GS | GS | GS | G | BGS | G | (a-11) | CE | (a-1) | BGS | (a-5) |
| Illinois | CE | CE | CE | GB | GB | G | GS | GS | G | G | GS | GS | GS | CE | (a-1) | GS | A |
| Indiana | CE | CE | CE | GB | GB | G | G | G | G | G | (a-4) | A | ... | AT | G | A | A |
| Iowa | CE | CE | CE | GB | GB | GS | ... | SE | GS | (a-5) | GS | GS | A | GS | (a-1) | (a-3) | CS |
| Kansas | CE | CE | CE | GB | SE | GS | GS | B | GS | CS | B | GS | A | A | GS | A | A |
| Kentucky | CE | CE | CE | GB | GB | G | GS | G | AG | B | G | G | (a-10) | A | AG | AG | A |
| Louisiana | CE | CE | CE | GB | GB | GS | G | CE | GS | GS | ... | GS | GS | (a-8) | GS | GS | A |
| Maine | CE | CE | GS | GB | GB | G | GLS | GLS | GLS | AG | B | (a-27) | G | GLS | AG | CS | (a-5) |
| Maryland | CE | CE | CE | GB | GB | GS | ... | GS | AGS | GS | GS | A | AG | A | AGS | (a-5) | (a-5) |
| Massachusetts | CE | CE | CE | GB | GB | G | G | G | AG | AT | G | G | G | G | G | A | A |
| Michigan | CE | CE | CE | GB | GB | GS | GS | B | GS | (a-8) | B | GS | ... | (a-1) | B | (a-8) | (a-8) |
| Minnesota | CE | CE | CE | GB | GB | G | GS | GS | BS | GS | GS | (a-11) | A | GS | GS | A | A |
| Mississippi | CE | CE | CE | GB | GB | GS | ... | SE | GS | B | ... | (a-29) | B | (a-30) | A | B | B |
| Missouri | CE | CE | CE | GB | GB | GS | GS | GS | AS | A | B | (a-11) | A | GS | GS | A | A |
| Montana | CE | CE | CE | GB | A | G | GS | GS | (a-11) | G | G | G | (a-11) | A | G | A | A |
| Nebraska | CE | CE | CE | GB | GB | G | GS | GS | A | B | GS | (a-11) | A | (a-1) | GS | A | A |
| Nevada | CE | CE | CE | GB | GB | G | G | BG | A | (a-8) | G | G | CE | A | G | A | A |
| New Hampshire | CE | ... | CL | GB | GB | GC | (a-5) | GC | GC | A | B | GOC | GOC | GOC | (a-1) | GOC | B |
| New Jersey | CE | ... | GS | GB | GB | ... | BC | GS | GS | A | GS | GS | GS | GS | GS | GS | A |
| New Mexico | CE | CE | GS | GB | GB | GS | (b) | GS | G | G | G | GS | AG | G | (a-1) | A | A |
| New York | CE | CE | CE | GB | A | G | ... | GS | G | G | G | GS | GS | CE | GS | GS | (a-6) |
| North Carolina | CE | CE | CE | GB | GB | G | G | CE | GS | AG | (a-8) | G | A | (a-22) | A | G | AG |
| North Dakota | CE | CE | CE | GB | GB | G | A | CE | GS | A | ... | G | ... | A | A | GS | A |
| Ohio | CE | CE | CE | GB | GB | G | GS | GS | A | GS | GS | GS | (a-11) | (a-21) | (a-1) | GS | A |
| Oklahoma | CE | CE | GS | GB | GB | GS | ... | GS | GS | G | B | G | G | AG | B | B | ... |
| Oregon | CE | CE | SE | GB | GB | G | GS | AG | A | CS | GS | A | A | A | AG | A | A |
| Pennsylvania | CE | CE | GS | GB | GB | GS | G | GS | GS | G | GS | GS | AG | A | AG | AG | AG |
| Rhode Island | CE | CE | CE | GB | GB | G | GS | (a-12) | G | CS | B | GS | GS | A | BS | GS | A |
| South Carolina | CE | CE | CE | GB | GB | CE | (a-22) | SE | B | B | B | (a-27) | A | CE | B | B | (a-22) |
| South Dakota | CE | CE | CL | GB | GB | GS | G | GS | A | G | GS | GS | (a-27) | CE | (a-1) | AG | A |
| Tennessee | CE | (i) | SC | GB | GB | G | (a-10) | G | A | B | G | (a-11) | CL | A | G | A | A |
| Texas | CE | CE | GS | GB | GB | GS | ... | SE | BS | G | ... | (a-27) | GS | CE | A | B | B |
| Utah | CE | CE | ... | GB | GB | G | GS | GS | GS | G | ... | GS | GS | AG | BA | AG | AG |
| Utah | CE | CE | ... | GB | GB | SL | GS | GS | GS | GS | (a-1) | A | GS | (a-10) | (a-1) | GS | CS |
| Vermont | CE | CE | CE | GB | GB | G | GS | GS | GS | GS | (a-1) | A | GS | (a-10) | (a-1) | GS | CS |
| Virginia | CE | CE | GB | GB | GB | GB | GB | GB | B | GB | ... | GB | A | GB | (a-29) | GB | GB |
| Washington | CE | CE | CE | GB | GB | GS | (a-6) | GS | A | GS | B | GS | (a-11) | (a-22) | (a-1) | GS | B |
| West Virginia | CE | ... | CE | GB | GB | GS | (a-10) | CE | GS | A | GS | GS | A | (a-10) | (a-1) | GS | A |
| Wisconsin | CE | CE | CE | GB | GB | G | GS | B | GS | (a-8) | A | GS | (a-11) | (a-8) | (a-1) | A | (a-8) |
| Wyoming | CE | ... | CE | GB | GB | G | G | G | G | ... | ... | (a-27) | G | (a-1) | BG | A | A |
| Guam | CE | CE | ... | GS | A | ... | GS | GS | (a-38) | GS | ... | GS | G | (a-8) | A | GS | A |
| Puerto Rico | CE | ... | GB | GS | GS | ... | GS | GS | (a-21) | G | G | G | A | G | GS | GS | ... |
| Virgin Islands | CE | CE | ... | GS | ... | (b) | GS | GS | (a-4) | G | GS | GS | (b) | ... | GS | GS | (b) |

Note: Salary figures for these officials may be found in Table 18.

Key:

Appointed by:

Approved by:

Appointed by:

Approved by:

AT —Attorney general

A —Agency head

AB —Agency head

AG —Agency head

AGC —Agency head

AS —Agency head

ALS —Agency head

AGS —Agency head

ASH —Agency head

B —Board or commission

BG —Board

BGC —Board

BGS —Board

BS —Board or commission

BA —Board or commission

CS —Civil Service

ACB —Nominated by audit committee

Board

Governor

Governor & council

Senate

Appropriate legislative committee & senate

Governor & senate

Senate president & house speaker

Governor

Governor & council

Governor & senate

Senate

Agency head

Both houses

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Table 6
ATTORNEYS GENERAL AND SECRETARIES OF STATE:
QUALIFICATIONS FOR OFFICE

| State or other jurisdiction | Attorneys General | | | | | Secretaries of State | | | | |
|-----------------------------|-------------------|----------------------|------------------------|-----------------|---------------------------|-------------------------------------|-------------|----------------------|------------------------|-----------------|
| | Minimum age | U.S. citizen (years) | State resident (years) | Qualified voter | Licensed attorney (years) | Membership in the state bar (years) | Minimum age | U.S. citizen (years) | State resident (years) | Qualified voter |
| Alabama | 25 | 7 | 5 | ... | ... | ... | 25 | 7 | 5 | * |
| Alaska | ... | * | ... | ... | ... | ... | (a) | (a) | (a) | (a) |
| Arizona | 25 | 10 | 5 | ... | ... | ... | 25 | 10 | 5 | * |
| Arkansas | ... | * | ... | *(b) | ... | ... | ... | ... | ... | *(b) |
| California | 18 | ... | ... | ... | *(c) | *(c) | ... | ... | ... | *(b) |
| Colorado | 25 | * | 2 | ... | * | ... | 25 | * | 2 | * |
| Connecticut | 21 | * | 6 mos. | * | 10 | 10 | 21 | * | * | * |
| Delaware | ... | ... | ... | ... | ... | ... | ... | ... | ... | ... |
| Florida | 30 | * | 7 | * | 5 | 5 | 30 | * | 7 | * |
| Georgia | 25 | 10 | 6 | * | 7 | 6 | 25 | 10 | 6 | ... |
| Hawaii | ... | ... | 1 | ... | ... | ... | (a) | (a) | (a) | (a) |
| Idaho | 30 | * | 2 | * | * | * | 25 | * | 2 | ... |
| Illinois | 25 | * | 3 | ... | ... | ... | 25 | * | 3 | ... |
| Indiana | ... | ... | ... | *(b) | * | ... | ... | ... | ... | *(b) |
| Iowa | ... | ... | ... | ... | ... | ... | ... | ... | * | ... |
| Kansas | ... | * | ... | ... | * | * | ... | ... | ... | *(b) |
| Kentucky | 30 | 2 | 2 | * | 8 | 2 | 30 | ... | 2 | ... |
| Louisiana | 25 | 5 | 5 | * | 5 | 5 | 25 | 5 | 5 | * |
| Maine | ... | ... | ... | ... | ... | ... | ... | ... | ... | ... |
| Maryland | ... | ... | 10 | *(b) | 10 | 10(d) | ... | ... | ... | ... |
| Massachusetts | ... | * | 5 | * | * | * | 18 | * | 5 | * |
| Michigan | 18 | * | 30 days | * | * | * | ... | * | 30 days | *(b) |
| Minnesota | 21 | 3 mos. | 30 days | * | ... | ... | 21 | * | * | * |
| Mississippi | 26 | * | 5 | * | 5 | 5 | 25 | 5 | 5 | * |
| Missouri | ... | ... | ... | ... | ... | ... | ... | ... | ... | ... |
| Montana | 25 | * | 2 | ... | 5 | 2(d) | 25 | 2 | 2 | ... |
| Nebraska | 21(e) | ... | *(d) | ... | *(d) | ... | 18 | * | * | ... |
| Nevada | 25 | 2 | 2 | * | ... | ... | 18 | 2 | 2 | * |
| New Hampshire | ... | ... | ... | ... | ... | ... | ... | ... | ... | ... |
| New Jersey | 18(f) | ... | ... | ... | * | * | ... | ... | ... | ... |
| New Mexico | 30 | * | 5 | ... | * | * | 30 | * | 5 | * |
| New York | 30 | * | 5 | ... | *(d) | ... | ... | ... | ... | ... |
| North Carolina | 21 | * | 30 days | * | ... | ... | 21 | * | 1 | * |
| North Dakota | 25 | * | * | * | ... | ... | 25 | ... | 30 days | * |
| Ohio | 18 | 30 days | 30 days | * | ... | ... | ... | ... | ... | *(b) |
| Oklahoma | 31 | * | 10 | * | ... | ... | 31 | * | 10 | * |
| Oregon | ... | ... | ... | *(b) | ... | ... | 18 | * | * | * |
| Pennsylvania(g) | 30 | * | 7 | *(d) | *(d) | * | ... | ... | ... | ... |
| Rhode Island | 18 | 30 days | 30 days | * | ... | ... | 18 | 30 days | 30 days | * |
| South Carolina | ... | ... | ... | *(b) | ... | ... | 21 | * | 1 | * |
| South Dakota | ... | * | * | *(b) | * | * | ... | ... | ... | ... |
| Tennessee | ... | ... | ... | ... | ... | ... | ... | ... | ... | ... |
| Texas | ... | * | ... | ... | * | * | ... | * | * | ... |
| Utah | 25 | * | 5 | * | * | * | (a) | (a) | (a) | (a) |
| Vermont | ... | ... | ... | ... | ... | ... | ... | ... | ... | *(b) |
| Virginia | ... | ... | * | *(b) | * | ... | ... | ... | ... | ... |
| Washington | ... | * | * | *(b) | * | * | ... | * | * | *(b) |
| West Virginia | 25 | 5 | 5 | * | ... | ... | 18 | 5 | 5 | * |
| Wisconsin | ... | ... | ... | ... | ... | ... | ... | ... | ... | ... |
| Wyoming | ... | ... | * | ... | 4 | 4 | 25 | * | * | * |
| American Samoa | ... | ... | ... | ... | ... | ... | (a) | (a) | (a) | (a) |
| Guam | N.A. | N.A. | N.A. | N.A. | N.A. | N.A. | (a) | (a) | (a) | (a) |
| Northern Mariana Is. | ... | ... | ... | ... | 5(d) | ... | (a) | (a) | (a) | (a) |
| Puerto Rico | 21(e) | ... | ... | ... | *(d) | *(d) | ... | ... | ... | ... |
| Virgin Islands | ... | * | ... | ... | *(h) | ... | (a) | (a) | (a) | (a) |

N.A.—Not available.
 (a) No secretary of state.
 (b) Although there may be no specific requirement for minimum age of U.S. citizen, it can be inferred that the individual must be 18 years old and a U.S. citizen since he or she must be a qualified voter. In addition, some states have residency requirements to be a qualified voter and these can be found in the table "Qualifications for Voting."
 (c) No statute specifically requires this, but the State Bar Act can be construed as making this a qualification.
 (d) Implied.

(e) Implied, since the attorney general must represent the state in all legal matters and, therefore, must be an attorney. To be an attorney in Nebraska and Puerto Rico, one must be at least 21 years old.
 (f) Implied, since the attorney general must be a practicing attorney and to be an attorney in New Jersey, one must be at least 18 years old.
 (g) These qualifications took effect for the first time with the attorney general entering office in 1981.
 (h) Must be admitted to practice before highest court of a state or territory.

Stat other jur
 Alabama
 Alaska(c)
 Arizona
 Arkansas
 California
 Colorado
 Connecticut
 Delaware
 Florida
 Georgia
 Hawaii(c)
 Idaho
 Illinois
 Indiana
 Iowa
 Kansas
 Kentucky
 Louisiana
 Maine
 Maryland
 Massachusetts
 Michigan
 Minnesota
 Mississippi
 Missouri
 Montana
 Nebraska
 Nevada
 New Hampshire
 New Jersey
 New Mexico
 New York
 North Carolina
 North Dakota
 Ohio
 Oklahoma
 Oregon
 Pennsylvania
 Rhode Island
 South Carolina
 South Dakota
 Tennessee
 Texas
 Utah(c)
 Vermont
 Virginia
 Washington
 West Virginia
 Wisconsin
 Wyoming
 American Samoa
 Puerto Rico
 (a) In this c
 (b) D—Don
 (c) No secre
 governor.
 (d) Adminis
 (e) Only as

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Table 9

ATTORNEYS GENERAL: PROSECUTORIAL AND ADVISORY DUTIES

| State or other jurisdiction | Authority to initiate local prosecutions | May intervene in local prosecutions | May assist local prosecutor | May supersede local prosecutor | Issues advisory opinions | | | | Reviews legislation | |
|-----------------------------|--|-------------------------------------|-----------------------------|--------------------------------|------------------------------|----------------|----------------------|-----------------------------------|---|------------------|
| | | | | | To state executive officials | To legislators | To local prosecutors | On the interpretation of statutes | On the constitutionality of bills or ordinances | Prior to passage |
| Alabama | A | A,D | A,D | A | * | * | * | * | * | * |
| Alaska | A(a) | A(a) | A(a) | A(a) | * | * | * | * | * | * |
| Arizona | A,B,C,D,F | B,D | B,D | B | * | * | * | * | * | * |
| Arkansas | | D | D | | * | * | * | * | * | * |
| California | A, E | A,D,E | A,B,D | A | * | * | * | * | * | * |
| Colorado | B,F | B | D,F(b) | B | * | * | * | * | * | * |
| Connecticut | | | | | * | * | * | * | * | * |
| Delaware | (c) | (c) | (c) | (c) | * | * | * | * | * | * |
| Florida | F | D | D | | * | * | * | * | * | * |
| Georgia | A,B,F | A,B,D,G | A,B,D,F | B | * | * | * | * | * | * |
| Hawaii | E | A,D,G | A,D | A,G | * | * | * | * | * | * |
| Idaho | A,D,F | A | A,D | A | * | * | * | * | * | * |
| Illinois | A,D,E,F,G | A,D,E | A,D | F | * | * | * | * | * | * |
| Indiana | F(b) | | A,D,E,F | G | * | * | * | * | * | * |
| Iowa | D,F | D | D | | * | * | * | * | * | * |
| Kansas | B,C,D,F | D | D | A,F | * | * | * | * | * | * |
| Kentucky | A,B | B,D | B,D,F | G | * | * | * | * | * | * |
| Louisiana | G | G | G | G | * | * | * | * | * | * |
| Maine | A | A | A | A | * | * | * | * | * | * |
| Maryland | B,C,F | B,C,D | B,C,D | B,C | * | * | * | * | * | * |
| Massachusetts | A,B,C,D,E,F,G | A,B,C,D,E,G | A,B,C,D,E | A,B,C,E | * | * | * | * | * | * |
| Michigan | A | A | D | A | * | * | * | * | * | * |
| Minnesota | B | B,D,G | A,B,D | B | * | * | * | * | * | * |
| Mississippi | B,E,F | | B,F | | * | * | * | * | * | * |
| Missouri | F | | B | | * | * | * | * | * | * |
| Montana | C,F | A,B,C,D | A,B,C,D,F | A,C | * | * | * | * | * | * |
| Nebraska | A | A | A,D | A | * | * | * | * | * | * |
| Nevada | D,F,G(i) | D(i) | (f,g) | G,F | * | * | * | * | * | * |
| New Hampshire | A | A | A | A | * | * | * | * | * | * |
| New Jersey | A | A,B,D,G | A,D | A,B,D,G | * | * | * | * | * | * |
| New Mexico | A,B,E,F,G | B,D,G | D | B | * | * | * | * | * | * |
| New York | B,F | B | D | B | * | * | * | * | * | * |
| North Carolina | | D | D | | * | * | * | * | * | * |
| North Dakota | A,G | A,D | A,D | A | * | * | * | * | * | (d) |
| Ohio | B,C,F | B,F | F | B,C | * | * | * | * | * | * |
| Oklahoma | B,C | B,C | B,C | B,C | * | * | * | * | * | * |
| Oregon | B,F | B,D | B,D | B | * | * | * | * | * | (d) |
| Pennsylvania | A,D,G | D,G | D | G | * | * | * | * | * | * |
| Rhode Island | A | D | D | A | * | * | * | * | * | * |
| South Carolina | A | A | A,D | A | * | * | * | * | * | * |
| South Dakota | A(h) | A | A | A | * | * | * | * | * | * |
| Tennessee | D,F,G(b) | D,G(b) | D | F | * | * | * | * | (d) | (d) |
| Texas | F | | D | | * | * | * | * | * | * |
| Utah | A,B,D,E,F,G | E,G | D,E | E | * | * | * | * | (d) | (d) |
| Vermont | A | A | | A | * | * | * | * | * | * |
| Virginia | B,F | A,B,D,F | B,D,F | B | * | * | * | * | * | * |
| Washington | B,D,G | B,D,G | D | B | * | * | * | * | * | * |
| West Virginia | | | D | | * | * | * | * | (i) | (i) |
| Wisconsin | B,C,F | B,C,D | D | B,C(i) | * | * | * | * | (i) | (i) |
| Wyoming | B,D(b) | B,D | B,D | | * | * | * | * | * | * |
| American Samoa | A,E | A,E | A,E | A,E | * | * | * | * | * | * |
| No. Mariana Is. | A | | | | * | * | * | * | * | * |
| Puerto Rico | A,B,E | A,B,E | A,E | A,B,E | * | * | * | * | * | * |
| Virgin Islands | A | | | | * | * | * | * | * | * |

Key:
A—On own initiative.
B—On request of governor.
C—On request of legislature.
D—On request of local prosecutor.
E—When in state's interest.
F—Under certain statutes for specific crimes.
G—On authorization of court or other body.
(a) Local prosecutors serve at pleasure of attorney general.
(b) Certain statutes provide for concurrent jurisdiction with local prosecutors.

(c) No local prosecutions or prosecutors.
(d) Only when requested by governor or legislature.
(e) To legislative leadership only or to legislature as a whole.
(f) In connection with grand jury cases.
(g) Will prosecute as a matter of practice when requested.
(h) Has concurrent jurisdiction with states' attorneys.
(i) No legal authority, but sometimes informally reviews laws at request of legislature.
(j) If the governor removes the district attorney for cause.

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Table 10

ATTORNEYS GENERAL: CONSUMER PROTECTION ACTIVITIES AND SUBPOENA AND ANTITRUST POWERS

| State or other jurisdiction | May commence civil proceedings | May commence criminal proceedings | Represents the state before regulatory agencies | Administers consumer protection programs | Handles consumer complaints | Subpoena powers (a) | Antitrust duties |
|-----------------------------|--------------------------------|-----------------------------------|---|--|-----------------------------|---------------------|------------------|
| Alabama | * | * | * | * | * | * | A, B |
| Alaska | * | * | * | * | * | * | B, C |
| Arizona | * | * | * | * | * | * | A, B, D |
| Arkansas | * | * | * | * | * | * | B, C, D |
| California | * | * | * | * | * | * | B, C, D |
| Colorado | * | * | * | * | * | * | B, C, D(b) |
| Connecticut | * | * | * | * | * | * | A, B, D |
| Delaware | * | * | * | * | * | * | A, B, C |
| Florida | * | * | * | * | * | * | A, B, C, D |
| Georgia | * | * | * | * | * | * | B, C, D |
| Hawaii | * | * | * | * | * | * | A, B, C, D |
| Idaho | * | * | * | * | * | * | D |
| Illinois | * | * | * | * | * | * | A, B, D |
| Indiana | * | * | * | * | * | * | B, C, D |
| Iowa | * | * | * | * | * | * | A, B, C, D |
| Kansas | * | * | * | * | * | * | B, C, D |
| Kentucky | * | * | * | * | * | * | A, B, D |
| Louisiana | * | * | * | * | * | * | B, C |
| Maine | * | * | * | * | * | * | B, C |
| Maryland | * | * | * | * | * | * | B, C, D |
| Massachusetts | * | * | * | * | * | * | A, B, C, D |
| Michigan | * | * | * | * | * | * | A, B, C, D |
| Minnesota | * | * | * | * | * | * | B, D |
| Mississippi | * | * | * | * | * | * | B, C |
| Missouri | * | * | * | * | * | * | A, B, C, D |
| Montana | * | * | * | * | * | * | B, C, D |
| Nebraska | * | * | * | * | * | * | A, B, C(d), D |
| Nevada | * | * | * | * | * | * | A, B, C, D |
| New Hampshire | * | * | * | * | * | * | B, C, D |
| New Jersey | * | * | * | * | * | * | A, B, C, D |
| New Mexico | * | * | * | * | * | * | A, C |
| New York | * | * | * | * | * | * | A, B, C, D |
| North Carolina | * | * | * | * | * | * | A, B, C, D |
| North Dakota | * | * | * | * | * | * | C, D |
| Ohio | * | * | * | * | * | * | B, C, D |
| Oklahoma | * | * | *(e) | * | * | * | B, D |
| Oregon | * | * | *(c) | * | * | * | A, B, C, D |
| Pennsylvania | * | * | * | * | * | * | D |
| Rhode Island | * | * | * | * | * | * | A, B, C, D |
| South Carolina | * | * | * | * | * | * | A, B, C, D |
| South Dakota | * | * | * | * | * | * | A, B, C, D |
| Tennessee | * | * | *(c) | * | * | * | A, B, C, D |
| Texas | * | * | * | * | * | * | B, D |
| Utah | * | *(d) | *(d) | * | *(f) | * | A(g), B, C, D(g) |
| Vermont | * | * | * | * | * | * | A, B, C, D |
| Virginia | * | *(e) | * | *(f) | *(f) | * | A, B, C, D |
| Washington | * | * | * | * | * | * | A, B, D |
| West Virginia | * | * | * | * | * | * | A, B, D |
| Wisconsin | * | * | * | * | * | * | A, B, C, D |
| Wyoming | * | * | * | * | * | * | ... |
| American Samoa | * | * | * | * | * | * | ... |
| Northern Mariana Is. | * | * | * | * | * | * | B, C, D |
| Puerto Rico | * | * | * | *(c) | *(c) | * | A, B, C |
| Virgin Islands | * | *(h) | * | * | * | * | A, B(i), C, D |

Key:
A—Has parens patriae authority to commence suits on behalf of consumers in state antitrust damage actions in state courts.
B—May initiate damage actions on behalf of state in state courts.
C—May commence criminal proceedings.
D—May represent cities, counties and other governmental entities in recovering civil damages under federal or state law.
(a) In this column only: * indicates broad powers and • indicates limited powers.
(b) Only under Rule 23 of the Rules of Civil Procedure.

(c) When permitted to intervene.
(d) Attorney general has exclusive authority.
(e) Limited.
(f) Attorney general handles legal matters only with no administrative handling of complaints.
(g) Opinion only, since there are no controlling precedents.
(h) May always prosecute in inferior courts. May prosecute in District Court by request or consent of U.S. Attorney General.
(i) May initiate damage actions on behalf of territory in District Court.

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Table 11

ATTORNEYS GENERAL: DUTIES TO ADMINISTRATIVE AGENCIES AND MISCELLANEOUS DUTIES

| State or other jurisdiction | Serves as counsel for state | Appears for state in criminal appeals | Duties to administrative agencies | | | | | | | |
|-----------------------------|-----------------------------|---------------------------------------|-----------------------------------|------------------------------------|---------------------|----------------|-------------------------------------|---|-------------------------|----------------------------|
| | | | Issues official advice | Interprets statutes or regulations | Conducts litigation | | | Represents the public before the agency | Involved in rule-making | Reviews rules for legality |
| | | | | | In behalf of agency | Against agency | Prepares or reviews legal documents | | | |
| Alabama | A, B, C | *(a) | * | * | * | * | * | * | *(b) | * |
| Alaska | A, B, C | * | * | * | * | * | * | * | * | * |
| Arizona | A, B, C | *(c,d) | * | * | * | * | * | * | * | * |
| Arkansas | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| California | A, B, C | *(a) | * | * | * | * | * | * | * | 0 |
| Colorado | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Connecticut | A, B, C | * | * | * | * | * | * | * | * | * |
| Delaware | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Florida | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Georgia | A, B, C | *(b,c) | * | * | * | * | * | * | * | * |
| Hawaii | A, B | *(b,c) | * | * | * | * | * | * | * | * |
| Idaho | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Illinois | A, B, C | *(b,c,e) | * | * | * | * | * | * | * | 0 |
| Indiana | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Iowa | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Kansas | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Kentucky | A, B, C | * | * | * | * | * | * | * | * | * |
| Louisiana | A, B, C | *(c) | * | * | * | * | * | * | * | * |
| Maine | A, B, C | *(b,d) | * | * | * | * | * | * | * | * |
| Maryland | A, B, C | * | * | * | * | *(b) | * | * | * | * |
| Massachusetts | A, B, C | *(b,c,d) | * | * | * | * | * | * | * | * |
| Michigan | A, B, C | *(b,c,d) | * | * | * | * | * | * | * | * |
| Minnesota | A, B, C | *(c) | * | * | * | * | * | * | * | * |
| Mississippi | A, B, C | * | * | * | * | * | * | * | * | * |
| Missouri | A, B, C | * | * | * | * | * | * | * | * | * |
| Montana | A, B, C | * | * | * | * | * | * | * | * | * |
| Nebraska | A, B, C | * | * | * | * | * | * | * | * | * |
| Nevada | A, B, C | *(d) | * | * | * | * | * | * | * | * |
| New Hampshire | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| New Jersey | A, B, C | *(d) | * | * | * | * | * | * | * | * |
| New Mexico | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| New York | A, B, C | *(b) | * | * | * | * | 0 | *(b) | * | 0 |
| North Carolina | A, B, C | * | * | * | * | * | * | * | * | * |
| North Dakota | A, B, C | *(b) | * | * | * | * | * | * | * | 0 |
| Ohio | A, B, C | ... | * | * | * | * | * | * | * | 0 |
| Oklahoma | A, B, C | *(b) | * | * | * | * | * | * | * | * |
| Oregon | A, B, C | * | * | * | * | * | * | * | * | * |
| Pennsylvania | A, B, C | *(c) | * | * | * | * | * | * | * | * |
| Rhode Island | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| South Carolina | A, B, C | *(d) | * | * | * | * | * | * | * | * |
| South Dakota | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Tennessee | A, B, C | *(a) | * | * | * | * | * | *(b) | * | * |
| Texas | A, B, C | *(c) | * | * | * | * | * | * | * | * |
| Utah | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Vermont | A, B, C | *(b) | * | * | * | * | * | *(b) | * | * |
| Virginia | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Washington | A, B, C | *(c,f) | * | * | * | * | * | * | * | * |
| West Virginia | A, B, C | *(a) | * | * | * | *(f) | * | * | * | 0 |
| Wisconsin | A, B, C | *(b) | * | * | * | * | * | *(b) | * | 0 |
| Wyoming | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| American Samoa | A, B, C | *(a) | * | * | * | * | * | * | * | * |
| Northern Mariana Is. | A, B, C | *(g) | * | * | * | * | * | * | * | * |
| Puerto Rico | A, B, C | * | * | * | * | * | * | * | * | * |
| Virgin Islands | A, B, C(h) | * | * | * | * | * | * | * | * | * |

Key: A—Defend state law when challenged on federal constitutional grounds.
 B—Conduct litigation on behalf of state in federal and other states' courts.
 C—Prosecute actions against another state in U.S. Supreme Court.
 *Only in federal courts.
 (a) Attorney general has exclusive jurisdiction.

(b) In certain cases only.
 (c) When assisting the local prosecutor in the appeal.
 (d) Can appear on own discretion.
 (e) In certain courts only.
 (f) If authorized by the governor.
 (g) Because there are no local prosecutors.
 (h) Except in cases in which the U.S. Attorney is representing the Government of the Virgin Islands.

- (b) The commissioner of administration may
- (1) adopt regulations that the commissioner considers necessary to implement AS 44.21.400 — 44.21.440;
 - (2) report on the operation of the office of public advocacy when requested by the governor or legislature or when required by law;
 - (3) solicit and accept grants of funds from the federal government and from private foundations, and allocate or restrict the use of those funds as required by the grantor. (§ 1 ch 55 SLA 1984)

Sec. 44.21.420. Employment of office personnel. (a) The commissioner of administration may employ guardians ad litem, public guardians, clerical staff, and other assistants that the commissioner determines are needed to perform the duties set out in AS 44.21.410. Employees under this subsection are in the classified service under AS 39.25.100.

(b) The commissioner of administration may employ attorneys needed to perform the duties set out in AS 44.21.410. Attorneys employed by the commissioner of administration in the office of public advocacy are in the partially exempt service under AS 39.25.120.

(c) The commissioner of administration may contract for services of court-appointed visitors and experts needed to perform the duties set out in AS 44.21.410. The commissioner may contract with attorneys to provide legal representation, and with other persons to provide guardian ad litem services, as needed to perform the duties set out in AS 44.21.410. The commissioner may determine the rate of compensation for contractual services, taking into account the time involved, the skill and experience required, and other pertinent factors. (§ 1 ch 55 SLA 1984)

Sec. 44.21.430. Attorneys engaged by public advocacy office. (a) Only an attorney admitted to the practice of law in this state may be employed or retained under contract by the office of public advocacy to provide legal representation.

(b) An attorney employed by the office of public advocacy may not engage in the private practice of law unless the attorney provides services to the office as an independent contractor. (§ 1 ch 55 SLA 1984)

Sec. 44.21.440. Conflicts of interests. Services and legal representation rendered by the office of public advocacy, whether performed by a person under contract or by an employee of the office, shall be provided in a manner that avoids conflicts of interests. (§ 1 ch 55 SLA 1984)

Chapter 23. Department of Law.

| Section | Section |
|--|--|
| 10. Attorney general | 50. Employment of attorney to appear before distant court |
| 20. Duties | 60. Discovery of information and data from transportation business |
| 30. Promotion of uniform laws | |
| 40. Records, reports and recommendations on uniform laws | |

Sec. 44.23.010. of the Department o

Collateral reference 2d, Attorney General, § Jur. 2d, States, 7 Dependencies, § 62.

- Sec. 44.23.020. I** of the governor and
- (b) The attorney
 - (1) bring, prosecu the name of the sta
 - (2) represent the party;
 - (3) prosecute all c. mations and prosecu state laws where th
 - (4) administer st. written legal opinio officers and departm on a law, proposed la the legislature or a
 - (5) draft legal ins
 - (6) make a report regular legislative s
 - (A) of the work
 - (B) on needed l
 - (7) perform all oth to the office of attor
 - (8) prepare, publi do so an informatio means of making cor landlord and tenan revision shall be app sumer protection, be 128 SLA 1959; § 9 c

Powers and dutie ascribed at common law indicates that the office general is to function wi and duties normally as

Sec. 44.23.010. Attorney general. The principal executive officer of the Department of Law is the attorney general. (§ 9 ch 64 SLA 1959)

Collateral references. — 7 Am. Jur. 7A C.J.S. Attorney General, § 1 et seq.; 2d, Attorney General, § 1 et seq.; 72 Am. 81A C.J.S. States, § 61. Jur. 2d, States, Territories and Dependencies, § 62.

Sec. 44.23.020. Duties. (a) The attorney general is the legal advisor of the governor and other state officers.

(b) The attorney general shall

(1) bring, prosecute and defend all necessary and proper actions in the name of the state for the collection of revenue;

(2) represent the state in all civil actions in which the state is a party;

(3) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

(4) administer state legal services (including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs), and give legal advice on a law, proposed law or proposed legislative measure upon request by the legislature or a member of the legislature;

(5) draft legal instruments for the state;

(6) make a report to the legislature, through the governor, at each regular legislative session

(A) of the work and expenditures of the office, and

(B) on needed legislation or amendments to existing law; and

(7) perform all other duties required by law or which usually pertain to the office of attorney general in a state;

(8) prepare, publish and revise as it becomes useful or necessary to do so an information pamphlet on landlord and tenant rights and the means of making complaints to appropriate public agencies concerning landlord and tenant rights; the contents of the pamphlet and any revision shall be approved by the Department of Law, division of consumer protection, before publication. (§ 9-1-5 ACLA 1949; am § 1 ch 128 SLA 1959; § 9 ch 64 SLA 1959; am § 1 ch 8 SLA 1976)

NOTES TO DECISIONS

Powers and duties are those ascribed at common law. — This section indicates that the office of the attorney general is to function with those powers and duties normally ascribed to it at common law. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Under the common law, an attorney general is empowered to bring any

action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. Public Defender Agency v. Superior Court, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Authority to sue for restitution for defrauded land purchasers. — The state has the authority to bring suit in the public interest on the basis of common-law fraud to obtain restitution for defrauded land purchasers. State v. First Nat'l Bank, Sup. Ct. Op. No. 2591 (File Nos. 5006, 5107), 660 P.2d 406 (1982).

What control over state's legal business includes. — Discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases. Public Defender Agency v. Superior Court, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Discretion not subject to judicial review. — When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers. Public Defender Agency v. Superior Court, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Collateral references. — 7 Am. Jur. 2d Attorney General, § 9 et seq.

7A C.J.S. Attorney General, § 7 et seq.

Waiver by attorney general of state's immunity from suit. 42 ALR 1484; 50 ALR 1408.

Power of attorney general as to compro-

Although the supreme court has jurisdiction to entertain a case and to find the existence of legal authority, it does not have power to control the exercise of the attorney general's discretion as to whether he will take action in any particular cases of contempt for nonsupport. Public Defender Agency v. Superior Court, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Court may not order prosecution of contempt for nonsupport. — The authority to proceed under this section does not empower the court to order the attorney general to prosecute any particular contempt for nonsupport. Public Defender Agency v. Superior Court, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Contempt of support order is violation of state law. — In light of the substantial state interest in the enforcement of child support orders, contempt of such an order is a violation of state law within the meaning of subsection (b)(3). Public Defender Agency v. Superior Court, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Cited in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

promise and settlement or dismissal of suit or proceeding, 81 ALR 124.

Prohibition as means of controlling attorney general, 115 ALR 14; 159 ALR 627.

Right or duty of attorney general to intervene in civil suits, 163 ALR 1346.

Sec. 44.23.030. Promotion of uniform laws. (a) The Department of Law shall examine, collect, and arrange data as to prevailing laws in the United States and other countries on marriage, divorce, insolvency, wills, executors and administrators, probate practice, taxation, commercial law, civil and criminal practice in the courts, elections, insurance, real property, all phases of corporation law, forms of notarial certificates, vital statistics, attachments, banking, partnership, and other subjects where uniformity is considered important. It shall investigate the best means to assimilate and make uniform the laws of the several states, territories, and districts of the United States, and shall investigate and report upon these matters whenever the governor or the legislature refers them to it for investigation or action.

(b) At least one meeting of the (§§ 10-5-5, 10-5-6

Collateral references. Am. Jur. 2d, Administrative Employees, § 22; 72.

Sec. 44.23.040. uniform laws. To be before the beginning to the governor and with recommendations transmit the report convenes. (§ 10-5-

Sec. 44.23.050. distant court. If in a court distant be represented by the governor, may attorney general. of appropriations 1949; am § 2 ch 1

Sec. 44.23.060. portation business. attorney general appeal officer of the United transportation bet tion, the attorney the transportation which is (A) pertinent prepare for the def hearing or proceed person furnish for records in the pos freight and passen charged on each cl; (D) other expense i (E) the bonded an; gross capital inves depreciation; (H) tl detail or the aggre ceeding.

(b) If the person records for inspect

(b) At least one member of the Department of Law shall attend each meeting of the National Conference on Uniform State Laws. (§§ 10-5-5, 10-5-6 ACLA 1949)

Collateral references. — 1 and 2 Am. Territories and Dependencies, § 5; 73 Am. Jur. 2d, Administrative Law, 1 et seq.; 63 Jur. 2d, Statutes, §§ 338 to 341. Am. Jur. 2d, Public Officers and 73 C.J.S. Public Administrative Law, Employees, § 22; 72 Am. Jur. 2d, State, § 1 et seq.; 81A C.J.S. States, §§ 20 to 33.

Sec. 44.23.040. Records, reports and recommendations on uniform laws. The Department of Law shall, not less than 30 days before the beginning of each regular session of the legislature, present to the governor a report of its activities under AS 44.23.030, together with recommendations which it considers proper. The governor shall transmit the report and recommendations to the legislature when it convenes. (§ 10-5-7 ACLA 1949)

Sec. 44.23.050. Employment of attorney to appear before distant court. If a matter in which the state is interested is pending in a court distant from the capital, and it is necessary for the state to be represented by counsel, the attorney general, with the approval of the governor, may engage one or more attorneys to appear for the attorney general. The attorney general may pay for these services out of appropriations for the attorney general's office. (§ 9-1-16 ACLA 1949; am § 2 ch 128 SLA 1959)

Sec. 44.23.060. Discovery of information and data from transportation business. (a) In a hearing or proceeding in which the attorney general appears before a board, court, commission, committee, or officer of the United States involving traffic and commerce or rates of transportation between points in intrastate or interstate transportation, the attorney general may (1) demand from a person engaged in the transportation business between those points, that information which is (A) pertinent at the hearing or proceeding or (B) necessary to prepare for the defense of the interests of the people of the state at the hearing or proceeding; and (2) may require by notice in writing that the person furnish for inspection, within a reasonable time, books or other records in the possession of the person showing (A) the amount of freight and passenger traffic to and from or in the state; (B) the rates charged on each class of freight or passenger; (C) the carriage expense; (D) other expense in aggregate and detail including overhead charges; (E) the bonded and other indebtedness and interest charges; (F) the gross capital invested and how invested; (G) amounts charged off for depreciation; (H) the gross and net income; and (I) other data, either in detail or the aggregate, necessary or pertinent in the hearing or proceeding.

(b) If the person does not furnish the data, information, books, or records for inspection by the attorney general within a reasonable

time, upon a written demand by the attorney general which specifically sets out the information required, and the reason and need for its use in the hearing or proceeding, the attorney general may present to the judge of a state court a petition in the name of the state for the furnishing of the data, information, books or records for inspection. The petition shall set out the nature of the hearing or proceeding for which the information is required, the necessity or materiality of it and other facts which are pertinent to showing the court the importance of obtaining the information.

(c) If the court is satisfied that the petition is made in good faith to obtain information necessary or important to the state or its people at the hearing or proceeding designated and that the information can or ought to be supplied to the state, the court shall issue an order directing the person to appear before the court on a certain day and hour to show cause why an order should not issue directing the furnishing of the data, records, or books or part of them as the court considers proper. The order shall be served on the person as other process of the court.

(d) At the time set in the order, or at another time set by the court, the court shall hear and determine the issues formed by the petition and the answer to it, if filed, and shall determine whether (1) the information or data mentioned in the petition is necessary or important to the state in the hearing in which it is proposed to be used; (2) it can be obtained; and (3) the person should produce it or a part of it for the purpose designated.

(e) If the court finds that the information or data is important to the petitioner in preparing for the trial or is necessary or important at the hearing and that it should be furnished the attorney general for preparation for use in or production at the hearing, the court shall enter an order setting out the time within which the information or data shall be furnished or produced for inspection and whether in whole or in part and what part.

(f) If the person does not furnish the attorney general with the information for inspection in the manner and within the time set out in the order, the person is guilty of contempt and is punishable by a fine of not more than \$5,000. The fine shall be paid to the state treasury. (§ 9-1-11 ACLA 1949)

Chapter 25. Department of Revenue.

Section

- 10. Commissioner of revenue
- 20. Duties of department

Sec. 44.25.010. Commissioner of revenue. The principal executive officer of the Department of Revenue is the commissioner of revenue. (§ 10 ch 64 SLA 1959)

Collateral referenc
2d, Public Funds, §
2d, Public Officers :

Sec. 44.25.020
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- (2) collect, acc
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- 1. Board and Departm
- 2. Alaska State Coun
- 3. Alaska Historical C

Article 1

Section

- 10. Board and commi
- 20. Duties of departm

Sec. 44.25.010.
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department. (§ 11

Anch. Times 7/16/85

Group wants vote on elected attorney general

Martin files petitions in Juneau

by Debble Reinwand
Times Juneau Bureau

Juneau — Whether Alaska's attorney general should be an elected official or an appointed cabinet member has been debated by lawmakers for nearly a decade. This week, a group of Anchorage residents took the matter into their own hands.

Led by Rep. Terry Martin, R-Anchorage, and Joseph Brewer, a former state court judge, a group known as CIVIC (Citizens Involved in the Constitution) on Monday filed a petition requesting that an advisory vote on election of the attorney general be put before voters in the fall of 1986.

Currently, the state's top law enforcement officer is appointed by the governor. The petitioners would like Alaska voters to recommend whether that position should become an elected post as it is in 45 states.

"Alaskans are beginning to realize that the attorney general is in charge of enforcing and upholding the state's laws and in order to do the best possible job, that person should be elected by the people," said Martin. "That way if there's a problem, then he or she can be held accountable. And the best form of accountability is at the ballot box."

The petition filed by CIVIC would allow voters to cast an advisory vote on the issue — a vote that would not be legally binding.

"Under the initiative process, the voters cannot amend the state's constitution and a change like this requires a constitutional amendment. In that case, the best alternative is to push for an advisory vote," Martin said.

While voters cannot amend the constitution by initiative, lawmakers can instigate such a change and have tried unsuccessfully to do so in recent years.

Martin, Rep. Rick Uehling, R-Anchorage, and former Anchorage Republican Rep. Ramona Barnes all have introduced bills in the past five years that

would have made the attorney general an elected position.

A two-thirds majority of both houses is needed to pass a proposed constitutional amendment, which also must win voter approval, according to Lt. Gov. Stephen McAlpine.

The process being used by CIVIC to put the matter before voters includes three phases. The first requires the petitioners to file with McAlpine their proposed advisory question, along with the signatures of 100 registered Alaska voters and a \$100 filing fee.

Martin filed the check and more than 100 signatures Monday.

The petition must be reviewed and approved by the Division of Elections and Department of Law, then CIVIC will need to gather about 20,000 signatures prior to the start of the next legislative session in order for their proposal to be included on the general election ballot in November 1986.

State law requires that initiative proposals be completed and approved prior to the start of a legislative session so lawmakers can take up the issue if they wish to, according to McAlpine.

"The idea behind that is to prevent someone from coming in and dumping an initiative on the legislature without giving them the opportunity to address that issue," McAlpine said.

Martin said he expects the petition to gain the state stamp of approval and predicts the group will gather the necessary number of signatures by January 1986, when lawmakers return for the second session of the 14th Alaska Legislature.

Lawmakers in particular have been critical of the appointive process, saying an attorney general selected by the governor is likely to put the administration's interests before those of the public.

Attorney General elect

Daily News Oct 3, 1981

Rodey calls for att

By STAN JONES
Daily News reporter

The chairman of the state Senate Judiciary Committee Monday called for a constitutional amendment to provide for the election of Alaska's attorney general. In a speech to the Alaska Association of Police Chiefs, State Sen. Pat Rodey, D-Anchorage, said the proposal would increase the accountability of the state's top lawyer to the people.

"Forty-three other states provide for the election of the attorney general," Rodey said, "and I believe it is time Alaska made it 44."

Rodey said the accountability of the attorney general had been cited as a concern to him by law enforcement professionals as well as ordinary citizens.

There have also been calls for electing district attorneys, but Rodey aide Kevin Bruce said Rodey feels that electing only the attorney general is "the best way to go, to ensure statewide that prosecution is uniform."

Last year, Rodey's committee passed out a measure which would place the question on the 1982 ballot. It is now in the Senate Rules Committee.

If both houses of the state legislature pass the

resolution and the constitution electing the attorney general. The Hamner plan.

Attorney General Condon said he is presently occupied with making elective sides of the question in running for

In a telephone interview, Condon said he would like to see the attorney general elected by the governor, who

But Condon said he would like to see the attorney general elected by the governor, who

"It's hard to say whether it won't be extended," Condon said.

Condon said he would like to see the attorney general elected by the governor. "That's the way to go," he said.

Condon said he would like to see the attorney general elected by the governor. "That's the way to go," he said.

the weight of high interest rates, fell 0.9 percent more in September to the lowest rate in a year, the Commerce Department reported Monday. As usual, a big drop in the already depressed residential housing field was a main factor. The overall September decline was the seventh in the past eight months but was a comparatively small one, less than half as big as August's drop of 0.9 percent.

Marathon takeover blocked

CLEVELAND — A federal judge has issued a temporary restraining order barring Mobil Corp. from taking further action to purchase up to 40 million shares of common stock in the Marathon Oil Co. Marathon, the nation's 17th-largest oil company, opposed the \$3.4 billion takeover bid by No. 2 Mobil on antitrust grounds. U.S. District Judge Frank B. Sweeney signed a restraining order just before midnight Sunday prohibiting Mobil from soliciting sellers of Marathon stock. The order expires Nov. 10.

From Daily News

good news, bad news

SECTIONAL ANALYSIS
SJR9 Elected Attorney General

Sections 1, 2 and 3 of this bill are correlative amendments necessary to conform existing material in the constitution to the new material added. It is easier to follow if the analysis of these follows the new material.

Sec. 4 of the bill is the new material which is added to Article III of the Constitution. It consists of new sections 28 - 34.

Sec. 28 provides there shall be an attorney general and establishes qualifications. The attorney general must be:

- (1) at least 30 years of age;
- (2) a qualified voter;
- (3) a resident for the five years immediately preceding filing;
- (4) a United States citizen for seven years;
- (5) licensed to practice law in this state; and
- (6) possess other qualifications prescribed by law.

Sec. 29 provides for election of the attorney general. The ballot is nonpartisan and candidates file for office. The initial election is the primary and the two highest vote getters at the primary appear on the general election ballot. The one receiving the highest vote in the general election is elected.

Sec. 30 limits service to two full terms unless a full term has intervened.

Sec. 31 provides for an election to fill a vacancy in office with interim appointment by the governor.

Sec. 32 requires compensation to be prescribed by law and may not be diminished during a term unless by general law applying to all salaried officers of the state.

Sec. 33 provides that the attorney general is the legal advisor of all state officials and performs other duties prescribed by law.

Sec. 34 provides that the first election for an attorney general shall be at the general election first held after

the office was created. It sets the term at four years commencing the first Monday in December following the election.

Sec. 1 of the bill amends section 23 of Article III of the Constitution to take away the power of the governor to change the organization and function of the attorney general's office.

Sec. 2 of the bill amends section 24 of Article III of the Constitution to provide the attorney general's office is not under supervision of the governor.

Sec. 3 of the bill excepts the attorney general from the appointment power of the governor. It also corrects the designation of Secretary of State to lieutenant governor.

Sec. 5 of the bill provides for placing the proposed amendments on the ballot at the next general election.

ATTORNEYS GENERAL OF ALASKA

From 1913 to 1916 the Territory of Alaska was served by Territorial Counsel John H. Cobb. In 1915, the legislature created the Office of the Attorney General, to become effective after the general election in 1916.

| | |
|--------------------|--------------|
| George B. Grigsby | 1916-1919 |
| Jeremiah C. Murphy | 1919-1920 |
| John Rustgard | 1920-1933 |
| James S. Truitt | 1933-1941 |
| Henry Roden | 1941-1945 |
| Ralph J. Rivers | 1945-1949 |
| J. Gerald Williams | 1949-1959 |
| John L. Rader | 1959-1960 |
| Ralph E. Moody | 1960-1962 |
| George N. Hayes | 1962-1964 |
| Warren C. Colver | 1964-1966 |
| D. A. Burr | 1966-1967 |
| Edgar Paul Boyko | 1967-1968 |
| G. Kent Edwards | 1968-1970 |
| John E. Havelock | 1970-1973 |
| Norman C. Gorsuch | 1973-1974 |
| Avrum M. Gross | 1974-1980 |
| Wilson L. Condon | 1980-1982 |
| Norman C. Gorsuch | 1982-present |

6. SELECTION, TERM AND REMOVAL

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

Method of Selection

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

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

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

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

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

TABLE 6: SELECTION AND TERM OF ATTORNEYS GENERAL

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

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

A study published in the Law Library Journal⁸⁸ showed how methods of selecting Attorneys General developed in nineteen states; of these, eight provided for legislative selection prior to 1843, but none finally retained this method. Prior to 1845, twelve states provided by constitution or legislation for the appointment of an Attorney General by the Governor, the legislature, or other authority. The trend then turned toward election. For example, North Carolina's 1776 Constitution provided for appointment by the legislature; its 1868 Constitution provided for election. Louisiana's 1812 Constitution provided for appointment by the Governor; its 1852 Constitution provided for election. Michigan's 1835 Constitution provided for appointment by the Governor; the 1850 Constitution provided for election. Virginia's 1776 Constitution provided for selection by the legislature; its 1902 Constitution provided for election. Kentucky's 1792 Constitution provided that the Governor would appoint the Attorney General, with the consent of the Senate; the 1850 Constitution made the office elective.

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

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

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

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

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

is not equipped with the constitutional status necessary to exercise constructive leadership as the chief lawmaker and political head of his state.⁸⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1970s and 1980s, many county attorneys and law firms have been established. The Attorney General is only one of many state officials who are advised by the Attorney General.

Confirmation of Appointment

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

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

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

Length of Term and Succession

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

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

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

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

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

Succession to Office

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

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

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

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

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

Removal from Office

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

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

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

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

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

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

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

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

Filling Vacancies

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

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

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

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

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

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

EDITORIAL PAGE

The Anchorage TimesROBERT B. ATWOOD
Editor and PublisherWILLIAM J. TOBIN
Associate Editor
And General ManagerFRED DICKEY
Executive Editor

Page A-10

Sunday, March 29, 1981

Let the voters decide

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

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

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

For example:

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

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

More damaging? More harmful? More dangerous?

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

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

There are many Alaskans

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

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

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

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

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

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

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

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

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

1.4 Selection and Term

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

1.41 Method of Selection

Table 1.41 shows methods of selecting the Attorney General. He is popularly elected in forty-two states. He is appointed by the Governor in six states (Alaska, Hawaii, New Hampshire, New Jersey, Pennsylvania, and Wyoming), the three territories (Guam, Samoa and the Virgin Islands), and the Commonwealth of Puerto Rico. In Maine, he is selected by the Legislature and in Tennessee, by the Supreme Court.

Present Selection Methods

The Attorney General is the most prevalent elective official in state government, with the exception of the Governor, who is elected in all states. The Treasurer is elected in forty states, the Secretary of State in thirty-nine, the Lieutenant Governor in thirty-eight, the Auditor in twenty-nine and the Superintendent of Public Instruction in twenty-four.¹ If the trend continues toward team election of the Governor and Lieutenant Governor on a single ballot as now occurs in nine states, the Attorney General will soon be the most common single elective official. When, very few, but more than one, state executive officials are elected, the Attor-

ney General is usually included among these few. He is among the three executives elected in Maryland, Michigan and New York; among the five in Rhode Island; and among the six elected in Wisconsin, Oregon and Connecticut. However, he is not one of the two elected officers in Alaska, the four in Pennsylvania, nor the five in Wyoming.

Historic Development

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

Most of the first state constitutions specified that the legislature would choose the Attorney General. Some of the constitutions in effect during the revolutionary era even stipulated that the Governor would be so elected. The concept of universal suffrage had not yet taken hold, nor had the idea of direct election of many officials. Alexis de Tocqueville reflected the political theory prevalent in the 1830's in commenting on selection of officials by state legislatures, rather than by popular election:

This transmission of the popular authority through an assembly of chosen men operates an important change in it by refining its discretion and improving its choice. Men who are chosen in this manner . . . represent only the elevated thoughts that are current in the community.²

Andrew Jackson's administration brought a new political ethic to American government. The common man was

1.41

THE ATTORNEY GENERAL

| | Elected | Appointed by | With Consent of | Length of Term (Years) | May Succeed Himself |
|----------------|---------|--------------|-----------------------|------------------------|---------------------|
| Alabama | X | Governor | Legislature | Indefinite | No |
| Alaska | | | | | Yes |
| Arizona | X | | | 4 | Yes |
| Arkansas | X | | | 2 | Yes |
| California | X | | | 4 | Yes |
| Colorado | X | | | 1 | Yes |
| Connecticut | X | | | 1 | Yes |
| Delaware | X | | | 1 | Yes |
| Florida | X | | | 4 | Yes |
| Georgia | X | | | 4 | Yes |
| Guam | | Governor | Legislature Senate | Indefinite | Yes |
| Hawaii | | | | | Yes |
| Idaho | X | | | 4 | Yes |
| Illinois | X | | | 4 | Yes |
| Indiana | X | | | 4 | Yes |
| Iowa | X | | | 2 | Yes |
| Kansas | X | | | 2 | Yes |
| Kentucky | X | | | 4 | No |
| Louisiana | X | | | 4 | Yes |
| Maine | | Legislature | | 2 | Yes |
| Maryland | X | | | | Yes |
| Massachusetts | X | | | 4 | Yes |
| Michigan | X | | | 4 | Yes |
| Minnesota | X | | | 4 | Yes |
| Mississippi | X | | | 4 | Yes |
| Missouri | X | | | 4 | Yes |
| Montana | X | | | 4 | Yes |
| Nebraska | X | | | 4 | Yes |
| Nevada | X | Governor | Council | 5 | Yes |
| New Hampshire | | | | | Yes |
| New Jersey | | Governor | Senate | 4 | Yes |
| New Mexico | X | | | | Yes |
| New York | X | | | 4 | Yes |
| North Carolina | X | | | 4 | Yes |
| North Dakota | X | | | 4 | Yes |
| Ohio | X | | | 4 | Yes |
| Oklahoma | X | | | 4 | Yes |
| Oregon | X | Governor | Senate Senate | Indefinite | Yes |
| Pennsylvania | | | | | Yes |
| Puerto Rico | | | | 2 | Yes |
| Rhode Island | X | Governor | | 2 yr min | Yes |
| Samoa | | | | | Yes |
| South Carolina | X | | | 4 | Yes |
| South Dakota | X | Supreme Ct. | | 8 | Yes |
| Tennessee | | | | | Yes |
| Texas | X | | | 2 | Yes |
| Utah | X | | | 4 | Yes |
| Vermont | X | Governor | Legislature | Indefinite | Yes |
| Virgin Islands | | | | | Yes |
| Virginia | X | | | 4 | Yes |
| Washington | X | | | 4 | Yes |
| West Virginia | X | | | 4 | Yes |
| Wisconsin | X | Governor | Senate Senate | Indefinite | Yes |
| Wyoming | | | | | Yes |
| United States | | | | 4 | Yes |

¹ See The Council of State Governments, THE BOOK OF THE STATES, 1991, and Joseph Schwaner, *The Politics of the Executive in Local and American Politics in the American States* (Boston: Little, Brown, 1966), 11.

² Alexis de Tocqueville, DEMOCRACY IN AMERICA (Knopf ed., 1966), 205.

deemed competent enough to vote and to hold office. Short terms of office ensured popular control of government, and direct election of officials became the rule. State constitutions provided for election of numerous officials, including the Attorney General in most instances.

A study in the *Late Library Journal*¹ showed development of methods of selecting Attorneys General in nineteen states; of these, eight provided for legislative selection prior to 1843, but none finally retained this method. Prior to 1845, twelve states provided by constitution or legislation for the appointment of an Attorney General by the Governor, the legislature, or other authority. Some examples of the trends in selection in the older jurisdictions are given below:

North Carolina's 1776 Constitution provided for appointment by the legislature; its 1868 Constitution provided for election.

Louisiana's 1812 Constitution provided for appointment by the Governor; its 1852 Constitution provided for election.

Tennessee provided by 1831 legislation and by 1834 Constitution that the legislature would select the Attorney General; this appointive power was given to the Supreme Court by the 1870 Constitution.

Michigan's 1835 Constitution provided for appointment by the Governor; the 1850 Constitution provided for election.

Virginia's 1776 Constitution provided for selection by the legislature; its 1902 Constitution provided for election.

Kentucky's 1792 Constitution provided that the Governor would appoint the Attorney General, with the consent of the Senate; the 1850 Constitution made the office elective.

New York's 1777 constitutional convention appointed an Attorney General, then provided for selection by a Council of Appointment; the 1821 Constitution provided for

selection by the legislature, and the 1846 Constitution provided for popular election.

Although the Jacksonian tradition is still basic to state government, other trends have manifested themselves and of those principles no longer command the nearly unanimous support they once held. The late 19th Century saw the introduction of such innovations as civil service, open primaries, executive budgets, and the short ballot for state officials. Wyoming, in 1899, became the first "new" state to provide for appointment of the Attorney General, thereby ending the trend toward popular election. Alaska's 1959 Constitution and Hawaii's of 1960 provided for gubernatorial appointment, as did their territorial conventions in 1936 and 1950.

Recommendations for an appointive Attorney General were submitted to New York constitutional conventions in 1867, 1894, 1914, 1938, and 1967, but were not adopted. The New Jersey Constitutional Convention of 1947 continued the practice of gubernatorial appointment, as did the Pennsylvania Constitution of 1968. The 1961-62 Michigan Constitutional Convention extensively debated the issue of election versus appointment. An alliance between two of three convention factions led to the acceptance of elective status for the Attorney General and Secretary of State and appointive status for the State Treasurer, Auditor, and Highway Commissioner. The Maryland Constitutional Convention of 1967 also retained elective status for the Attorney General.

Strong arguments can be advanced for either system of selection. There is not necessarily a correlation between the selection process and the Attorney General's actual powers. For example, the Attorney General is elected in Delaware and appointed in Alaska, but in both jurisdictions he has control over all legal and prosecutorial functions. In some states, the Attorney General is independently elected, but he exercises

little power at either the state or local level. Thus, a "strong" department of justice can be developed under either system of selection, but is not guaranteed by either.

The Case for Appointment

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

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

Are the voters capable, or should they even be asked, to pass upon the abilities and performances of a large number of elected administrative officials? Would it not be better to give broad appointive and administrative powers to one individual, to enhance his position of leadership—making him master in his own house—and then hold him responsible through democratic electoral processes?

Mr. Richard S. Childs, Honorary Chairman of the National Municipal League, adds that:

Our objection to election of attorneys general applies to all the jobs on the tail of the state tickets and rests on the conviction that the attempt to have the people scrutinize the candidates for these secondary and undramatic jobs has failed completely for 100 years. The failure is called apathy. . . . Scrutiny by the people cannot be ordained or enjoined. It is a pervasive habit and fact and furthermore, it is a reasonable result of the attempt to impose on busy voters the duty of investigating and scrutinizing

candidates for a technical non-representative office.²

The Model Executive Article for state constitutions recommended by the Committee on Suggested State Legislation of the Council of State Governments limits statewide elective officials to the Governor and Lieutenant Governor, who are elected jointly. This article was developed by the Committee on Constitutional Revision of the National Governor's Conference,³ and corresponds to that recommended by the Advisory Committee on Intergovernmental Relations.⁴

In 1949, when a major reorganization of the federal government was underway, state reorganization was being discussed at the annual meeting of the National Association of Attorneys General. Attorney General Theodore D. Parsons of New Jersey noted that reorganization would require certain constitutional conditions:

Most important of these conditions I would submit is a short ballot with the Governor being the only constitutional officer in the executive branch who is elected by the people, if possible; secondly, a reasonably secure term of office for the governor, the accepted term being four years, within which he may carry out a program and develop administration confidence; thirdly, a reasonable assurance in the constitution against invasion by either the legislature or the executive branches upon the proper providence of the other.⁵

This is the position of those experts who favor integrating administrative activities and concentrating their control over them in the hands of a responsible chief executive; most of the studies which have occurred since about 1910 on administrative reorganization have so

¹ Richard, *The Traditions of Government in the States in THE FORTY-EIGHT STATES: THE TASKS AS POLICY MAKERS*, 15 (1965).

² *Legal Mass: Historical Culture and Bibliography of Attorneys General Reports and Opinions*, at LAW LIBRARY JOURNAL 90-91 (1967).

³ National Municipal League, MODEL STATE CONSTITUTION, 206-21 (1962).

⁴ Letter from Richard S. Childs to Patton G. Wheeler, November 18, 1950.

⁵ The Council of State Governments, 1950 STATE CONSTITUTIONAL REVISIONS 41.

⁶ Advisory Commission on Intergovernmental Relations, A SHORT STATE EXECUTIVE PROGRAM (1949) 1960.

⁷ National Association of Attorneys General, 1949 PROCEEDINGS 10-11.

argued. They hold that fragmentation leads to irresponsibility, but a single chief executive can be held accountable through the electoral system and, as a consequence, can make the administration more responsive.¹⁰ Proponents of an appointive Attorney General argue that his function is to advise the Governor and the Governor should be permitted to choose his advisors. They believe that the two officials are more likely to maintain the close and harmonious relationship that is necessary for effective liaison if the Attorney General is appointed. His office is one through which the Governor is expected to discharge his responsibilities, and the Governor should therefore exercise some control over it.

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

The Case for Election

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

To sum it up—an elected Attorney General has a measure of independence and a sense of personal and direct responsibility to the public. The elected official has a natural and

impelling desire to be creative and to exercise broader initiative in the service of the public. He is free of the fear of dismissal by any superior official if he should exercise contrary independent judgment. He is in the best position to render maximum service to the People and impartial advice to the Governor, the Legislature and State departments and agencies. He can appear in Court *without fear or favor*—an attorney in the fullest and finest sense of the word.¹¹

An equally strong position in favor of election was taken by Attorney General William J. Scott before the recent Illinois Constitutional Convention; he stressed the Attorney General's roles of "government watchdog" and "attorney for the people" as requiring independence from the Governor. General Scott's two predecessors concurred in this position.¹²

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

Another argument against the con-

cept of the Attorney General as counsel to the Governor is that the legislative branch may also rely on him for advice. In some states, he also has responsibilities toward the judiciary branch, such as serving as court reporter. Thus, he should not be responsible to any single branch of government, but can serve to strengthen checks and balances within the system.

The fear of loss of office should not deter the Attorney General from issuing an opinion. Since his duties are of the highest order, as high as any judicial officer, he should enjoy the same independence as a member of the judiciary. He should not be a creature of the Governor, but should render opinions solely on the basis of law. He should not be the advocate for a particular administration, but should be free to oppose policies which he considers inconsistent with the law and to investigate apparent wrongdoing.¹³

In reference to the argument that harmony must exist between the Governor and the Attorney General, it is noted that the Attorney General in over one-third of the jurisdictions is of a different political party than the Governor. While conflicts undoubtedly result from such partisan differences, effective working relationships apparently are maintained in most states. In reference to the argument that an appointed Attorney General is a non-political technician, it is noted that a recent appointed Attorney General resigned to serve as chairman of a Senatorial campaign committee, while another was prominently mentioned as a gubernatorial candidate. Appointment does not necessarily remove the office from politics.

Attorney General Clarence Meyer of Nebraska, in response to the argument

that the Governor should be able to appoint his Attorney General, says that "The president of a large corporation does not name the general counsel. This is done by the board of directors and in some cases their action must be confirmed by a vote of the stockholders." Because of this, "the same general counsel sees a good many presidents come and go."¹⁴

In his remarks to a legislative committee which was considering a constitutional amendment to make the office appointive, General Meyer mentioned several arguments in addition to those usually advanced by proponents of election. These included the following points: the Governor can appoint men with legal training to his staff if he feels he needs lawyers of his own choosing; much of the Attorney General's work is in areas in which the Governor has little or no interest, such as advising county attorneys and handling routine criminal appeals; the Governor is only one of many state officials whom the Attorney General advises; a Governor can make mistakes in appointing someone to the office of Attorney General; in most states, the Governor has control over law enforcement officers. General Meyer quotes in conclusion from the remarks of a delegate to the 1920 Constitutional Convention in Nebraska:

If there is any man who holds office in this state and who should be elected by, and responsible to the people of the state, it should be the Attorney General. The head of the state may have good judgment in his appointment, he may be able, from his experience, to appoint an excellent man to act as Attorney General, but I do not believe, under ordinary circumstances, that the judgment of one man is better than the combined judgment of the electors of the State of Nebraska on that proposition, and an Attorney General should be a check upon all the officers in the state, and he

¹⁰ Attorney General Louis J. Lefkowitz, *Position Paper of Louis J. Lefkowitz, Attorney General, to the Constitutional Convention Committee on the Executive Branch*, June 1, 1967, Albany, N. Y.

¹¹ See also William J. Scott, *Attorney General*, State of Illinois, Feb. 16, 1920.

¹² See summary of arguments presented to New York's constitutional convention in Robert H. Cardon, *The Relationship Between the Attorney General and Agency Councils in New York State*, unpublished Ph.D. Dissertation, Syracuse, N. Y., Feb. 1, 1966.

¹⁴ Letter from Attorney General Clarence A. H. Meyer to Chairman, Whelan, November 24, 1920.

should be free, if necessary, to proceed against any department or against any officer in the state. I do not want his hands tied. I do not want him to be responsible to any individual or to any particular department. I want him free in the discharge of his duties.¹⁵

No recent or current arguments defend the proposition that either the legislature or the courts should appoint the Attorney General; appointment is viewed as an executive function. It is assumed that the Attorney General is logically a member of the administrative branch of government, not the legislative or judicial. Furthermore, his impartiality in rendering opinions on legislation could be impaired if he remained responsible to the legislative body. The Attorney General represents many facets of the state before the court of the state; such being the case, there are obvious arguments against permitting the judges to select one of the advocates in a case.

Confirmation of Appointment

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

In Puerto Rico and the Virgin Islands confirmation is also by the Senate. The C.O.A.G. questionnaire from Guam indicated appointments are made with "advice and consent" of the legislature, whereas Samoa mentions that appointment is by the Governor, without indicating any mechanism for confirmation.

The Advisory Commission on Intergovernmental Relations suggested constitutional provision for a short ballot for state officials provides for Senatorial

confirmation. The Model State Constitution of the National Municipal League does not mention confirmation. There is no extensive literature, and presumably no vigorous arguments to be made, on the precise manner in which appointments are to be confirmed. Although all Pennsylvania Attorneys General of recent years have been in the same political party as the Governor, the requirement of approval of two-thirds of all elected members of the Senate for confirmation of the Attorney General gives the minority party considerable leverage over appointments. We cannot now ascertain whether this has caused problems.

1.42 Length of Term and Succession

Thirty-eight states provide a four-year term for the Attorney General and nine provide a two-year term. Tennessee sets the term at eight years and New Hampshire at five. In Alaska, Guam, Puerto Rico, and the Virgin Islands, the Attorney General is appointed for an indefinite term. Samoa stipulates that he is appointed for a minimum of two years. Table 1.41 shows the length of term and succession.

Trend Toward Longer Terms

The trend is clearly toward longer terms. Most states initially limited terms of officials to one or two years, on the theory that frequent elections kept government closer to the people and prevented the accretion of power by elected officials. Many states prohibited successive terms on the theory that official power must be limited and there was no particular virtue in continuity of office-holding. These arguments may have been cogent at a time when Attorneys General had relatively few duties to perform, as the temporary abolition of the office in some jurisdictions indicates was the case, and those duties were relatively well defined. Present Attorneys General, however, cannot effectively operate with a two-

year term, which does not allow time to master the duties and responsibilities of the office. Neither should they be subjected to the continuing campaign requirements imposed by an election every two years.

The number of Attorneys General serving two-year terms declined from twenty-one in 1937, to eighteen in 1950, to the present nine.¹⁶ Arizona went from two to four years in 1970, and Wisconsin did so in 1971. Apparently only one jurisdiction has even gone from a four-year to a two-year term; this occurred under Missouri's 1865 Constitution, which was adopted during Reconstruction. Its 1875 Constitution restored the four-year term.

Michigan's 1963 Constitution lengthened the Attorney General's term from two to four years, as did North Dakota in 1964. Minnesota's first four-year Attorney General was elected in 1955, Nebraska's in 1966. New Mexico's proposed Constitution of 1969 included a provision for four-year terms, but was defeated at the polls.

Arguments for Longer Terms

Comments by members of Attorneys General's staffs in states with the two-year term in 1963 to the Committee on the Office of Attorney General were uniformly critical, as the following excerpts show:

The Attorney General's two-year term does create many problems, namely lack of continuity of office procedure when a new Attorney General is elected, rapid turnover of personnel, and a great amount of money required for each political campaign.¹⁷

The most obvious problem created by the two-year term is the frequency of campaign requirements.¹⁸

Maine said, in 1963, that there were no problems concerning the two-year term.¹⁹

In 1969, however, the Attorney General's office said that:

The increase in work required of the Department of Attorney General has reached the point where a full-time Attorney General is needed. . . . A properly qualified attorney cannot afford to accept the position on a full-time basis for a two-year term.²⁰ Efforts for a four-year term are regularly defeated in South Dakota, where the Attorney General reported to C.O.A.G. that:

The two-year term for the Attorney General does create serious problems. Perhaps most seriously, it has the effect of forcing the Attorney General into an almost continuous political campaign. That makes it imperative that the Attorney General be out of his office a great deal attending functions which are strictly political in nature or consequences, rather than giving his time to the operations and efficiency of his office. The time limits of the term do not allow the Attorney General sufficient opportunity to develop programs, particularly when they are controversial, because they cannot be evaluated properly before the next election is at hand. Several attempts have been made to amend the Constitution to provide a four-year term for the Attorney General as well as for other constitutional officers. There has always been considerable support for the proposals from both the news media and the legislators, but for some reason it has never succeeded in passing.²¹

1.43 Succession to Office

There are few restrictions on Attorneys General serving successive terms. There are more on the Governor, who may not succeed himself in eleven states, and in twelve others may serve only two terms.²² However,

1. The Council of State Governments: THE BOOK OF THE STATES 1947-1950.

2. Letter from Assistant Attorney General David M. Lane of Arizona to Attorney General John B. Brockmeyer, May 17, 1963.

3. Letter from Solicitor General William M. Thompson to Attorney General John B. Brockmeyer, May 21, 1963.

4. Letter from Deputies Attorney General George C. West to Attorney General John B. Brockmeyer, September 25, 1963.

5. Letter from Deputies Attorney General George C. West to Attorney General John B. Brockmeyer, August 7, 1963.

6. N.A.A.C., Supplementary Questionnaire for South Dakota, October 8, 1971.

7. The Council of State Governments: THE BOOK OF THE STATES 1971-1968-1970.

15. *Report of Mr. Spillman*, PROCEEDINGS 1939 CONSTITUTIONAL CONVENTION STATE OF NEBRASKA 146.

there are such restrictions on Attorneys General in only three states: Kentucky, New Mexico and Alabama. Only Kentucky prohibits immediate succession. New Mexico restricts the Attorney General to two successive two-year terms and Alabama to two successive four-year terms. Alabama formerly provided for only one term, but a 1968 amendment permitted the limited succession.

Historical data on past restrictions are lacking, but good sense has led toward their elimination. The Model State Constitution permits succession in the office of Governor because:

The main argument favoring restriction in the term of the governor is fear of bossism or perpetuation through use of the powers of the office. This is always a possibility but the better argument seems against any form of restriction. Limitations of this kind restrict the right of the people to pass judgment upon the quality of the gubernatorial service performed for them and thus eliminate from the field the one candidate about whom the voters usually know the most. From a program policy point of view, a restriction on service in office affects the governor's ability to develop and implement a long-range plan.¹

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

NAAG recommends that the Attorney General should serve for a minimum term of four years and should be allowed to succeed himself. A shorter term makes it difficult for him to develop and execute programs, build a staff, or otherwise function effectively.

1.44 Removal from Office

There are several mechanisms for removing Attorneys General: impeachment, recall, or removal by the Governor, the legislature, or the courts.

Impeachment

Of the fifty-four jurisdictions, thirty-

six provide for impeachment. It is the only method of removal provided in twenty-one of these jurisdictions. Impeachment processes vary. Professor Clyde F. Snider of the University of Illinois describes the typical process:

Impeachment proceedings are instituted in the lower house of the legislature by the introduction of a resolution of impeachment. Such a resolution may be introduced by any house member, whereupon the matter is referred to a committee for investigation and report. On the basis of the committee's findings and recommendations, the house decides whether or not to vote charges in the form of "articles of impeachment." In most states a simple majority vote in the house is sufficient to impeach, although a few states require a two-thirds vote. If the house votes in favor of impeachment, it transmits a copy of the charges to the senate which resolves itself into an impeachment court to try the case. A board of managers is constituted by the house from among its members to prosecute the proceedings before the senate. The accused official is entitled to be represented by counsel, and the entire proceedings are conducted in a manner similar to procedure before the regular courts. When the taking of testimony and the presentation of evidence have been concluded, the senate votes upon the question of conviction or acquittal. A two-thirds vote—in some states of all members and in others merely of those present—is ordinarily necessary to convict. . . . the consequences of impeachment may also vary. Professor Snider adds that:

In a few states the judgment is limited to removal from office, but more commonly it may also include disqualifications from holding any state office in the future. Most constitutions expressly except impeachment cases from the governor's pardoning power. Moreover, a person who has been impeached may, whether or not he is convicted on the impeachment charges, be prosecuted in the ordinary courts for any criminal act which he may have committed.²

In New York, the judges of the Court of Appeals, the state's highest court, sit with the members of the Senate as a

court of impeachment. In Nebraska, impeachment charges are preferred by the unicameral Legislature and tried before the State Supreme Court. In Missouri, impeachments are tried before the Supreme Court after charges are filed by the House of Representatives.

An impeachment proceeding is rare, and is used only under the most extraordinary circumstances. Apparently, the last impeachment trial of an Attorney General was in Kansas in 1934. That action resulted in an acquittal.³ Whatever are the prescribed grounds for impeachment, the method is not a common means of removing officials. It can be utilized only when the legislature is in session and is quite time-consuming.

Alternative Removal Processes

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

The legislature stands alone as a

removing authority in proceedings other than impeachment in eight states. Recall may be used to remove the Attorney General in Arizona, Colorado, Louisiana, North Dakota, Oregon, Washington, and Wisconsin; he is an elective officer in all of these states.

Professor Snider evaluates the recall procedure as follows:

Recall provisions where they exist have been used but sparingly. The recall is sometimes criticized on the grounds that it involves a further lengthening of the ballot. On the other hand, it has been contended that, without the recall as a means of holding to account officials vested with wide appointing powers, the short ballot would not be practical. Provision for the recall may make it possible to lengthen official terms without impairing popular control, but may also be used by factions defeated in an election to continue the election fight or to harass the winners while in office.⁴

Louisiana reports that the district court may remove the Attorney General, and Maryland indicates that removal is attendant to any conviction in a court of law.

As a result of a court decision, an Arizona Attorney General was removed from office in 1947, having been adjudged guilty of conspiring to violate the gambling laws of the state. The Governor considered the office vacant and appointed a new Attorney General. The former Attorney General, however, refused to vacate his office. Subsequent court action affirmed the validity of an act which provided that an office would be vacant if its incumbent was convicted of a felony. The court reasoned that the powers of impeachment were an added protection for the public, not the sole protection.⁵ Section 1.6 discusses the Attorney General's relationship to the bar, and points out that disbarment proceedings may be brought against an Attorney General.

¹ Snider, *supra* note 1, at 167-8.

² *State ex rel. De Courten v. Sullivan*, 46 Ark. 318, 188 P. 2d 702 (1918).

³ *New York Times*, February 7, 1932, at 17.

⁴ National Municipal League, MODEL STATE CONSTITUTIONS, 30th ed. (1961).

⁵ Clyde F. Snider, AMERICAN STATE AND LOCAL GOVERNMENT 715-6 (1961).

1.45 Filling Vacancies

There are four methods of filling vacancies in the office of Attorney General: by appointment of the Governor, the legislature, or the supreme court, or by promotion of a deputy to the position of Attorney General.

Authority to Fill Vacancies

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

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

If the Deputy Attorney General is promoted to fill a vacancy, the chances of continuity in office programs are greater, however, the Attorney Gen-

eral may select his chief Deputy according to different criteria from those he would use in selecting his own replacement.

Length of Vacancy Appointment

Vacancy appointments for elective offices usually are valid only until the next general or next biennial election. At that time, if the original term has not elapsed, a short-term Attorney General is elected. This point was litigated in Oregon.¹ The statute creating the Oregon office in 1891 provided that the Attorney General would be elected for a full four-year term in 1894. Further, it mentioned that vacancies would be filled by gubernatorial appointment until the next general election, when an Attorney General would be chosen to fill out the term or commence a new term. The Governor appointed an Attorney General in 1891. The question of the case was simply, was there to be an election to fill out the first "quasi-term" in the general election of 1892? The court ruled that there was to be such an election.

The Supreme Court of Georgia reached the opposite conclusion in a 1939 case.² The office of Attorney General was created under the judicial article, hence the rule that provisions for elections to fill vacancies in executive positions did not apply to the office of Attorney General. The gubernatorial appointee to fill a vacancy created by a resignation was to serve out the full four-year term of office without standing for election. The Attorney General was to stay in office until his successor's election had been declared by the General Assembly. The provision for the special vacancy election made no provision for such declarations; hence, the elections were deemed not to apply to the Attorney General.

¹ *State v. Board of Election*, 171 Or. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

1.5 Qualifications and Experience

The effectiveness of the office of Attorney General depends on the qualifications of the incumbent more than on any single factor. Statutory requirements can do little other than establish certain minimum standards. It is equally difficult to equate past experience of incumbents with their performance as Attorney General.

1.51 Qualifications Required

Table 1.51 gives the qualifications required for holding the office of Attorney General. Some states add other requirements, such as prohibition from holding other offices, to these qualifications. Only Pennsylvania and Guam indicate that no qualifications are required.

There was no minimum age requirement in seventeen jurisdictions. There were either implicit or explicit requirements in thirty-three jurisdictions. The minimum age was 21 in twelve jurisdictions, 25 in nine, 26 in two, 30 in six, and 31 in one. California, Connecticut and Maryland reported no minimum ages, but the requirement of five years bar membership in California and ten years in Maryland and Connecticut indicate a practical minimum age of 26 to 31 years, depending on state bar requirements.

Residence and citizenship are required by most jurisdictions. Citizenship is an express requirement in thirty-two jurisdictions and can be inferred in another eight from the provision that the Attorney General must be a qualified elector. Ten jurisdictions indicate that there is no citizenship requirement. Citizenship might be inferred elsewhere from requirements that the Attorney General be an elector. The Maryland court, for example, has said that the constitutional provision that the Attorney General be a qualified voter necessarily implies that he be a U. S. citi-

zen.¹ Nineteen of forty-five states have residency requirements for the office. These range from six months in Michigan to ten years in Maryland and to ten years as an elector in Oklahoma. Ten states have requirements of two years or under, seven of from three to six years and two above six years.

Admission to the bar is a practical necessity for an Attorney General, but is not required in all jurisdictions. Although during Colonial times there were occasional non-lawyer Attorneys General, there is no evidence of a layman so serving after statehood. Formal requirements appear moot as the electorate probably would not choose a non-attorney to be its chief law officer. However, the question arose in the Canadian province of Alberta in 1937 when Premier William Aberhart, a layman, designated himself to be the provincial Attorney General. W. Kent Power examined the implications of Aberhart's tenure and concluded that both tradition and practicality required that the Attorney General should be a lawyer. He pointed out that the Legal Profession Act provided that no person "who is not enrolled as a barrister and solicitor in the books of the Law Society of Alberta shall commence, prosecute, carry on or defend any person in any Court . . ." Power added, "It is his duty to function as such, and under said . . . provision he cannot legally do so." Power concluded that:

The history of the office, its duties and responsibilities, and especially the successful operation of our federal system, afford weighty support for the view that the relationship of the attorney general to the Lieutenant Governor is in the nature of a personal one. The name "King's attorney" crystallizes that idea. The Lieutenant Governor has, therefore, at least as much

¹ *Case v. Board of Supervision of Elections of Baltimore City*, 214 MD 577, 220 A 24 (1946).

QUALIFICATIONS FOR ATTORNEY GENERAL

| | Age | Residence and Citizenship | Admission to Bar |
|----------------|------|--------------------------------|-------------------------|
| Alabama | 25 | U.S. citizen—5 years in state | No |
| Alaska | None | U.S. citizen | No |
| Arizona | 25 | 10 years U.S.—5 years in state | Yes |
| Arkansas | 21 | 1 year in state | Yes |
| California | None | U.S. and state citizen | No |
| Colorado | 25 | U.S. citizen—2 years in state | Yes—5 years (statutory) |
| Connecticut | None | Elector | Yes |
| Delaware | None | U.S. citizen—elector | Yes—10 years |
| Florida | 30 | U.S. citizen—elector | Yes |
| Georgia | 25 | U.S. citizen—elector | Yes—5 years |
| Hawaii | None | No requirements | Yes |
| Idaho | None | Elector—1 year in state | No |
| Illinois | 30 | U.S. citizen—2 years in state | Not required |
| Indiana | None | U.S. citizen | Yes |
| Iowa | 21 | Elector | Yes |
| Kansas | None | Elector | No |
| Kentucky | 30 | U.S. citizen—2 years in state | Yes—(case law) |
| Louisiana | None | U.S. citizen—2 years in state | Yes—8 years |
| Maine | None | | Yes—5 years |
| Maryland | None | U.S. citizen—10 years in state | Yes |
| Massachusetts | None | None | Yes—10 years |
| Michigan | 21 | Elector—6 months in state | Yes |
| Minnesota | 21 | U.S. citizen for 3 months | Yes |
| Mississippi | 26 | U.S. citizen—elector | Not statutory |
| Missouri | None | U.S. citizen—1 year in state | Yes—5 years |
| Montana | 30 | U.S. citizen—2 years in state | Not required |
| Nebraska | None | No requirements | Yes |
| Nevada | 25 | U.S. citizen—2 years in state | No |
| New Hampshire | None | No requirements | No |
| New Jersey | None | | Yes |
| New Mexico | 30 | U.S. citizen—5 years in state | No |
| New York | 30 | Elector | Yes |
| North Carolina | 21 | Elector | Not required |
| North Dakota | 25 | Elector | No |
| Ohio | 21 | U.S. citizen—elector | No—(but implied) |
| Oklahoma | 31 | U.S. citizen—10 years elector | Yes |
| Oregon | None | | No |
| Pennsylvania | None | (No requirement for office) | Yes |
| Puerto Rico | 21 | U.S. citizen—elector | No |
| Rhode Island | 21 | U.S. citizen—elector | Yes |
| Samoa | None | U.S. citizen | No |
| South Carolina | None | U.S. citizen—elector | Yes |
| South Dakota | 25 | —1 year in state | Not statutory |
| Tennessee | None | None | Yes (case law) |
| Texas | None | | Yes—(implied only) |
| Utah | 25 | U.S. citizen—elector | No |
| Vermont | 21 | U.S. citizen—elector | Yes |
| Virgin Islands | None | U.S. citizen | No |
| Virginia | 21 | U.S. citizen—elector | Yes |
| Washington | 21 | Elector—1 year in state | No |
| West Virginia | 25 | U.S. citizen—5 years in state | Yes |
| Wisconsin | None | U.S. citizen—elector | No |
| Wyoming | 21 | U.S. citizen—elector | Yes |
| United States | None | Required by general law | Yes |
| | | | No |

right to receive the personal, not the inversely delegated, opinion of his attorney as any private client has to expect the personal opinion of his solicitor rather than the transmitted opinion of one or more of the solicitor's partners or employees, even though that opinion may be the result or the amalgam of their research and points of view. Moreover it is the right and, in many instances, the duty of the attorney general to appear in Court on behalf of the Crown. No layman can fulfill that duty with competence.²

Many jurisdictions report specific statutory or constitutional requirements of bar membership. In addition, Kansas reports a case which implies this requirement.³ The court defined the duties of the Attorney General so as to remove any doubt but that they required a person licensed to practice law and added:

One who is admitted to practice as an attorney at law is an officer of the courts and both by virtue of his oath of office and the customs and traditions of the legal profession, he owes to the courts the highest duty of fidelity. . . . The attorney general by his motion to intervene and supersede the county attorney exercised his powers and duties under the constitution and appropriate statutes; this was as far as he could go as an executive officer and as an attorney and officer of this court. Since he is an officer of the judicial branch, under the separation of powers of the three branches of government, he was limited and restricted in his conduct before this court by the code of professional ethics to the same extent any other lawyer would be.

In at least six additional states the requirement can be implied from other statutory or constitutional duties of the Attorney General. In Minnesota, for example, the statutes make it unlawful for anyone except a member of the bar to appear in court as an attorney and, since the Attorney General's statutory duties require such appearances, his bar membership is necessarily implied. New Jersey statutes prohibit the At-

torney General from engaging in the private practice of law during his term of office, thereby implying that he be admitted to practice.

Seven states provide a minimum period of time that one must be admitted to the bar before being eligible to serve as Attorney General. This period ranges from five years in California, Florida, Louisiana, and Mississippi to ten years in Maryland and Connecticut.

Several states have constitutional requirements providing that the Attorney General keep his office and his official records in the state capitol. A West Virginia court decision of 1943 rejected the contention that such requirements affected the eligibility of those seeking to become Attorney General. The provision took effect only after election.⁴

Though only tangentially a requirement for office, several states prohibit multiple office holding. For example, in Maine and Massachusetts the acceptance of a seat in Congress by the Attorney General automatically renders his office vacant.⁵ Eight states provide that the Attorney General is constitutionally ineligible to sit in the state legislature. Other states stipulate that he may not hold any other office. In West Virginia, such a provision caused a dispute over the rightful claim to office. Lyell Clay describes the action:

The state was set for the dispute when Clarence W. Meadows resigned from the office on May 15th, 1942. On May 26th, 1942, Wysong was appointed by Governor Matthew M. Neely to serve until the next general election and until his successor was elected and qualified. On November 3d, 1942, James Kay Thomas, who had been the Democratic nominee for Attorney General in the primary election held on August 4th, 1942, and who had entered the United States

² W. Kent Power, *The Office of Attorney General*, XVII CAN. BAR REV. 416-29 (1970).

³ *State of Kansas v. Foster v. City of Kansas City*, 186 Kan. 100 (1911), 24 W. (1911).

⁴ *State ex rel. Thomas v. Wigman*, 125 W. Va. 499, 21 S.E. 2d 661 (1943).

⁵ AM. CONST. art. I, § 2 (1820); MASS. CONST. art. VIII (1780).

Army on October 1st, 1942, received the majority of the votes cast for such office at the General election. Certificates of result were transmitted to the Governor and Secretary of State by the several counties, and in turn, were delivered by the Secretary of State to the Speaker of the House of Delegates on January 13th, 1943, which body declared Thomas, who personally appeared before it on that day, elected to the office of Attorney General for the unexpired term. Thomas took the oath of office, and then made demand upon Wysong for possession of the property and records pertaining to the office. Wysong refused, and Thomas thereupon brought a proceeding in mandamus before the Supreme Court of Appeals seeking induction into the office. The Supreme Court held that notwithstanding the fact that Thomas was then in the military service, he was eligible under the law for election to the office of Attorney General.⁶

A Nevada case in 1867 also involved dual office holding.⁷ The Nevada Constitution provided that no person holding any lucrative office under the government of the United States or any other power would be eligible for any civil office of profit in state government. Robert Clarke was elected Attorney General in 1866. After he took office, the previous Attorney General, George Nourse, claimed possession of the office because Clarke was, prior to his election, the U. S. District Attorney for Nevada. Clarke replied that he had tendered a conditional resignation from the office of District Attorney effective in January, 1867. One day prior to the election, Clarke wrote a preemptory resignation to take effect immediately. The court ruled that Clarke would have had to resign unconditionally prior to the election day to be eligible for office. However, the court accepted his action the day prior to the election as an effective resignation and allowed him to remain in office.

1.52 Experience and Tenure

Much as the office itself varies widely, persons serving as Attorneys General between the years 1963 and 1968 exhibit a wide range of backgrounds and personal characteristics.⁸ An analysis of such factors as education, age at assumption of office, occupation, public service, political affiliation, and tenure reveals a group solidly legalistic in character but as different in certain other respects as the jurisdictions they serve. Due to the professional and political aspects of the office, striking similarities appear in such areas as education and past public service.

Age at assumption of office, ranged between 29 and 63 years of age. In spite of the wide distribution, nearly 60 percent took office while in their 40's, following a career of public service spanning at least a decade. This modular characteristic is again seen in the fact that the average age of assuming the office of Attorney General is approximately 45 years.

By profession, all are attorneys at law, although very few moved directly into the position from private practice. More than one-half can be occupationally classified as public servants, due to their long period of employment in municipal, state, or federal government. Approximately 10 percent have occupational backgrounds as teachers, bankers, or businessmen. About one-fourth hold A.B. and LL.B. degrees, with a scattering of B.S., LL.D., and M.A.'s.

The vast majority of the Attorneys General possess impressive records of past public service. Approximately 40 percent have served as municipal or county attorneys, while several served as mayors. Municipal, state, or federal

judgeships were held by 20 percent. Two-fifths of the Attorneys General have served in the legislature, with a ratio of three times as many in the House as in the Senate. Several were elected Floor Leader. In the executive branch, one served as both Governor and Lieutenant-Governor, and others have held such positions as Secretary of State, agency director, and Executive Assistant. In the federal sphere, nearly 10 percent of the Attorneys General have served as United States Attorneys, and several others were employed by agencies, boards, and commissions. One-quarter of the Attorneys General served as Deputy or Assistant Attorney General.

In 1963, twenty-eight Attorneys General were Democrats, twenty were Republicans, and one was a Popular Democrat. In 1966, there were thirty-nine Democrats, thirteen Republicans, and the single Popular Democrat. By 1968 the ratio stood at thirty-three Democrats, nineteen Republicans, and the Popular Democrat.

Almost one-half of the Attorneys General for any given year between 1963 and 1968 had served one or more prior terms in that office. The period indicates a trend of increasing numbers of Attorneys General possessing tenure of eight or more years. While only 10 percent were so characterized in 1963, the number reached 20 percent in 1967 and 30 percent in 1968.

As with every aspect of the American political system, the past decade

has subjected the office of the Attorney General to an overall evolutionary process. Needless to say, the changing demand structure of the position requires the services of highly educated individuals, with a background of public service and legal experience. The following tables, briefly summarized above, provide a survey of those who have held the office of Attorney General during the past six years.

One hundred and fifteen former Attorneys General responded to a C.O.A.G. survey in 1970.⁹ This group included sixty-two Democrats, fifty-one Republicans and two from other parties. They had served an average of 4.61 years, taking office at an average age of 43 years. Prior to becoming Attorney General, fifty-two served as local government attorneys; twenty-four served as legislators; and thirty-four served on the Attorney General's staff. After serving as Attorney General, ten became Governors; two became United States Senators, and two became members of the House of Representatives. Nineteen became state Supreme Court justices and twelve became judges of other courts.

⁹ Committee on the Office of Attorney General FOR THE ATTORNEYS GENERAL ASSOCIATION OF THE U.S., September, 1970.

1.521 THE ATTORNEYS GENERAL: EDUCATIONAL BACKGROUND

| Degree Held | Number of Attorneys General Holding Degree | | | | |
|------------------|--|------|------|------|------|
| | 1963 | 1964 | 1965 | 1966 | 1968 |
| LL.B. | 53 | 50 | 52 | 51 | 50 |
| A.B. and LL.B. | 26 | 22 | 19 | 21 | 25 |
| B.S. and LL.B. | 6 | 5 | 12 | 0 | 7 |
| J.D. | 1 | 1 | 0 | 0 | 1 |
| B.S. and LL.B. | 0 | 0 | 1 | 1 | 0 |
| A.A. and LL.B. | 0 | 0 | 0 | 0 | 1 |
| Ph.D. and LL.B. | 0 | 2 | 1 | 1 | 1 |
| B.B.A. and LL.B. | 0 | 0 | 1 | 0 | 1 |

⁶ In re Clarke, THE OFFICE OF ATTORNEY GENERAL OF NEVADA 75 (1947).

⁷ State of Nevada v. Nourse, 1 Clark 706 (1867).

⁸ All data on 1963-68 are from the Council of State Governments, THE ATTORNEYS GENERAL OF THE STATES AND THEIR DISPOSITIONS (pub. listed as 1970).

1.6 Relationship to the Legal Profession

1.522 AGE AT ASSUMPTION OF OFFICE

| Year | Range | Age at Assumption of Office | |
|------|-------------|-----------------------------|-----------------------|
| | | Arithmetic Mean | Mode |
| 1961 | 32-63 years | 47.2 years | 49 years (freq. of 6) |
| 1964 | 32-61 years | 45.9 years | 49 years (freq. of 7) |
| 1965 | 29-63 years | 46.4 years | 49 years (freq. of 9) |
| 1968 | 29-63 years | 40.4 years | 49 years (freq. of 3) |
| 1967 | 29-63 years | 44.1 years | 44 years (freq. of 7) |
| 1969 | 29-63 years | 44.8 years | none discernible |

1.523 PUBLIC OFFICES HELD PRIOR TO TAKING OFFICE

| Office | Number of Attorneys General Having Held Position | | | | | | |
|-------------------------|--|------|------|------|------|------|------|
| | 1961 | 1964 | 1965 | 1966 | 1967 | 1968 | 1969 |
| City or County Attorney | 16 | 22 | 25 | 22 | 20 | 22 | |
| Municipal Judge | 2 | 2 | 5 | 4 | 4 | 4 | |
| State Judge | 3 | 4 | 4 | 1 | 4 | 4 | |
| Federal Judge | 0 | 0 | 1 | 1 | 1 | 1 | |
| State Agency Head | 3 | 2 | 4 | 3 | 7 | 5 | |
| Governor | 1 | 1 | 1 | 1 | 1 | 1 | |
| State Senator | 5 | 4 | 2 | 3 | 1 | 1 | |
| State Representative | 16 | 14 | 13 | 13 | 13 | 14 | |
| Floor Leader | 3 | 2 | 2 | 1 | 4 | 4 | |
| Asst. or Dep. AG | 14 | 11 | 13 | 13 | 15 | 13 | |
| U.S. Attorney | 6 | 7 | 7 | 7 | 6 | 6 | |
| Assistant to Governor | 1 | 0 | 2 | 2 | 2 | 1 | |
| City Elected Official | 2 | 1 | 1 | 1 | 2 | 2 | |
| Lieutenant Governor | 1 | 1 | 1 | 1 | 1 | 1 | |

1.524 TENURE OF OFFICE

| Years of Tenure | Number of Attorneys General Holding Given Tenure | | | | | | |
|-----------------|--|------|------|------|------|------|------|
| | 1963 | 1964 | 1965 | 1966 | 1967 | 1968 | 1969 |
| One or less | 16 | 7 | 4 | 4 | 0 | 0 | |
| Two | 14 | 10 | 15 | 5 | 14 | 4 | |
| Three | 5 | 7 | 3 | 15 | 3 | 12 | |
| Four | 5 | 10 | 10 | 7 | 15 | 1 | |
| Five | 5 | 6 | 5 | 4 | 1 | 13 | |
| Six | 2 | 1 | 5 | 1 | 1 | 4 | |
| Seven | 1 | 2 | 2 | 5 | 1 | 1 | |
| Eight | 1 | 6 | 2 | 2 | 1 | 5 | |
| Nine | 0 | 1 | 1 | 2 | 1 | 1 | |
| Ten-Thirteen | 3 | 1 | 5 | 1 | 5 | 5 | |
| Fifteen-Twenty | 1 | 1 | 1 | 1 | 1 | 1 | |

The Attorney General's relationship to the bar in the states is not strongly defined, although he is potentially in a position to exercise leadership. In England and Canada, the Attorney General is the titular head of the bar. No such formal role devolves upon the office in America.

State Attorneys General have varying degrees of involvement with the bar. Some have formal duties in reviewing petitions for bar membership and in initiating proceedings for disbarment. Generally, however, the extent of their professional activities depends on their individual interests. Most take an active part in bar association meetings and some have published articles in the state bar journal. In some states, Attorney General's advisory opinions are published or briefed in the bar magazine. The Attorney General's role in recruiting lawyers for community service in times of emergency has been demonstrated. He may be active in projects of the American Bar Association, such as promoting that group's standards for the administration of justice¹

1.61 The Attorney General and the Bar

Table 1.6, based on data submitted to C.O.A.G. by Attorneys General's offices, shows his relationship to the bar. Attorneys General serve on the state bar's board of delegates in Colorado, Connecticut (*ex-officio*) and Pennsylvania (*ex-officio*). Minnesota's Attorney General serves on the bar association's unauthorized practice committee and Wisconsin's Attorney General does legal work for the state bar. The Attorney General of South Carolina serves on the committees on criminal law of both the integrated

state bar and the private bar association. C.O.A.G. inquiries to a few state bar associations showed that there is some interest in involving the Attorney

General in bar activities. For instance, the director of the Missouri bar indicated that while the various Attorneys General in the past have been repeatedly urged to participate in bar activities, his participation often has been limited because of a busy schedule. However, the director commented that:

Since Attorney General John Danforth has been in office, we have had a closer relationship than in the past. He has expressed a very definite interest in promoting projects in which The Missouri Bar is interested, and because of that we have had several private conversations with him that have been very helpful and very resourceful to us. We would like to expand and continue to involve the Attorney General's Office in Bar activities.²

The director of Maine's Bar Association pointed out that, though the relationship of the Attorney General and the bar was informal, it was nonetheless close. Five of Maine's Attorneys General have served as president of the bar association and one served as bar president while he was Attorney General. The bar association's director commented that relations between the association and the Attorney General were already very good:

The Attorney General himself has been most helpful in many ways and so have his staff. They have contributed material to our Bar Bulletin and have never failed to give suggestions and advice when called upon.³

Former Attorneys General responding to C.O.A.G. questionnaires

² Letter from Wade E. Baker, Executive Director, the Missouri Bar, to Attorney General John B. Brockmeyer, April 29, 1970.

³ Letter from Clarence Biddow, Executive Director, Maine Bar Association, to Attorney General John B. Brockmeyer, April 29, 1970.

¹ See Section 1.75 of this study.

Testimony of

JUDGE THOMAS B. STEWART

before the

SENATE STATE AFFAIRS COMMITTEE

HJR 7:
Constitutional Amendment
Election of the Attorney General

May 26, 1983

Members Present:

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

TRANSCRIPT OF PROCEEDINGS

SENATOR FISCHER:

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

JUDGE STEWART:

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

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

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

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

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

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

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

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

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

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

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

be

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

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

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

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

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

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

history of that idea is two hundred years old.

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

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

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

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

SENATOR FISCHER:

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

SENATOR RAY:

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

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

JUDGE STEWART:

May I respond, Mr. Chairman?

SENATOR FISCHER:

Certainly, Tom.

JUDGE STEWART:

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

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

SENATOR RAY:

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

JUDGE STEWART:

To take this to the court?

SENATOR RAY:

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

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

JUDGE STEWART:

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

SENATOR RAY:

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

SENATOR RODEY:

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

JUDGE STEWART:

That may very well be.

SENATOR RAY:

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

JUDGE STEWART:

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

SENATOR FISCHER:

Thank you, Tom.

SENATOR STURGULEWSKI:

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

SENATOR FISCHER:

Senator Ray?

SENATOR RAY:

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

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

SENATOR STURGULEWSKI:

Your asking what?

SENATOR RAY:

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

JUDGE STEWART:

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

SENATOR STURGULEWSKI:

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

JUDGE STEWART:

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

opinions.

SENATOR FISCHER:

Senator Ray?

SENATOR RAY:

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

JUDGE STEWART:

I appreciate the opportunity to appear, Mr. Chairman.

SENATOR FISCHER:

I really appreciate your testifying.

STATE OF ALASKA

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OFFICE OF THE ATTORNEY GENERAL

April 23, 1985

The Honorable Patrick Rodey
Chairman
Senate Judiciary Committee
Alaska State Senate
Pouch V
Juneau, AK 99811

Re: Elected AG
SJR 9

Dear Senator Rodey:

I would like to comment on the merits of the question of whether or not we should elect the attorney general.

As you take up this issue, it is useful to consider how this proposed change will effect the citizens of our State in both the short and long term. I have lived and practiced law in our state for most of my adult life. I am absolutely convinced that the needs of all Alaskans are best served by having an appointed attorney general. Election of one cabinet level official makes no more sense than the election of some or all other commissioners.

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

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

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flexibility and discretion that is implied in an appointed attorney general. Anything less will inevitably drive a wedge between the Governor and the Department of Law to the detriment of the citizens of our state.

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

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

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

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

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I have a number of substantive points which weigh against the election of the attorney general. First, in Alaska, the people, through their legislators do participate in the selection of the attorney general by the confirmation process. In addition, the confirmation process allows the Legislature to examine the qualifications and integrity of the nominee.

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

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

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

Studies on administrative reorganization usually argue that fragmentation leads to irresponsibility, but that a single chief executive can be held accountable through the electoral system and, as a consequence, can make the administration more responsive. In my opinion, the Governor of Alaska needs the

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

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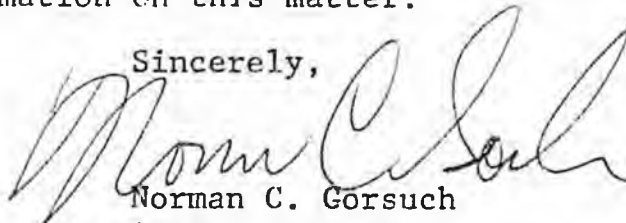
Fourthly, in states where the attorney general is elected, the heads of executive departments often hire their own attorneys. In jurisdictions with elected attorneys general, there is often a proliferation of house counsel on the staff of major departments. Historically, such counsel have been employed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

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

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

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

Sincerely,



Norman C. Gorsuch
Attorney General

signify by saying "aye", all opposed by saying "no". The "ayes" have it and the proposed amendment is ordered adopted. Are there amendments to Section 14? Mr. Barr.

BARR: Mr. President, I have an amendment to insert after Section 13. It is on the Secretary's desk.

PRESIDENT EGAN: Between Section 13 and Section 14?

BARR: Yes, it will be a new Section 14.

PRESIDENT EGAN: The Chief Clerk may read the proposed amendment.

CHIEF CLERK: "Page 0, line 16, after Section 13, insert a new Section 14, and renumber the following sections accordingly: "An Attorney General shall be elected at the same time and in the same manner as the Governor, and his term of office shall be four years. He shall be the chief law officer of the State, shall represent the State in all courts of law, and shall see that all laws are uniformly and adequately enforced throughout the State. He shall be legal advisor to the Legislature and all State officers, and shall perform such other duties as may be prescribed by law. He shall be responsible to the Governor and the Legislature for the faithful performance of his duties. The Attorney General shall receive for his services a compensation fixed by the Legislature which shall not be increased or diminished during his term of office. He shall devote his full time to his office and shall not receive any salary, fees or other compensation from any other source. In case of vacancy in the office of Attorney General for any cause, the Governor shall appoint his successor to complete the term of office with the consent of a majority of both Houses of the Legislature in joint session assembled, or, when not in session, a poll of the members may be taken by mail by the President of the Senate and Speaker of the House."

PRESIDENT EGAN: What is your pleasure, Mr. Barr?

BARR: I move the adoption of this amendment.

PRESIDENT EGAN: Mr. Barr moves the adoption of the amendment. Is there a second to the motion?

KNIGHT: I'll second the motion.

PRESIDENT EGAN: Mr. Knight seconds the motion. The amendment is open for discussion. Mr. Barr.

BARR: Mr. President, as this is rather a long amendment --

PRESIDENT EGAN: The Chair would like to make an announcement at this time, before you proceed, Mr. Barr. The News Miner just called and Guy Rivers, brother of Vic and Ralph, was found alive and safe about 30 minutes ago. (Applause) He has been picked up and is now on his way back to Fairbanks. Mr. Barr.

BARR: I have had placed on all the delegates' desks a mimeographed copy of the text of this amendment. It is not the complete amendment showing the lines and paragraph, it is merely the text. It provides for the election of the attorney general, that is the gist of it. He shall be elected at the same time and manner as the governor. He shall be legal adviser to the legislature and all state officers, and shall perform such other duties as may be prescribed by law. It outlines his duties and it provides for his replacement in case there is a vacancy. Now, in presenting this amendment, I do not go against the thought of the Executive Committee in that we should have a strong executive. Some people will think so. I went along with their committee report and I still do not disagree with it; however, the reason I decided finally to put this amendment in was the fact that I met innumerable people, speaking to them privately, who thought that the attorney general should be elected. In fact, they stated it in broader terms, they said they would like to elect more officials than the state governor. None of them stated that they wanted to elect as many as we have now, that they wanted to reduce the governor's power, but they thought they should elect enough so that they felt they had a hand in the government themselves. I felt that if another official should be elected, it should be the attorney general. Why the attorney general? Because all these other department heads are there expressly to carry out the governor's program and should agree with him in every detail on his policy. That makes up a good working team. The attorney general also should work with the governor, he is the governor's legal counsel and the legislature's legal counsel and also counsel for all the department heads, but he has one other duty that does not quite conform to the usual idea of a department head's duty under administration and that is, he is called upon to interpret the law at times. That is a semijudiciary function, I would call it, although it's not final. It is a temporary decision and may be taken into the courts. In interpreting the law, he should be impartial. Many times, of course, the governor might ask him to interpret the law to be sure that he is on the right ground when he proposes something. In case we had a governor who wanted to bulldoze something through anyhow, if it were a little bit questionable, the attorney general might feel that he was obligated to the governor if he were appointed and his opinion might be biased a little bit. I wouldn't say that he would flout the law, but he could be biased a little bit to either one side or the other.

And even if he were entirely honest and tried to render an impartial decision, I'm afraid his conscience would hurt him a little bit because he was obligated to the governor and went against the governor's wishes, so to remove him from that embarrassing position, I think that he should be elected. Now I grant you in electing any man we cannot be sure that we will get a good man, and on the other hand, by appointment we cannot insure that we will get a good man, but I believe that if we are going to elect another official because the people want it, then it should be the attorney general.

PRESIDENT EGAN: Any further discussion? Mr. Marston.

MARSTON: Mr. President, if my recollection is right, in the past 14 years that I have definite recollection of, there have been only two attorney generals and the reason is that they just can't get attorneys to run for that job. I'd want to know that there are attorneys that will step up and lend themselves to be elected to that job before we pass on this. I have no argument with the mover of this amendment, Mr. Barr, except that is information that I would like to have. Maybe we have some lawyers here that could enlighten me on that.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: Mr. President, I think I could answer that. All the lawyers that favor the amendment will probably stand up, and those who don't will sit down. (Laughter)

PRESIDENT EGAN: The Convention will come to order. Is there further discussion of the proposed amendment? Mr. Nolan.

NOLAN: Mr. President, at a meeting that I had, I think there were 12 people there on an hour and a half's notice, that was the one thing they were unanimous on. They wanted the attorney general elected by the people. They seem to think it was the one independent arm that they would have, and for that reason they were unanimous that the attorney general should be elected, and therefore I think I will support Mr. Barr's amendment.

PRESIDENT EGAN: Mr. McLaughlin.

McLAUGHLIN: Mr. President, I voted against the governor and secretary of state as co-runners on the belief that we had merely one elective office in the executive arm and that would suffice, because my other voting had been predicated, and other proposals had been predicated, on that belief we were going to have a strong executive. This is merely the introduction to other offices. I notice we have a Delegate Proposal No. 45 submitted by Mr. Barr, and we have a Delegate Proposal No. 44 also,

providing for the election of a commissioner of labor. If we yield ground in one respect, we might as well elect our commissioner of welfare, our commissioner of education, and having provided those, I feel that we should go right down the list and completely dissipate the theory upon which the voting has taken place. It was with reluctance that I even voted in favor of the secretary of state as a co-runner for the governor. I am violently opposed to the election of the attorney general. I don't think the election of him accomplishes any purpose. The blunt fact is that there is a general misconception as to the function of the attorney general. The attorney general is a lawyer and his opinion is the equivalent of any other lawyer's. It can be attacked. Any recommendation he makes, if acted upon, can always be attacked in the courts by private citizens. His opinion is worth the paper it is written upon. It's impressive upon the state and the officials are bound by it until some irate taxpayer attacks it and the actions taken under the authority of it, and the courts can promptly overrule it. There is a misconception about the function of the attorney general, his functions are not quasi-judicial. He is another attorney giving an opinion, and if you could assure yourselves that he would have the wisdom of a deus, those lawyers don't exist in Alaska as it has been evidenced by the variety of opinions expressed here before this body. I do oppose it, I think if we are going to have an attorney general, the power should be vested in the governor to appoint him, and that is without any screening by any judicial council or anything of the sort. If you're going to elect him, elect him, but by and large if you're creating a strong executive, then give him the power to appoint his own attorney general. The discrepancy has been pointed out in New York under the series, Governors and Administration of New York, which is put out under the American Commonwealth Series, it's pointed out that because of the fact that the attorney general is an elective office under the constitution, that is, the governor, in substance, has to rely on a legislative act passed in 1900 authorizing him to have private counsel. You're putting a diverse and possibly a discordant element into the executive branch. It isn't necessary. The courts can protect the government from the opinions of an attorney general appointed by the governor, and that attorney general does, in a sense, bear the same relationship to the governor as any attorney bears to his private client. It is an attorney-client relationship and the relationship has to be based on faith and personal selection. I would strongly recommend that there be no other elective offices in the state.

PRESIDENT EGAN: Mr. Barr.

BARR: Mr. President, may I be allowed to close?

PRESIDENT EGAN: If there is no other person who wishes to be heard. Mr. Stewart.

STEWART: Mr. President, may I ask Mr. McLaughlin a question?

PRESIDENT EGAN: You may, Mr. Stewart.

STEWART: Is it your idea that the attorney general, as such, he is or should act as the counsel for the legislature, as well as for the executive?

McLAUGHLIN: He should, in substance, act as counsel for the legislature. In many respects, you also have the unusual circumstance where the attorney general is of one party and the legislature is predominantly of another party.

STEWART: He may have to give decisions in one case that might favor the executive and in another case might favor the legislature?

McLAUGHLIN: That's right.

STEWART: I think that is an unwholesome situation, and should be corrected by having the attorney general purely and simply the adviser for the executive.

PRESIDENT EGAN: Mr. Ralph Rivers.

R. RIVERS: Mr. President, this has developed to the point where I want to say a few words. I wasn't going to, but when I was attorney general, that office was legislative counsel for the legislature, advised the members of the legislature, advised the various administrative departments under the governor, and advised the governor, and wrote legal opinions interpreting the law. Since that time the legislature has created a Legislative Council, that Legislative Council has a political scientist in charge, Jack McKay. It could very well have a lawyer and is authorized to engage any legal services that may be required. The legislature has full power to hire all the legal assistance it needs during the sessions so that I believe that Mr. Stewart's thought is well taken, that the attorney general will be the attorney for the executive arm of the government and that if we have the governor appoint an attorney general, he is not going to be the adviser to the legislature nor the drafter of legislative bills. Now, he may draft proposed legislation for the administrative departments. If the department of health wants a bill, the governor will tell the attorney general to get out a good bill or the commissioner of health, or as the case may be. They'll fall back on the attorney general for some bill drafting

for the governmental departments, but the legislature from now on and under this setup, is not going to have the attorney general doing its bill drafting. It's going to have its own legal counsel. The present Attorney General, because of the press of business, gave up being legislative counsel for the legislature three years ago and told them they were too busy and were just looking after the executive department, and that they were to figure out how to get their own bills drafted. Two years ago that situation got so acute that the Legislative Council was created and it serves a very useful need, but I think that Mr. McLaughlin actually emphasized the wrong answer when he said that the attorney general would be the counsel for the legislature as well as for the executive arm, because under the present development with Legislative Council, he will be the attorney for the executive branch and the legislature can take care of itself. I might also say that I wrestled with this, I started out advocating that the attorney general be elected, but I wrestled with it, I told Mr. Barr that I felt the way he did four or five days ago. Because of my doubts though, I have talked to many people, they have said if you are going to let the governor's administration be held responsible for the conduct of that administration, you have got to at least give the governor an attorney of his own choice. Under this setup he might get an attorney of the opposite political faith. He might get one of his own party who is either inadequate or who is hostile to him, or who doesn't see eye-to-eye with him. In either case, the governor could say at the end of his term, if things haven't gone well, "We had a good program but that attorney general you foisted upon me wrecked our program." There again, you have got passing the buck as to who was to blame because things didn't go well. Now then, if we want to be sure that the strong executive who is going to have the responsibility of carrying out a successful administration is going to get the blame if he doesn't have a successful administration, let us not give him any outs. Let's not take him off the hook by giving him an attorney general that he can put the blame on.

PRESIDENT EGAN: Mr. Robertson.

ROBERTSON: Mr. President, I don't intend being an applicant for the position of attorney general either by appointment or election, but I don't quite see Delegate Marston's point that there are no attorneys in the Territory who are willing to run to be elected attorney general. I can't see how there would be any attorneys who would be willing to accept the appointment. I support Mr. Barr's position in this matter. I, too, am in favor of a strong executive, but I don't think that the mere fact that because under the appointive system of governorships that the governor virtually has no powers, that we should let that carry

us too far away. I think that it is a good thing for the people, to have their own elected attorney general who can check the legislation which the governor proposes to introduce and have introduced, and for that reason I am going to vote for this amendment.

BARR: Mr. President, may I close now?

PRESIDENT EGAN: You may, Mr. Barr.

BARR: I was also going to answer Colonel Marston much as Mr. Robertson did. If lawyers aren't available, they aren't available period. Mr. Rivers was talking about an entirely different thing. He mentioned our present Legislative Council. There is not a lawyer in charge. They do draft bills for the legislature. They have taken over a duty which the attorney general formerly did, that is as it should be. There is a lot of detailed work there, but it isn't legal work. If the legislature wants to ask a legal opinion, they will not go to our political science experts, they will go to the attorney general. Now he also stated that if an attorney general of the opposite political party were elected, the governor could pass the buck and say, "Well, you people see what you saddled me with here. I couldn't do anything. He wouldn't let me." Well, if there was an attorney general of the opposite political party there, he would make the governor toe the line pretty well as far as the law was concerned. All the governor could say to the people is, "You see that attorney general, he made me conform with the law." That's all this is designed to do. It isn't supposed to restrict his actions otherwise, just to conform with the law. Now, as Mr. McLaughlin said, because he was the legal counsel for the governor period, that this would not accomplish any particular purpose. It will accomplish several purposes. It is up to you people to decide how important they are. It might provide a little brake on the governor if he wants to go too far. If he wants to over-step the law just a little bit, but the principal purpose it has, the principal objective it will achieve is that it will allow the people to have more hand in the government and that is what we want.

PRESIDENT EGAN: Mr. Hellenthal.

HELLENTHAL: I request a roll call on this vote and will raise my hand to indicate that request. Under these rules, 10 people have to --

PRESIDENT EGAN: No, that rule failed of passage.

HELLENTHAL: Oh, I see.

PRESIDENT EGAN: The question is, "Shall the proposed amendment as offered by Mr. Barr be adopted by the Convention?" The Chief Clerk will call the roll.

(The Chief Clerk called the roll with the following result:

Yeas: 12 - Barr, Collins, H. Fischer, Laws, McNealy, Metcalf, Nolan, Robertson, Smith, Sweeney, Taylor, Walsh.

Nays: 40 - Armstrong, Awes, Boswell, Buckalew, Cooper, Cross, Davis, Doogan, Emberg, V. Fischer, Gray, Harris, Hellenthal, Hermann, Hilscher, Hinckel, Hurley, Johnson, Kilcher, King, Knight, Lee, Londborg, McCutcheon, McLaughlin, McNees, Marston, Nerland, Nordale, Peratrovich, Poulsen, Reader, Riley, R. Rivers, V. Rivers, Rosswog, Stewart, Sundborg, White, Mr. President.

Absent: 3 - Coghill, VanderLeest, Wien.)

CHIEF CLERK: 12 yeas, 40 nays, and 3 absent.

PRESIDENT EGAN: So the "nays" have it and the proposed amendment has failed of adoption. Mr. Barr.

BARR: Mr. President, I had another amendment which I had intended introducing providing for the election of a commissioner of labor. I would just like to state that the reason for that was that without destroying the powers of a strong executive, I thought the people would like to have a number of officials elected someplace between the number of two and four, but I can see that this body does not believe that that should be done.

McCUTCHEON: Point of order, Mr. President.

PRESIDENT EGAN: Your point of order, Mr. McCutcheon.

McCUTCHEON: Isn't Mr. Barr speaking to a matter of personal privilege?

PRESIDENT EGAN: Do you ask to speak on a matter of personal privilege, Mr. Barr?

BARR: Yes, I will, if the tape is left on.

HURLEY: I'll move that Mr. Barr be allowed to speak on a matter of personal privilege.

Fischer, Vic AK Constitutional Convention
University of AK Press, 1975

CONSTITUTIONAL CONVENTION

... floor debate; key issues
... and, if so, to what
... should seek to insure
... spokesmen empha-
... proposed would not be
... ly makes speeches and
... a secretary of state as an
... etual student of govern-
... the legislature as well as

... d members of the com-
... state official was tied on
... ke of strength and effi-
... i that their scheme would
... g simply a backup to the
... prospective job-holder as
... cond horse in the same
... was repeatedly described
... n" resulting from ticket
... d man with a strong
... d that:

... ve a strong executive, I believe
... with a crown prince who sub-
... v that runs or supports the
... d is someone who is picked,
... tical considerations. He inevi-
... tate, or appeal to that class of
... s not appeal to. It's a history
... ould be the history here. We
... ary of state; he would make a
... ion of his selection would be

... e plan was based on the
... e: governor, secretary of
... of the house. Many dele-
... to the governor's chair
... ently of the chief execu-

... the secretary of state
... o thirty-three vote.⁶⁶ A

STRUCTURE OF GOVERNMENT

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subsequent proposal by Seaborn Buckalew of Anchorage to strike the secretary of state position was narrowly approved on a twenty-six to twenty-five vote.⁶⁷ While this action eliminated the secretary of state problem, most delegates were not comfortable with the elimination of an elected successor to the governor.

The delegates reconsidered the problems on the following day, and after much additional debate finally agreed to include in the article a secretary of state who would be chosen separately in the primary election by the voters of each party and then paired with the party's candidate for governor in the general election. Matching the top vote-getter for governor and secretary within each party would ensure that the selected secretary was popularly chosen and of the same political party as the governor.⁶⁸

As approved under the constitution, the secretary of state succeeds to the governorship in case of a vacancy and serves as acting governor when the governor is temporarily absent from office. Further provision for succession in the event that the secretary of state is unable to succeed to the office or to act as governor was to be made by law. The convention preferred this formula to the initial committee proposal that when the secretary of state is unable to act, the president of the senate and the speaker of the house of representatives shall, in succession, act as governor until the disability is removed.

Attorney General

There was also considerable debate about whether the attorney general should be elected. A problem in this debate was the lack of agreement among delegates about the functions of an attorney general. Some viewed his role as strictly that of legal adviser to the governor and other officers in the executive branch. Others believed he performed similar functions with respect to the legislature. Yet others felt that because the attorney general prosecutes cases on behalf of the state, he should be independent of those, including the governor. Responsible for administering the state's police functions. And some argued that one purpose of the attorney general was to keep the executive honest.

As alternative to a gubernatorially appointed attorney general as proposed by the committee, it was proposed to nominate attorney general candidates in a method similar to that provided in the judicial article for judges. Others suggested the attorney general be elected.

⁶⁷Ibid., p. 2093

⁶⁸Ibid., p. 2009-10, 2127-45.

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However, by votes of twelve to forty and eighteen to thirty-six, delegates rejected the proposals for treating the attorney general differently from other heads of principal departments.⁶⁹ The argument against electing the attorney general, founded primarily on the belief in a strong chief executive, was summed up by George McLaughlin, himself a lawyer:

If we yield in one respect, we might as well elect our commissioner of welfare, our commissioner of education, and having provided those, I feel that we should go right down the list and completely dissipate the theory upon which the voting has taken place . . . I am violently opposed to the election of the attorney general . . . I don't think the election of him accomplishes any purpose. The blunt fact is that there is a general misconception as to the function of the attorney general. The attorney general is a lawyer and his opinion is the equivalent of any other lawyer's . . . Any recommendation he makes, if acted upon, can always be attacked in the courts by private citizens. His opinion is . . . impressive upon the state and the officials are bound by it until some irate taxpayer attacks it and the actions taken under the authority of it and the courts can promptly overrule it . . . His functions are not quasi-judicial. He is another attorney giving an opinion . . . I think if we are going to have an attorney general, the power should be vested in the governor to appoint him without any screening by a judicial council or anything of the sort . . . (The) attorney general does, in a sense, bear the same relationship to the governor as any attorney bears to his private client . . . It is an attorney-client relationship and the relationship has to be based on personal selection.⁷⁰

Executive Departments

The Committee on the Executive proposed that all executive and administrative functions be allocated among a maximum of twenty departments, all under supervision of the governor. There was little disagreement with this recommendation. The problems arose on the question of how each department was to be headed: by a single department head or by a governing board or commission that could in turn designate a departmental executive.

The committee's guiding principle was that single department heads would, in chairman Victor Rivers' words, ". . . help effectuate and make more efficient the strong executive type of government in the executive branch."⁷¹ Delegates saw the state constitution as a means of eliminating and avoiding the proliferation of boards and commissions that had characterized territorial government. While they deemed it necessary then to provide Alaskans at least some

⁶⁹*Ibid.*, pp. 2193-2200, 2215, 2226.

⁷⁰*Ibid.*, p. 2196.

⁷¹*Ibid.*, p. 2034.

bill, with a statement of his objections.
of origin.

16. Upon receipt of a veto message
regular session of the legislature, the
hall meet immediately in joint session
after passage of the vetoed bill or item.
revenue and appropriation bills or
which are vetoed, become law by affirmative
three-fourths of the membership of the
house. Other vetoed bills become law by
a vote of two-thirds of the membership
of the legislature. Bills vetoed after adjournment of
a regular session of the legislature shall be
reconsidered by the legislature sitting as one body
on the fifth day of the next regular ses-
sion of that legislature. Bills vetoed
at the adjournment of the second regular session
shall be reconsidered by the legislature sitting
on the fifth day of a special session of
that legislature, if one is called. The vote
on reconsideration of a vetoed bill shall be entered
in the journals of both houses.

Amendment of this section was approved by the voters of
Alaska on November 2, 1976 and became effective December 23,
1976. Amendment inserted "during a regular session of the
legislature" in the first sentence and added the present fourth and

17. A bill becomes law if, while the
legislature is in session, the governor neither signs
nor vetoes it within fifteen days, Sundays excepted,
after delivery to him. If the legislature is not
in session and the governor neither signs nor vetoes
the bill within twenty days, Sundays excepted, after
delivery to him, the bill becomes law.

18. Laws passed by the legislature be-
come effective ninety days after enactment. The
governor may, by concurrence of two-thirds of
the membership of each house, provide for another

Local or Special Acts

Impeachment

Suits Against the State

Executive Power

Governor: Qualifications

SECTION 19. The legislature shall pass no local
or special act if a general act can be made applica-
ble. Whether a general act can be made applicable
shall be subject to judicial determination. Local
acts necessitating appropriations by a political sub-
division may not become effective unless approved
by a majority of the qualified voters voting thereon
in the subdivision affected.

SECTION 20. All civil officers of the State are
subject to impeachment by the legislature. Im-
peachment shall originate in the senate and must
be approved by a two-thirds vote of its members.
The motion for impeachment shall list fully the
basis for the proceeding. Trial on impeachment
shall be conducted by the house of representatives.
A supreme court justice designated by the court
shall preside at the trial. Concurrence of two-thirds
of the members of the house is required for a judg-
ment of impeachment. The judgment may not ex-
tend beyond removal from office, but shall not
prevent proceedings in the courts on the same or
related charges.

SECTION 21. The legislature shall establish pro-
cedures for suits against the State.

ARTICLE III

THE EXECUTIVE

SECTION 1. The executive power of the State is
vested in the governor.

SECTION 2. The governor shall be at least thirty
years of age and a qualified voter of the State. He
shall have been a resident of Alaska at least seven
years immediately preceding his filing for office,
and he shall have been a citizen of the United
States for at least seven years.

in joint session, these orders become effective at a date thereafter to be designated by the governor.

Supervision

SECTION 24. Each principal department shall be under the supervision of the governor.

Department
Heads

SECTION 25. The head of each principal department shall be a single executive unless otherwise provided by law. He shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and shall serve at the pleasure of the governor, except as otherwise provided in this article with respect to the Secretary of State. The heads of all principal departments shall be citizens of the United States.

(The Sixth Legislature's Senate Joint Resolution No. 2 "changing the name of the secretary of state to lieutenant governor" in sixteen sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.)

Boards and
Commissions

SECTION 26. When a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency, its members shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session, and may be removed as provided by law. They shall be citizens of the United States. The board or commission may appoint a principal executive officer when authorized by law, but the appointment shall be subject to the approval of the governor.

Recess
Appointments

SECTION 27. The governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature. The duration of such appointments shall be prescribed by law.

ARTICLE IV

THE JUDICIARY

Judicial
Power and
Jurisdiction

SECTION 1. The judicial power of the State is vested in a supreme court, a superior court and the courts established by the legislature. The jurisdic-

tion of courts shall be established by law. The courts shall constitute the judicial system. The operation and administration of the courts shall be established by law.

Supreme
Court

SECTION 2. (a) The highest court of the State shall be the Supreme Court. It shall consist of three justices, one of whom is chief justice. The number of justices may be increased by law up to a maximum of five. The Supreme Court shall be a court of final appeal.

(b) The chief justice shall be elected by a majority vote of the justices of the Supreme Court. The chief justice shall hold office for more than one term as long as he or she shall serve consecutive terms.

(The amendment to this section by the state August 25, 1970 and Subsection (b) was added.)

Superior
Court

SECTION 3. The superior court of general jurisdiction shall consist of five judges. The number of judges shall be prescribed by law.

Qualifications
of Justices
and Judges

SECTION 4. Supreme court judges shall be citizens of the State, licensed to practice law in the State, and possessing a minimum of ten years' experience as prescribed by law. Judges shall be selected in a manner, and shall hold office for terms prescribed by law.

Nomination
and
Appointment

SECTION 5. The governor shall appoint or nominate in an office of supreme court judge by appointment or nomination persons nominated by the legislature.

Approval or
Rejection

SECTION 6. Each superior court judge shall be elected by law, be subject to a nonpartisan ballot at the

Table 18
STATE ADMINISTRATIVE OFFICIALS: METHODS OF SELECTION

| State | Governor | LI. governor | Secretary of state | Attorney general | Treasurer | Adjutant general | Administration | Agriculture | Banking | Budget | Civil rights | Commerce | Community affairs | Comptroller | Consumer affairs | Corrections | Data processing |
|----------------|----------|--------------|--------------------|------------------|-----------|------------------|----------------|-------------|---------|--------|--------------|----------|-------------------|-------------|------------------|-------------|-----------------|
| Alabama | CE | CE | CE | CE | CE | GB | A | CE | G | CS | ... | G | GB | GB | AG | G | CS |
| Alaska | CE | CE | (a-1) | GB | GB | GB | A | A | A | A | G | G | GB | GB | AT | GB | A |
| Arizona | CE | CE | CE | CE | CE | G | GS | B | GS | G | A | (b) | (c) | (a-19) | (a-3) | GS | AG |
| Arkansas | CE | CE | CE | CE | CE | G | G | AG | AG | AG | (e) | (a-6) | AT | AT | GS | GS | ... |
| California | CE | CE | CE | CE | CE | GS | ... | GS | GS | (a-19) | G | GS | GS | CE | GS | GS | G |
| Colorado | CE | CE | CE | CE | CE | G | GS | GS | A | GS | A | A | A | A | AT | GS | A |
| Connecticut | CE | CE | CE | CE | CE | G | GE | GE | A | A | GE | A | CE | GE | GE | A | ... |
| Delaware | CE | CE | GS | CE | CE | GS | GS | GS | GS | GS | ... | AG | L | AG | GS | ... | ... |
| Florida | CE | CE | CE | CE | CE | GS | GS | GS | (a-12) | A | A | (a-1) | AG | CE | A | GS | (a-9) |
| Georgia | CE | CE | CE | CE | A | G | GS | CE | GS | G | ... | B | G | CE | G | GD | A |
| Hawaii | CE | CE | (a-1) | GS | (a-9) | GS | ... | GS | AG | GS | ... | GS | (a-10) | GS | G | A | A |
| Idaho | CE | CE | CE | CE | CE | G | GS | GS | GS | G | BGS | G | (a-10) | (h) | (a-3) | BGS | (a-6) |
| Illinois | CE | CE | CE | CE | CE | G | GS | GS | G | GS | GS | (a-10) | CE | (a-3) | GS | G | A |
| Indiana | CE | CE | CE | SE | CE | G | G | (a-1) | G | G | G | (a-1) | A | (h) | AT | G | A |
| Iowa | CE | CE | CE | CE | CE | GS | A | SE | GS | (a-12) | GS | GS | A | GS | AT | GS | CS |
| Kansas | CE | CE | CE | CE | SE | GS | GS | B | GS | CS | B | GS | A | A | AT | GS | A |
| Kentucky | CE | CE | CE | CE | CE | G | CE | G | CE | G | B | G | G | G | AG | AG | (a-6) |
| Louisiana | CE | CE | CE | CE | CE | GS | G | CE | GS | GS | (a-3) | GS | GS | (a-6) | GS | GS | A |
| Maine | CE | ... | CL | CL | CL | G | ... | GLS | GLS | AG | B | GS | ... | AG | GLS | AG | CS |
| Maryland | CE | CE | GS | CE | CL | GS | GS | GS | AGS | GS | GS | A | AG | CE | AT | AGS | A |
| Massachusetts | CE | CE | CE | CE | CE | G | G | G | G | AG | AT | G | G | G | G | G | A |
| Michigan | CE | CE | CE | CE | CE | GS | GS | R | GS | (a-6) | H | GS | A | (a-4) | A | B | A |
| Minnesota | CE | CE | CE | CE | CE | G | GS | GS | BS | (a-19) | GS | GS | A | (a-19) | GS | GS | A |
| Mississippi | CE | CE | CE | CE | CE | GS | GS | SE | GS | B | ... | (a-10) | (a-31) | AT | B | B | ... |
| Missouri | CE | CE | CE | CE | CE | GS | GS | GS | AS | A | B | A | A | (a-6) | GS | GS | A |
| Montana | CE | CE | CE | CE | A | G | GS | GS | A | G | G | G | A | (a-6) | G | A | A |
| Nebraska | CE | CE | CE | CE | CE | G | G | GS | GS | GS | A | C | G | (a-6) | ... | GS | A |
| Nevada | CE | CE | CE | CE | CE | G | G | GG | A | (a-6) | G | G | G | CE | A | G | A |
| New Hampshire | CE | ... | CL | CL | CL | GC | GC | GC | GC | (a-12) | B | GOC | GOC | GOC | AT | GOC | B |
| New Jersey | CE | ... | GS | GS | GS | ... | BG | GS | (a-12) | A | GS | GS | GS | GS | GS | GS | A |
| New Mexico | CE | CE | CE | CE | CE | GS | (a-21) | RG | GS | G | G | GS | ... | (a-4) | A | A | (a-21) |
| New York | CE | CE | GS | CE | CE | G | G | G | G | G | GS | (a-2) | CE | GS | GS | GS | (a-21) |
| North Carolina | CE | CE | CE | CE | CE | G | G | CE | GS | AG | A | G | A | ... | AT | G | AG |
| North Dakota | CE | CE | CE | CE | CE | G | A | CE | GS | (a-26) | G | A | (f) | AT | G | A | ... |
| Ohio | CE | CE | CE | CE | CE | G | GS | GS | A | GS | (f) | A | (a-4) | B | GS | A | ... |
| Oklahoma | CE | CE | GS | CE | CE | GS | ... | GS | GS | G | B | G | G | AG | B | B | A |
| Oregon | CE | CE | SE | CE | CE | G | GS | GS | AG | A | CS | GS | A | A | A | AG | AG |
| Pennsylvania | CE | CE | GS | CE | CE | GS | G | GS | GS | G | GS | GS | GS | AG | A | AG | AG |
| Rhode Island | CE | CE | CE | CE | CE | G | GS | A | G | CS | B | GS | GS | A | BS | GS | A |
| South Carolina | CE | CE | CE | CE | CE | (a-9) | SE | (a-4) | B | B | G | A | CE | B | B | G | ... |
| South Dakota | CE | CE | CE | CE | CE | GS | G | GS | A | (a-19) | (a-3) | GS | GS | CE | AT | AG | (a-6) |
| Tennessee | CE | (y) | CL | SC | CL | G | G | G | G | A | B | G | (a-10) | CL | A | G | A |
| Texas | CE | CE | GS | CE | CE | OS | SE | BS | A | B | B | G | GS | CE | AT | B | AG |
| Utah | CE | CE | (a-1) | CE | CE | G | GS | GS | GS | G | B | GS | (a-10) | (a-19) | AG | HA | AG |
| Vermont | CE | CE | CE | SE | CE | SL | GS | GS | GS | GS | AT | A | GS | AGS | AT | GS | CS |
| Virginia | CE | CE | GB | CE | GB | GB | GB | GB | B | GB | ... | (a-24) | A | GB | (a-7) | GB | GB |
| Washington | CE | CE | CE | CE | CE | GS | GS | GS | (a-2) | GS | B | GS | (a-10) | (a-4) | AT | GS | B |
| West Virginia | CE | ... | CE | CE | GS | A | CE | GS | (bb) | GS | A | A | CE | AT | GS | A | ... |
| Wisconsin | CE | CE | CE | CE | CE | G | GS | B | GS | A | (d-1) | A | A | (a-3) | A | (a-19) | ... |
| Wyoming | CE | ... | CE | GS | CE | G | B | GS | A | G | ... | G | (a-10) | (a-31) | AT | HC | A |

Note: The chief administrative officials responsible for each function were determined from information given by the states for the same function as listed in *State Administrative Officials Classified by Function*, PU-84, published by The Council of State Governments.

... — No specific chief administrative official or agency in charge of function.

CL — Constitutional, elected by legislature
 SE — Statutory, elected
 SL — Statutory, elected by legislature
 L — Selected by legislature or one of its organs
 SC — Statutory, elected by state supreme court

Appointed by:
 G — Governor
 GS — Governor
 GB — Governor
 GL — Governor
 GC — Governor
 GD — Governor
 GGS — Governor

Approved by:
 Senate
 Both houses
 Either house
 Council
 Departmental board
 Appropriate legislative committee & senate

Appointed by:
 G — Governor
 GS — Governor
 GB — Governor
 GL — Governor
 GC — Governor
 GD — Governor
 GGS — Governor

Approved by:
 Senate
 Both houses
 Either house
 Council
 Departmental board
 Appropriate legislative committee & senate

Appointed by:
 G — Governor
 GS — Governor
 GB — Governor
 GL — Governor
 GC — Governor
 GD — Governor
 GGS — Governor

Approved by:
 Senate
 Both houses
 Either house
 Council
 Departmental board
 Appropriate legislative committee & senate

(a) Chief administrative official or agency in charge of function:
 (a-1) Lieutenant Governor
 (a-2) Secretary of State
 (a-3) Attorney General
 (a-4) Treasurer
 (a-5) Adjutant General
 (a-6) Administration
 (a-7) Agriculture
 (a-8) Banking
 (a-9) Budget
 (a-10) Commerce
 (a-11) Community Affairs
 (a-12) Comptroller
 (a-13) Consumer Affairs
 (a-14) Disaster Preparedness
 (a-15) Education (chief state school officer)
 (a-16) Employment Services
 (a-17) Energy Resources
 (a-18) Environmental Conservation
 (a-19) Finance
 (a-20) Fish and Game
 (a-21) General Services
 (a-22) Health
 (a-23) Highways
 (a-24) Industrial Development
 (a-25) Insurance
 (a-26) Labor and Industrial Relations
 (a-27) Natural Resources
 (a-28) Parks and Recreation
 (a-29) Personnel
 (a-30) Planning
 (a-31) Post Audit
 (a-32) Public Utility Regulation
 (a-33) Purchasing
 (a-34) Social Services
 (a-35) Taxation
 (a-36) Transportation

(b) Responsibilities shared by Director of the Development Division within the Office of Economic Planning and Development and chief administrative official listed under Industrial Development
 (c) Responsibilities shared by Director of the Planning Division within the Office of Economic Planning and Development and Director of the Development Division within the same office, listed under Commerce. The Director of the Planning Division is also responsible for the function Planning.
 (d) Numerous boards and commissions responsible for function.
 (e) Responsibilities shared by the chief administrative officials listed under the following functions: Industrial Development and Tourism.
 (f) Solid Waste Management Board is composed of nine voting members; seven appointed by the governor subject to Senate confirmation; one each appointed by the speaker of the Assembly and the Senate Committee on Rules.
 (g) Not a state employee.
 (h) See entry under Pre-Audit.
 (i) Function performed by eight-member board (GS). Four members are nominated by governor and four are nominated by highest ranking constitutional officer of the public health department of the state.
 (j) Executive director of the board is appointed by the board.
 (k) Due to reorganization, effective July 1, 1984, the responsibilities for this function will be shared by the chief administrative official of the Labor Relations Board, the chief administrative official of the Labor Board, and the Director of the Department of Labor.
 (l) Responsibilities shared by chief administrative officials under the following functions: Health and Social Resources.
 (m) Responsibilities shared by Chief Treasurer of the Bureau of Government Services within the same department.
 (n) Responsibilities shared by Chief Treasurer of the Bureau of Public Safety, and Chief of State Police Division within the same department.
 (o) Responsibilities shared by Chief of Economic Planning and Development within the same department.
 (p) No central planning agency. Responsibilities shared by Departments of Commerce, State and Transportation, the State Office, and the Tri-State Regional Planning Commission.
 (q) Responsibilities shared by Director of the Office of Management and Budget and Executive Director of the same office.
 (r) Director of Management and Budget is also responsible for the function Audit.
 (s) Responsibilities shared by chief administrative officials under Budget and by the Director of the Accounting Commission.
 (t) Responsibilities shared by chief administrative officials under (L) and the state auditor (CL).
 (u) Responsibilities shared by Chief of Department of Development and Director of Department of Commerce.
 (v) Responsibilities shared by Chief of the Department of Fish and Game and Executive Director of the same Commission.
 (w) Federal government employee.
 (x) Responsibilities shared by Chief of Economic Planning and Development within the Department of Public Welfare and the Children, Child and Youth Services within the same department.
 (y) Each profession has its own governing board.
 (z) Speaker of the Senate has the authority to appoint and reappoint and is elected by the Senate from among its members.
 (aa) Solid Waste Commission is composed of 15 members appointed by the speaker from among the general public, the Senate, and one appointed by the governor (two are chairman and one from the group).
 (ab) Responsibilities shared by Supervisor of Banking and Savings and Loan.
 (ac) Responsibilities shared by Commissioner of the Department of Finance and Administration, Director of Finance and the Bureau of Planning Director within the same department.
 (ad) Responsibilities shared by Commissioner of the Department of Employment Security and Director of the Employment Services within the same department.

EXECUTIVE BRANCH

Table 12
ATTORNEYS GENERAL: PROSECUTORIAL AND ADVISORY DUTIES

| State or other jurisdiction | Authority in local prosecutions | | | | Issues advisory opinions | | | | | | Reviews legislation |
|-----------------------------|--|-------------------------------------|-----------------------------|--------------------------------|------------------------------|----------------|----------------------|-----------------------------------|---|------------------|---------------------|
| | Authority to initiate local prosecutions | May intervene in local prosecutions | May assist local prosecutor | May supersede local prosecutor | To state executive officials | To legislators | To local prosecutors | On the interpretation of statutes | On the constitutionality of bills or ordinances | Prior to passage | Before signing |
| Alabama | A | A, D | A, D | A | * | * | * | * | * | * | * |
| Alaska | (a) | (a) | (a) | (a) | * | * | * | * | * | * | * |
| Arizona | A, B, C, D, F | B, D | D, D | B | * | * | * | * | * | * | * |
| Arkansas | D | D | D | D | * | * | * | * | * | * | * |
| California | A, E | A, D, E | A, B, D | A | * | * | * | * | * | * | * |
| Colorado | B, F | B | D, F (b) | B | * | * | * | * | * | * | * |
| Connecticut | | | | | * | * | * | * | * | * | * |
| Delaware | | | | | * | * | * | * | * | * | * |
| Florida | F | D | D | D | * | * | * | * | * | * | * |
| Georgia | A, B, F | A, B, D, G | A, B, D, F | B | * | * | * | * | * | * | * |
| Hawaii | E | A, D, G | A, D | A, G | * | * | * | * | * | * | * |
| Idaho | A, D, F | A | A, D | A | * | * | * | * | * | * | * |
| Illinois | A, D, E, F, G | A, D, E | A, D, E, F | F | * | * | * | * | * | (c) | (c) |
| Indiana | F (b) | D | A, D, E, F | G | * | * | * | * | * | * | * |
| Iowa | D, F | D | D | D | * | * | * | * | * | * | * |
| Kansas | B, C, D, F | D | D | A, F | * | * | * | * | * | * | * |
| Kentucky | A, B | B, D | B, D, F | G | * | * | * | * | * | * | * |
| Louisiana | G | G | D | G | * | * | * | * | * | * | * |
| Maine | A | A | A | A | * | * | * | * | * | * | * |
| Maryland | B, C, F | B, C, D | B, C, D | B, C | * | * | * | * | * | * | * |
| Massachusetts | A, B, C, D, E, F, G | A, B, C, D, E, G | A, B, C, D, E | A, B, C, E | * | * | * | * | * | * | * |
| Michigan | A | A | D | A | * | * | * | * | * | * | * |
| Minnesota | B | B, D, G | A, B, D | B | * | * | * | * | * | * | (c) |
| Mississippi | B, E, F | | H, I | | * | * | * | * | * | (c) | (c) |
| Missouri | F | | H | | * | * | * | * | * | * | * |
| Montana | C, F | A, B, C, D | A, B, C, D, F | A, C | * | (d) | * | * | * | * | * |
| Nebraska | A | A | A, D | A | * | * | * | * | * | * | * |
| Nevada | D, F, G (e) | D (e) | (e, f) | G, F | * | * | * | * | * | * | * |
| New Hampshire | A | A | A | A | * | * | * | * | * | * | * |
| New Jersey | A | A, B, D, G | A, D | A, B, D, G | * | * | * | * | * | * | * |
| New Mexico | A, B, E, F, G | B, D, G | D | B | * | * | * | * | * | * | * |
| New York | B, F | B | D | B | * | * | * | * | * | * | * |
| North Carolina | D | D | D | D | * | * | * | * | * | * | * |
| North Dakota | A, G | A, D | A, D | A | * | * | * | * | * | (c) | * |
| Ohio | B, C, F | B, J | F | B, C | * | (h) | * | * | * | * | * |
| Oklahoma | B, C | B, C | B, C | B, C | * | * | * | * | * | * | * |
| Oregon | B, F | B, D | B, D | B | * | * | * | * | * | (c) | (c) |
| Pennsylvania | A, D, G | D, G | D | G | * | * | * | * | * | * | * |
| Rhode Island | A | D | D | A | * | * | * | * | * | * | * |
| South Carolina | A | A, D | A, D | A | * | * | * | * | * | * | * |
| South Dakota | A (h) | A | A | A | * | * | * | * | * | * | * |
| Tennessee | D, F, G (b) | D, G (b) | D | F | * | * | * | * | * | (c) | (c) |
| Texas | F | D | D | D | * | * | * | * | * | * | * |
| Utah | A, B, D, E, F, G | E, G | D, F | E | * | * | * | * | * | (c) | (c) |
| Vermont | A | A | A | A | * | * | * | * | * | * | * |
| Virginia | B, F | A, B, D, F | B, D, F | B | * | * | * | * | * | * | * |
| Washington | B, D, G | B, D, G | D | B | * | * | * | * | * | (i) | (i) |
| West Virginia | D | D | D | D | * | * | * | * | * | (i) | (i) |
| Wisconsin | B, C, F | B, C, D | D | B, C (j) | * | * | * | * | * | * | * |
| Wyoming | B, D (e) | B, D | B, D | | * | * | * | * | * | * | * |
| American Samoa | A, E | A, E | A, E | A, E | * | * | * | * | * | * | * |
| N. Mariana Is. | A | A | A | A | * | * | * | * | * | * | * |
| Puerto Rico | A, B, E | A, B, E | A, E | A, B, E | * | * | * | * | * | * | * |
| Virgin Islands | A | | | | * | * | * | * | * | * | * |

Key:
A—On own initiative.
1)—On request of governor.
C—On request of legislature.
D)—On request of local prosecutor.
1—When in state's interest.
1—Under certain statutes for specific crimes.
c)—On authorization of court or other body.
*—Has authority in area.
*—Does not have authority in area.

(c) Only when requested by governor or legislature.
(d) To legislative leadership.
(e) In connection with grand jury cases.
(f) Will prosecute as a matter of practice when requested.
(g) To legislature as a whole not individual legislators.
(h) Has concurrent jurisdiction with states' attorneys.
(i) No legal authority, but sometimes informally reviews laws at request of legislature.
(j) If the governing phrase is the district attorney for cause.

EXECUTIVE BRANCH

Table 13
ATTORNEYS GENERAL: CONSUMER PROTECTION ACTIVITIES AND SUBPOENA AND ANTITRUST POWERS

| State or other jurisdiction | May commence civil proceedings | May commence criminal proceedings | Represents the state before regulatory agencies | Administers consumer protection programs | Handles consumer complaints | Subpoena powers (a) | Antitrust duties |
|-----------------------------|--------------------------------|-----------------------------------|---|--|-----------------------------|---------------------|--------------------|
| Alabama | * | * | * | * | * | * | A, B, C, D |
| Alaska | * | * | * | * | * | * | A, B, D |
| Arizona | * | * | * | * | * | * | B, C, D |
| Arkansas | * | * | * | * | * | * | B, C, D |
| California | * | * | * | * | * | * | B, C, D |
| Colorado | * | * | * | * | * | * | B, C, D (b) |
| Connecticut | * | * | * | * | * | * | A, B, D |
| Delaware | * | * | * | * | * | * | A, B, C |
| Florida | * | * | * | * | * | * | A, B, C, D |
| Georgia | * | * | * | * | * | * | B, C, D |
| Hawaii | * | * | * | * | * | * | A, B, C, D |
| Idaho | * | * | * | * | * | * | D |
| Illinois | * | * | * | * | * | * | A, B, D |
| Indiana | * | * | * | * | * | * | B, C, D |
| Iowa | * | * | * | * | * | * | A, B, C, D |
| Kansas | * | * | * | * | * | * | B, C, D |
| Kentucky | * | * | * | * | * | * | A, B, D |
| Louisiana | * | * | * | * | * | (c) | B, C |
| Maine | * | * | * | * | * | * | B, C |
| Maryland | * | * | * | * | * | * | B, C, D |
| Massachusetts | * | * | * | * | * | * | A, B, C, D |
| Michigan | * | * | * | * | * | * | A, B, C, D |
| Minnesota | * | * | * | * | * | * | B, D |
| Mississippi | * | * | * | * | * | * | B, C |
| Missouri | * | * | * | * | * | * | A, B, C, D |
| Montana | * | * | * | * | * | * | B, C, D |
| Nebraska | * | * | * | * | * | * | A, B, C (d), D |
| Nevada | * | * | * | * | * | * | A, B, C, D |
| New Hampshire | * | * | * | * | * | * | B, C, D |
| New Jersey | * | * | * | * | * | * | A, B, C, D |
| New Mexico | * | * | * | * | * | * | A, C |
| New York | * | * | * | * | * | * | A, B, C, D |
| North Carolina | * | * | * | * | * | * | A, B, C, D |
| North Dakota | * | * | * | * | * | * | C, D |
| Ohio | * | * | * | * | * | * | B, C, D |
| Oklahoma | * | * | (c) | * | * | * | B, D |
| Oregon | * | * | (c) | * | * | * | A, B, C, D |
| Pennsylvania | * | * | * | * | * | * | D |
| Rhode Island | * | * | * | * | * | * | A, B, C, D |
| South Carolina | * | * | * | * | * | * | A, B, C, D |
| South Dakota | * | * | * | * | * | * | A, B, C, D |
| Tennessee | * | * | (c) | * | * | * | A, B, C, D |
| Texas | * | * | * | * | * | * | A, B, C, D |
| Utah | * | * | * | * | * | * | B, D |
| Vermont | (d) | * | (d, f) | * | (f) | * | A (g), B, C, D (g) |
| Virginia | * | (e) | * | (f) | (f) | * | A, B, C, D |
| Washington | * | * | * | * | * | * | A, B, D |
| West Virginia | * | * | * | * | * | * | A, B, D |
| Wisconsin | * | * | * | * | * | * | A, B, C, D |
| Wyoming | * | * | * | * | * | * | A, B, C, D |
| American Samoa | * | * | * | * | * | * | |
| Northern Mariana Is. | * | * | * | * | * | * | |
| Puerto Rico | * | * | * | (e) | (e) | * | B, C, D |
| Virgin Islands | * | (h) | * | * | * | * | A, B, C, D |

Key:
A—Has *parens patriae* authority to commence suits on behalf of consumers in state antitrust damage actions in state courts.
B—May initiate damage actions on behalf of state in state courts.
C—May commence criminal proceedings.
D—May represent cities, counties and other governmental entities in receiving civil damages under federal or state law.
*—Has authority in area.
(a) In this column only: * broad powers and * limited powers.
(b) Only under Rule 23 of the Rules of Civil Procedure.
(c) When permitted to intervene.
(d) Attorney general has exclusive authority.
(e) To a limited extent.
(f) Attorney general handles legal matters only with no administrative handling of complaints.
(g) Opinion only, since there are no controlling precedents.
(h) May prosecute in inferior courts. May prosecute in district court only by request or consent of U.S. Attorney General.
(i) May initiate damage actions on behalf of jurisdiction in district court.

Table 14
ATTORNEYS GENERAL: DUTIES TO ADMINISTRATIVE AGENCIES
AND MISCELLANEOUS DUTIES

| State or other jurisdiction | Serves as counsel for state | Appears for state in criminal appeals | Duties in administrative agencies | | | | | | | | |
|-----------------------------|-----------------------------|---------------------------------------|-----------------------------------|------------------------------------|---------------------|-----------------|-------------------------------------|---|-------------------------|----------------------------|---|
| | | | As an official | Interprets statutes or regulations | In behalf of agency | Requests agency | Prepares or reviews legal documents | Represents the public before the agency | Involved in rule-making | Reviews rules for legality | |
| Alabama | A, B, C | (a) | * | * | * | * | * | * | * | (h) | * |
| Alaska | A, B, C | (c, d) | * | * | * | * | * | * | * | * | * |
| Arizona | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Arkansas | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| California | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Colorado | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Connecticut | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Delaware | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Florida | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Georgia | A, B, C | (b, c) | * | * | * | * | * | * | * | * | * |
| Hawaii | A, B | (f, c) | * | * | * | * | * | * | * | * | * |
| Idaho | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Illinois | A, B, C | (b, c, e) | * | * | * | * | * | * | * | * | * |
| Indiana | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Iowa | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Kansas | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Kentucky | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Louisiana | A, B, C | (c) | * | * | * | * | * | * | * | * | * |
| Maine | A, B, C | (b, d) | * | * | * | * | * | * | * | * | * |
| Maryland | A, B, C | (a) | * | * | (b) | * | * | * | * | * | * |
| Massachusetts | A, B, C | (b, c, d) | * | * | * | * | * | * | * | * | * |
| Michigan | A, B, C | (b, c, d) | * | * | * | * | * | * | * | * | * |
| Minnesota | A, B, C | (c) | * | * | * | * | * | * | * | * | * |
| Mississippi | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Missouri | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Montana | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Nebaska | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Nevada | A, B, C | (d) | * | * | * | * | * | * | * | * | * |
| New Hampshire | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| New Jersey | A, B, C | (d) | * | * | * | * | * | * | * | * | * |
| New Mexico | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| New York | A, B, C | (b) | * | * | * | * | * | * | * | * | * |
| North Carolina | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| North Dakota | A, B, C | (b) | * | * | * | * | * | * | * | * | * |
| Ohio | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Oklahoma | A, B, C | (b) | * | * | * | * | * | * | * | * | * |
| Oregon | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Pennsylvania | A, B, C | (c) | * | * | * | * | * | * | * | * | * |
| Rhode Island | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| South Carolina | A, B, C | (d) | * | * | * | * | * | * | * | * | * |
| South Dakota | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Tennessee | A, B, C | (a) | * | * | * | * | * | * | * | (b) | * |
| Texas | A, B, C | (c) | * | * | * | * | * | * | * | * | * |
| Utah | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Vermont | A, B, C | (b) | * | * | * | * | * | * | * | (b) | * |
| Virginia | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Washington | A, B, C | (c, f) | * | * | * | * | * | * | * | * | * |
| West Virginia | A, B, C | (f) | * | * | * | * | * | * | * | * | * |
| Wisconsin | A, B, C | (b) | * | * | * | * | * | * | * | (b) | * |
| Wyoming | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| American Samoa | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Northern Mariana Is. | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Puerto Rico | A, B, C | (a) | * | * | * | * | * | * | * | * | * |
| Virgin Islands | A, B, C(g) | (a) | * | * | * | * | * | * | * | * | * |

Key: A—Defend state law when challenged on federal constitutional grounds.
B—Conduct litigation on behalf of state in federal and other states' courts.
C—Prosecute actions against another state in U.S. Supreme Court.

(a) Attorney general has exclusive jurisdiction.
(b) In certain cases only.
(c) When assisting local prosecutor in the appeal.
(d) Can appear on own discretion.
(e) In certain courts only.
(f) If authorized by the governor.
(g) In federal courts.

Table 15
STATE CABINET SYSTEMS

| State | Authorization for cabinet system | | | | Criteria for membership | | | Number of members in cabinet (including governor) | Frequency of cabinet meetings | Open cabinet meetings |
|----------------|----------------------------------|--------------|----------|-----------|-------------------------------|-----------------------------|--|---|-------------------------------|-----------------------|
| | Statute | Constitution | Governor | Tradition | Appointed to specified office | Elected to specified office | Gubernatorial appointment regardless of office | | | |
| Alabama | * | * | * | * | * | * | * | 24 | Gov.'s discretion | (a) |
| Alaska | * | * | * | * | * | * | * | 17 | Regularly | (a) |
| Arizona | * | * | * | * | * | * | * | 15 | Every two weeks | * |
| Arkansas | * | * | * | * | * | * | * | 17 | Monthly | * |
| California | * | * | * | * | * | * | * | 11 | Every two weeks | * |
| Colorado | * | * | * | * | * | * | * | 20 | Monthly | * |
| Connecticut | * | * | * | * | * | * | * | 15 | Gov.'s discretion | (a) |
| Delaware | * | * | * | * | * | * | (b) | 16 | Gov.'s discretion | * |
| Florida | * | * | * | * | * | * | * | 7 | Every two weeks | * |
| Georgia | * | * | * | * | * | * | (c) | * | * | * |
| Hawaii | * | * | * | * | * | * | * | 18 | Gov.'s discretion | * |
| Idaho | * | * | * | * | * | * | (c) | * | * | * |
| Illinois | * | * | * | * | (b) | * | (c) | 21 | Gov.'s discretion(d) | * |
| Indiana | * | * | * | * | * | * | (c) | * | * | * |
| Iowa | * | * | * | * | * | * | * | 5 | Weekly | * |
| Kansas | * | * | * | * | * | * | * | 14 | Monthly | * |
| Kentucky | * | * | * | * | * | * | * | 18 | Weekly | * |
| Louisiana | * | * | * | * | * | * | (c) | * | * | * |
| Maine | * | * | * | * | (b) | * | (b) | 22 | Monthly | (c) |
| Maryland | * | * | * | * | (b) | * | * | 23 | Gov.'s discretion | * |
| Massachusetts | * | * | * | * | * | * | * | 13 | Twice monthly | * |
| Michigan | * | * | * | * | * | * | * | 25 | Monthly | (f) |
| Minnesota | * | * | * | * | * | * | * | 24(g) | Every two weeks | * |
| Mississippi | * | * | * | * | * | * | (c) | * | * | * |
| Missouri | * | * | * | * | * | * | (c) | * | * | * |
| Montana | * | * | * | * | * | * | * | 15 | 4-6 times a year | * |
| Nebaska | * | * | * | * | * | * | * | 27 | Weekly | * |
| Nevada | * | * | * | * | * | * | (c) | * | * | * |
| New Hampshire | * | * | * | * | * | * | (c) | * | * | * |
| New Jersey | * | * | * | * | * | * | * | 21 | Once or twice monthly | (b) |
| New Mexico | * | * | * | * | * | * | * | 12 | Monthly | * |
| New York | * | * | * | * | * | * | * | 22 | Gov.'s discretion | * |
| North Carolina | * | * | * | * | * | * | * | 11 | Weekly | * |
| North Dakota | * | * | * | * | * | * | (c) | * | * | * |
| Ohio | * | * | * | * | * | * | * | 27 | Every two weeks | (c) |
| Oklahoma | * | * | * | * | * | * | * | 8(j) | Gov.'s discretion | * |
| Oregon | * | * | * | * | * | * | * | 11 | Weekly | * |
| Pennsylvania | * | * | * | * | * | * | * | 19 | Gov.'s discretion | * |
| Rhode Island | * | * | * | * | * | * | (c) | * | * | * |
| South Carolina | * | * | * | * | * | * | (c) | * | * | * |
| South Dakota | * | * | * | * | * | * | * | 23 | Gov.'s discretion | * |
| Tennessee | * | * | * | * | * | * | (c) | 21 | Gov.'s discretion(k) | (f) |
| Texas | * | * | * | * | * | * | (c) | * | * | * |
| Utah | * | * | * | (l) | (l) | * | * | (l) | (l) | * |
| Vermont | * | * | * | * | * | * | * | 19 | Gov.'s discretion | * |
| Virginia | * | * | * | * | * | * | * | 8 | Gov.'s discretion(k) | * |
| Washington | * | * | * | * | * | * | * | 26 | Every 6-8 weeks | (f) |
| West Virginia | * | * | * | * | * | * | (c) | * | * | * |
| Wisconsin | * | * | * | * | * | * | (c) | * | * | * |
| Wyoming | * | * | * | * | * | * | (c) | * | * | * |

Key:
*—Yes
—No
(a) Except when in executive session.
(b) With the consent of Senate.
(c) No formal cabinet system. In Idaho, however, sub cabinets have been formed, by executive order; the chairmen report to the governor when requested.
(d) Sub cabinets meet monthly.
(e) In practice, the media and others do not attend, but cabinet meetings have not been formally designated closed.
(f) In Michigan and Tennessee closed, with some exceptions. In Washington, open with some exceptions.

(g) Five sub-cabinets have been formed.
(h) Closed to press, open to staff.
(i) Constitution provides for a Council of State made up of elective state administrative officials, which makes policy decisions for the state while the cabinet acts more in an advisory capacity.
(j) Each cabinet member is chair of a sub cabinet (each state agency). These sub-cabinets meet quarterly.
(k) State often during legislative sessions. Tennessee—weekly.
(l) State Planning Advisory Committee, comprised of all department heads serves as an informal cabinet. Committee meets at discretion of state planning coordinator.

OUTLINE OF REMARKS

Attorney General Clarence A. H. Meyer

ATTORNEY GENERAL SHOULD BE ELECTED - NOT APPOINTED

I. "ATTORNEY GENERAL OF U. S. IS APPOINTED." (Little Hoover: "As in the federal government, the chief executive of the state should have the right to choose his cabinet officers.")

- A. Vast difference. U.S. A. G. has broad administrative and policy-making functions in connection with the many bureaus placed in the Dept. of Justice -- Immigration & Nat; Nar-cotics Bureau; Bureau of Prisons; Parole; FBI -- Whereas we are law office -- not policy making.
- B. U.S.A.G. is carry over from English government. There first known as Attornati Regis, the king's counsel. Function was to protect the king's privileges, lands and estates and to quell civil disturbances among the people in order to keep the king on the throne.
- C. SIR THOMAS MORE ("A Man for All Seasons") beheaded by Henry VIII because he would not write an opinion the way the king wanted it.
- D. At common law, the function of the Attorney General was to safeguard the powers of the monarch - here this is not the case.

II. "GOVERNOR SHALL TAKE CARE THAT THE AFFAIRS OF THE STATE ARE EFFICIENTLY AND ECONOMICALLY ADMINISTERED."

- A. If Governor feels he needs lawyers of his own choosing to help run the state, he has authority under existing law to hire all the lawyers he wants to.
- B. He can authorize any state officer or department to employ its own counsel in any litigation.
- C. Present and previous Governors have appointed men with legal training on their staff - those men can and do advise the Governor and the Departments under him. (Yeutter & Barnett)
- D. But, would the Legislators want to go to the Governor's appointees for legal advice and opinions in all situations? Keep in mind that the Attorney General is also the advisor to the Legislature. (As well as being an officer of the Supreme Court.)

- E. A very substantial part of the work of the Attorney General is in areas in which the Governor has little or no interest, official or otherwise. A great deal of our work is with the counties -- we must advise the county attorneys. Nor does he have a day-to-day interest in the criminal cases we handle in the Supreme Court. (We had 290 cases in the Supreme Court in last 2 years). (No need for Governor to control or supervise us in this work.)

III. "WILL PROMOTE GREATER 'HARMONY' AS WELL AS EFFICIENCY."

- A. Have served under both Republican and Democratic Governors over the years and there never has been any lack of harmony. We don't give Democratic advice or Republican advice - we give legal advice.
- B. Must keep in mind that not just the giving of legal advice to the Governor is involved. We give legal advice to the many departments which are under his complete control -- and these are the departments which people contact every day - motor vehicles, agriculture, etc. Atty. Gen. Lefkowitz of New York: "All of the various departments and agencies of government turn to the Atty. Gen. for legal advice and for the rendering of official opinions. Such opinions are acted upon daily and a great deal of the operation of the state government depends upon the nature of the advice that is so rendered. These opinions are rendered to all departments of the State government, those under the direction and supervision of the Governor and those under the direction of other elected officials. It is important to note that the opinions have a direct and significant impact upon the People in their daily life. Here is a compelling reason why the Atty. Gen. should continue to be independently elected. If the Atty. Gen. is appointed by the Governor, then of necessity his opinions must reflect the philosophy of that Governor or the relationship would not be a compatible one."
- C. The late Joseph T. Votava in 1920: "The appointment of an Atty. Gen. would make him a private counsel of the Governor, and I do not think the people of the state want that. They want someone in addition to the Governor in the Executive Department, who would see that the rights of the people are protected."

D. "BUSINESS APPOINTS ITS LAWYERS."
Businesses are organized for profit to its owners and officers, and not necessarily for the profit of the people they serve.

E. "YOU GET BETTER MEN BY APPOINTMENT."
A Governor will be the first to admit that he makes mistakes in his appointments.

F. "GOVERNOR NEEDS TO APPOINT ATTORNEY GENERAL BECAUSE GOVERNOR IS RESPONSIBLE UNDER OUR CONSTITUTION TO SEE THAT THE LAWS ARE ENFORCED."
Primary responsibility is with county attorneys, sheriffs, police and the State Patrol. The Patrol is already under the direct supervision of the Governor, and he has the power to suspend any sheriff, county attorney, police commissioner, mayor, or any other officer who refuses to enforce the law.

G. CONCLUSION. O. S. SPILLMAN in 1920: "* * * I am afraid that we have not arrived at that point in our affairs in this state where we want the head of the government to appoint the Attorney General. If there is any man who holds office in this state and who should be elected by, and responsible to the people of the state, it should be the Attorney General. The head of the state may have good judgment in his appointment, he may be able, from his experience, to appoint an excellent man to act as Attorney General, but I do not believe, under ordinary circumstances, that the judgment of one man is better than the combined judgment of the electors of the State of Nebraska on that proposition, and an Attorney General should be a check upon all the officers in the state, and he should be free, if necessary, to proceed against any department or against any officer in the state. I do not want his hands tied; I do not want him to be responsible to any individual or to any particular department. I want him free in the discharge of his duties."

THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS

by

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INTRODUCTION

Judges and justice. Both words stem from the Latin *jus*, right or law. Linked by their semantic origin, the words remain closely related. Perhaps it is overstated to contend that the quality of our judges is the quality of our justice. Nevertheless, it cannot be disputed that the quality of justice in our society depends to a great extent on the ability of our judges. While a highly qualified judiciary cannot by itself assure justice, at the very least it helps assure that justice will not be compromised because of unqualified judges.

How should judges be selected? Historically, America has attempted to answer this question by employing a variety of selection methods. Early in our nation's history, judges were appointed by the executive or legislature. Although federal judges and judges in some states continue to be appointed by the executive with the advice and consent of the legislature, the direct popular election of state judges became popular during the Jacksonian era of the nineteenth century. However,

later in the century a reaction against the overtly and overly political nature of these elections led to nonpartisan judicial elections. More recently, many states have adopted selection processes which seek to combine the advantages of both the appointive and elective methods.

States and municipalities still seek to build upon and improve the judicial selection methods used by prior generations. Like most institutional arrangements that are responsive to the needs of society, judicial selection demands an on-going process that borrows and profits from the past, meets the needs of the present and remains flexible to permit future adaptation.

The form of state judicial selection that has expanded most dramatically in the past twenty-five years is the non-partisan merit selection plan. Used in only one state prior to 1950, the non-partisan merit selection plan (as defined herein) currently is being used, in whole or in part, in twenty-one states, the Commonwealth of Puerto Rico, the District of Columbia, and the territory of Guam.

The rapid expansion of this selection method and its current consideration by many state legislatures indicate a strong trend toward the adoption of the plan. However, the debate over judicial selection still is being waged in a factual vacuum. This study seeks to help fill that vacuum by providing the first national empirical analysis of the judicial nominating commission. These commissions are the distinguishing and most important component of the non-partisan merit selection plan. Composed of lawyers and non-lawyers, the commission submits a list of judicial nominees to the executive who then selects the judge.

Two principal research techniques were employed in this study: on-site field investigations in selected merit plan jurisdictions and a questionnaire survey of nominating commissioners in most merit plan jurisdictions. In 1973, on-site field investigations were conducted in five jurisdictions: Birmingham, Alabama; Alaska; Colorado; Kansas; and New York City. The immediate objective of these field investigations was to learn how judicial nominating commissions actually operate. A secondary objective was to analyze and contrast procedures from several jurisdictions in order to evaluate the commissions' strengths and weaknesses.

The five jurisdictions studied in Part II differ in geography, urban density, ethnic and racial composition, and political culture. Furthermore, although each jurisdiction has adopted

some form of the non-partisan merit selection plan, each plan has been developed to suit the particular circumstances and needs of the individual jurisdiction. Similarly, the organization and operation of judicial nominating commissions in these jurisdictions vary considerably.

At the outset of our study we realized that it would be impracticable to conduct research in each of the five jurisdictions in exactly the same manner. To do so would be unduly confining, and would risk overlooking the unique features of each commission. However, we also felt that a basis for comparison between these states and those merit selection plan states not included in the field investigations was needed. To implement this objective, a lengthy questionnaire was developed to serve as the focal point for such a comparison. In June of 1973 the questionnaire was mailed to all present members of judicial nominating commissions that had sufficient operating experience. The results of this nine-page questionnaire are set out in Chapters 2 and 3.

It should be underscored that this study does not seek to resolve the lively debate between those who defend the non-partisan merit selection plan and those who prefer other methods of judicial selection. Our interest in merit selection stems not from our advocacy of the plan but from the undeniable fact that during the last twenty-five years this method of judicial selection has been the most widely adopted means of selecting state judges. It appears likely that this trend will continue. Whether this trend *should* continue demands a normative judgment that is beyond the scope of this study. What this study does offer is the first empirical look at judicial nominating commissions on a national basis. To that extent it should not only add considerably to existing information, but lay the foundation for the kinds of evaluative studies of the nonpartisan merit selection plan that will permit normative judgments.

Also, we hope that this study will be of practical value to persons actively involved in the implementation or operation of a judicial merit selection plan. Toward this end, the recommendations contained in chapter nine, particularly our Evaluation Scale of Judicial Applicants (page 232) and the Model Rules of Procedure for a Judicial Nominating Commission (Appendix 9-A), should prove useful.

CHAPTER 1

OVERVIEW of JUDICIAL SELECTION PROCESS

The following outline of the historical development and evolution of judicial selection methods in the United States is intended to help place in perspective the role and function of the judicial nominating commissions. After highlighting the earlier selection procedures, the nonpartisan merit selection plan will be analyzed in greater detail.

Early History: The Appointive Method

Like most of our legal institutions, our methods for selecting judges have their roots in England. The Revolution of 1688 against the Stuart kings of England led to a number of far-reaching changes in the distribution of power between the

*Particularly helpful sources for this historical sketch were: Dorothy Nelson, *Variations on a Theme—Selection and Tenure of Judges* 36 S. CAL. L. REV. 4 (1962); Glenn R. Winters, *Selection of Judges—An Historical Introduction* 44 TEXAS L. REV. 1081 (1966); and Evan Haynes, *Selection and Tenure of Judges* (National Conference of Judicial Councils, 1944)

8 The Key to Judicial Merit Selection

monarch and other branches of government. The intolerably wide powers of the monarch over the appointment and removal of judges led to the Act of Settlement in 1701. Although the Act permitted the royal office to continue to commission the judges, two important checks were placed on the king. The judge's term of office was based upon good behavior, and more importantly, the removal of a judge was to be by address of both houses of parliament. No longer were judges viewed as merely serving at the pleasure and sole prerogative of the sovereign.

Throughout the early eighteenth century, the judicial office in England continued to gain independence. The final defeat of the theory of judges as mere adjuncts to the executive came in 1761 when a statute provided that judges were to continue in office even after the death of the appointing king.

Unfortunately, the Act of Settlement was not made applicable to the American colonies. The colonial judges were quite dependent upon the king. The Declaration of Independence notes quite simply, "He [George III] has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." After the American Revolution, the original thirteen states reacted against the selection of judges by executive appointment and overwhelmingly chose methods of selection that did not reflect the English colonial practice. In eight states the power of appointment was vested in one or both houses of the legislature. Two states allowed appointment by the governor and his council. In only three states was the power of appointment vested in the governor, and even then the power was subject to the consent of the council. Borrowing from the Act of Settlement, eight states based the judicial term of office on good behavior. Fixed terms were used in three states. Rhode Island did not define tenure, and Georgia allowed its General Assembly to decide the length of term.

At the Federal level, the only topic related to the judiciary that caused much debate at the constitutional convention of 1789 was the manner in which Federal judges were to be selected. Although executive appointment was ultimately adopted, certain safeguards were added to assure judicial independence. Article III, Sec. 1 of the Constitution provided, "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be

diminished during their continuance in office."

Thus the method of selecting judges in the early days of our republic was basically appointive. On the state level, the appointment power was vested in both the executive and legislative branches. On the Federal level, the power resided in the executive. While the Federal appointive method continues to be employed, this arrangement for judicial selection enjoyed only a brief period of dominance on the state level. The Jacksonian era of the nineteenth century introduced the elective method of selecting state judges.

The Jacksonian Era: The Elective Method

Beginning in the mid-1800's, the appointment of state judges by the executive or legislature was drastically curtailed. A basic principle of Jacksonian democracy was the equality in fact of all men. This principle was translated into a variety of political reforms, among them the notion that all public officials — including judges — should be elected.

Prior to the 1840's judges were elected infrequently and in only a few states. In 1832 Mississippi became the first state to elect all judges. By action of its constitutional convention in 1846, New York led the change from gubernatorial and legislative appointment to direct popular election. For the century following New York's shift, all states that entered the Union did so with an elected judiciary. Even the four colonial states of Georgia, Maryland, Pennsylvania and Virginia joined the movement from an appointed to an elected judiciary. By the time of the Civil War, judges were elected in twenty-four of the thirty-four states. For the first time in Anglo-American history, the judicial office became an integral part of the political elective process.

Although the philosophical and political underpinnings of the Jacksonian movement toward "common man" democracy are beyond the scope of this historical sketch, it suffices to note that the full ramifications of the partisan elective system were not discernible immediately. However, toward the end of the nineteenth century the "returns" on this method of judicial selection were both unexpected and unsettling. The post-Civil War increase in industrialization and its accompanying urbanization were marked by the formation of political "machines" in the nation's larger cities. The Tammany Hall organization in New York exemplified the potential abuses of a system which

permitted partisan judicial contests on the ballot. By seizing control of the political processes that led to nomination, Tammany effectively was able to run and elect its slate of judicial nominees. The stranglehold which such organizations had over elections was tightened by general voter unfamiliarity with metropolitan judicial candidates.

Dissatisfaction and resentment of political party control of judicial candidates led to a counter-reform movement. The reaction of New York lawyers against the party method of nomination and election was instrumental in the establishment of the first bar association in the nation, the Association of the Bar of the City of New York, in 1870. A number of similar associations, including the American Bar Association, were formed within the following decade. Although the theme "to take the judge out of politics" grew more popular, the reforms sought by the bar leaders were confined largely to the concept of improving popular elections. Bar leaders attempted to control the power of political party organizations through a variety of devices, such as nonpartisan ballots, separate judicial nominating conventions and elections, and direct primaries. They also attempted to increase the influence of the legal profession on judicial selection by conducting and publishing bar association referenda with respect to their recommendations on the fitness of judicial candidates. These initial measures proved inadequate to remove the effective control of political party leaders over elections, although most states retained the election system, but the concern over the adverse effects of political selection on the quality of judicial personnel was increasingly voiced with the approach of the twentieth century.

The Twentieth Century: Search for a Synthesis

The clarion call for a frontal attack on the popular election of judges was sounded in 1906 by a young University of Nebraska law professor, Roscoe E. Pound. In an address before the American Bar Association, Pound noted that popular judicial elections were a major cause of public dissatisfaction with the administration of justice. Pound's direct assault on popular elections was continued by William Howard Taft, the ex-President of the United States and future Chief Justice of the U.S. Supreme Court. Speaking before the American Bar Association in 1913, Taft declared that even the nonpartisan judicial ballot was a failure. He asserted that such a system permitted unqualified persons who were incapable even of political support to become

elected through a vigorous campaign.

In that same year, the American Judicature Society was founded. Dedicated to the efficient administration of justice, the organization was particularly concerned with the methods of selection, tenure and retirement of judges. As director of research for this new organization, Albert M. Kales, a law professor at Northwestern University, set out to devise a method of judicial selection that would maximize the benefits and minimize the weaknesses of both the appointment and election processes. In essence, Kales sought to preserve the informed and intelligent choice which is the strong point of the appointive system, while retaining ultimate voter control.

The system devised by Kales and promoted by the American Judicature Society did combine appointments with election. It also added a very important third element—a judicial nominating commission. Under the Kales Plan, an elected chief justice would fill judicial vacancies from a list submitted by the commission which was expected to seek out the best available judicial talent. Once on the bench, these judges would thereafter go before the voters on the sole question of their retention. In form, this type of election is quite similar to a referendum, for it is noncompetitive and nonpartisan. In the event of a rejection, the resulting vacancy would be filled as before by commission nomination and chief justice appointment. In 1926, Harold Laski, an English political scientist, proposed as a slight variation of the Kales Plan that the governor be substituted for the chief justice as the appointing agent. The Kales-Laski proposal contained the basic features upon which most subsequent plans for judicial reform have been based. The three-part approach consisted of: (a) a judicial nominating commission to nominate candidates for the bench; (b) an elected official (usually from the executive branch) who would make his appointments from the list submitted by the commission; and (c) subsequent nonpartisan and noncompetitive elections in which judges so chosen would run on their records.

For nearly twenty-five years, the plan remained dormant and most states continued to elect their judges. In 1937, the American Bar Association endorsed the Kales-Laski proposal. Three years later it was voted into the constitution of Missouri and quickly became identified as the "Missouri Plan". However, the nation's concern throughout the 1940's was turned toward international matters and by mid-century, Missouri remained the only state to have adopted the plan.

Merit Selection: A Closer Examination

To speak of the merit plan for judicial selection oversimplifies and often misleads. A large number of states and cities have adopted a variety of "merit" plans. An inclusive definition of the plan that includes all of these jurisdictions necessarily becomes analytically imprecise. A framework is needed to distinguish and compare the various plans. Indeed, several frameworks could be used to classify the plan. Often classification schemes hinge upon whether a particular plan:

- applies to all courts, or only appellate courts or only trial courts;
- is statewide or local;
- is based upon constitution, statute, executive order, or the informal compliance of the executive.

While these classifications bring a semblance of order to the assortment of plans, they still do not provide an adequate framework for the purposes of this study. Given the primary concern of this study with the structure, procedures and duties of the judicial nominating commissions, the nonpartisan merit selection plan is defined for our purposes as a judicial selection system which employs:

A permanent nonpartisan commission of lawyers and non-lawyers that initially and independently generates, screens and submits a list of judicial nominees to an official who is legally or voluntarily bound to make a final selection from the list.

This definition immediately distinguishes the nonpartisan merit selection plan from those jurisdictions which continue to use the strict appointive or elective systems. The definition also *excludes*:

- Commissions which *confirm* or *review* candidates submitted to it by another governmental unit or individual. Judicial vacancies in California trial courts are filled in this manner; the various county commissions approve or disapprove of the candidates whom the governor's office voluntarily channels to the commissions.

- Commissions composed solely of bar association members. Four states presently employ plans that do not include non-lawyers on their commissions.

- Ad hoc committees which respond to unusual vacancy situations. In 1972 Massachusetts voters approved a constitutional amendment requiring judges to retire at age seventy. To fill the thirty-eight vacancies thus created, Governor Francis W. Sargent appointed the Ad Hoc Advisory Committee on Judicial

Appointment. The Committee was disbanded after the appointments were made.

On the other hand, the definition *includes*:

- Commissions which operate on both state and local levels. For example, the only commission in New York State is the Mayor's Committee in New York City, which recommends nominees only for the city's local courts.

- Commissions initiated upon executive order or public announcement as well as those established by constitutional or statutory mandate.

- Commissions which are involved in all, or part, of a court system (trial, intermediate appellate, supreme). In Alaska, a single commission selects nominees for vacancies occurring in all the courts in the state. Maryland provides a single commission for appellate court vacancies and separate commissions for vacancies occurring in each of the eight district courts. Nebraska has separate commissions for each seat on the state's seven-man supreme court, separate district court nominating commissions in each of the state's twenty-one districts, separate county court nominating commissions in each of the state's judicial districts, a juvenile judge nominating commission, and a workmen's compensation court nominating commission.

- Plans which only fill judicial vacancies occurring between partisan or competitive election. Although Florida has commissions for the supreme court, intermediate courts of appeal, and circuit courts, these commissions nominate only for vacancies occurring between elections. A judge initially appointed to the bench under the state's merit plan must run in a nonpartisan election at the end of his term if he wishes to remain on the bench.

With the nonpartisan merit selection plan defined in this manner, we complete our judicial overview by charting the course of merit selection during the past quarter century.

The adoption of merit selection in the 1950's was gradual, with only three jurisdictions adopting the plan during this period. In the 1960's expansion was more rapid, with eight new jurisdictions adopting the plan. The movement has continued to gain momentum in the 1970's; ten jurisdictions already have chosen this form of judicial selection. In addition, a number of states and municipalities have adopted plans which do not quite fit our definition of merit selection but still incorporate features of the plan.

After the hiatus following the adoption of the Missouri Plan

in 1940, the *Alabama* constitution was revised in 1950 to provide for a nominating commission to fill interim vacancies in the circuit court of Jefferson County (Birmingham).¹ In 1958, the voters of *Kansas* approved a constitutional amendment establishing a merit selection plan. A supreme court nominating commission provided nominees whenever a vacancy in that court occurred.² The constitutional convention of *Alaska* adopted a model judicial article which included merit selection for all major trial and appellate judges. With statehood in 1959 Alaska became the first state to adopt merit selection with statewide application. Whenever a vacancy occurs in the supreme, superior, or district courts, the state's Judicial Council submits a list of nominees to the governor.

New York City was the first jurisdiction to opt for a merit plan in the 1960's. In 1961, Mayor Robert Wagner voluntarily pledged that he would fill certain judicial vacancies from a list submitted to him by a nominating commission. Mayor John V. Lindsay continued this practice. Mayor Abraham D. Beame has also stated that he will follow this same procedure.

In 1962, constitutional amendments in *Iowa* and *Nebraska* provided for merit selection of all major trial and appellate judges. Iowa now provides a supreme court nominating commission, separate district court commissions in each of its thirteen districts, and separate judicial magistrate "appointing" commissions in each of its ninety-nine counties. Nebraska provided separate supreme court commissions for each of that court's seven seats and separate district court commissions in each of its twenty-one districts.³ Having used a judicial commission to aid the mayor in selecting Denver County judges since 1964, *Colorado* amended its constitution in 1966 to provide for merit selection on a statewide basis. A single commission encompasses all supreme court and intermediate appellate court vacancies; twenty-two district commissions are used for all other courts of record (except Denver).

Puerto Rico has filled all judicial vacancies by merit selection since 1965. The plan was implemented by special rules adopted by the Supreme Court of Puerto Rico and instituted by Governor

1. By constitutional amendment adopted in 1974, Madison County (Huntsville) now has such a plan. A new judicial article, adopted in 1974, gives fifteen Alabama counties the option of adopting similar plans.

2. Under a new judicial article adopted in 1972, Kansas voters in each judicial district will be given the option of extending the plan to the selection of their district court judges.

3. In 1974, Nebraska extended the plan to its county courts.

Sanchez-Vilella. Successive governors, Luis A. Ferre and Rafael Hernandez-Colon, have continued to use the plan.

The remaining states that implemented merit selection plans in the 1960's did so in 1967. *Idaho's* legislature adopted a statutory measure for filling supreme and trial court vacancies between elections under a merit selection plan using a single judicial council. But the plan is not used when vacancies occur at the end of judicial tenure. Under the Idaho plan all judges must run for office on nonpartisan elective ballots to succeed retiring incumbents or to retain their own offices.

Oklahoma's plan was written to cover only the judges of that state's supreme court and court of criminal appeals. However, the plan was extended by the voluntary action of former Governor Dewey F. Bartlett and more recently his successor, Governor David Hall, to cover judges of the trial courts and courts of limited jurisdiction. A single nominating commission is responsible for selecting nominees whenever a vacancy occurs in any judicial office.

The *Utah* constitution was amended in the mid-1940's to permit the legislature to change from the elective method of selecting judges. Utah judges continued to be elected, however, until 1967 when the legislature enacted a merit plan to fill all vacancies based on the recommendations of the supreme court commission or the district court nominating commissions.

The *Vermont* legislature had historically selected its supreme and trial court judges. Since 1967, a nominating commission has been used in making initial judicial selections for the supreme, superior and district courts.⁴

In 1970, *Maryland* led the way in formalizing voluntary merit selection through executive order. Governor Marvin Mandel's orders established a governor's commission on Appellate Judicial Selection to fill interim vacancies on the court of appeals or court of special appeals, and eight trial court judicial selection commissions to fill interim vacancies occurring in the trial courts in each of the state's eight judicial districts.

Three states provided some form of merit selection in 1971. The voluntary plan adopted by *Georgia's* Governor Jimmy Carter was designed in his formal executive order to cover only

4. By constitutional amendment, effective April 9, 1974, all commission recommendations are now passed on to the governor rather than the legislature. The governor's appointments are subject to confirmation by the state senate.

appellate court vacancies, but in actual practice the plan has also been used to fill trial court vacancies. However, it should be pointed out that, since the 1950's, state legislation (later the Atlanta home rule charter) has provided for merit selection for the city courts in Atlanta.

The merit plan approved by Tennessee's legislature provided for a single nominating commission and covered the state's supreme court and appellate court judges.⁵

Under Governor Reubin O'D. Askew's executive order all appellate and trial court vacancies in Florida were filled by a voluntary merit selection plan. This plan was subsequently written into the state's revised judicial article of 1973. Its provisions apply to vacancies which occur between elections. Separate judicial nominating commissions were established for the supreme court, district courts of appeal (four) and circuit courts (twenty).

Indiana's plan for selecting all appellate judges was ratified as a part of a new judicial article in 1970 and became fully operative in 1972. While awaiting the referendum on the appellate judges, the Indiana legislature enacted a 1969 bill providing for merit selection of Indianapolis municipal court judges. Bills providing for merit selection of trial court judges were enacted in the 1971, 1972 and 1973 legislative sessions. The counties affected are Allen (with Ft. Wayne the county seat), Vanderburgh (with Evansville the county seat), Lake (with Hammond the county seat), and Marion (with Indianapolis the county seat). A single commission aids in appellate selections, and each of the four counties uses its own commission.

In 1972, Montana and Wyoming became the most recent states to adopt merit selection plans through constitutional changes, the former in a new constitution and the latter by amendment. Both states applied the plan to all major courts and used a single judicial nominating commission. In Wyoming, judges ran for retention on a nonpartisan and noncompetitive ballot at the end of their first year (and at the end of each term thereafter); Montana judges are appointed only for interim vacancies between competitive elections. By executive order, Governor John J. Gilligan of Ohio instituted a voluntary plan in the same year. The plan provided for twelve advisory councils, one for filling the supreme court vacancies and eleven district councils for filling court of appeals and trial court

5. However, the legislature repealed the plan's applicability to the supreme court in 1974.

vacancies within the eleven districts of the state. The plan is used to fill interim vacancies between elections.

Pennsylvania is the most recent jurisdiction to embrace the concept of merit selection by the voluntary action of a chief executive. In a 1973 executive order, Governor Milton J. Shapp called for two statewide commissions. One commission submits nominees to fill between-election vacancies on the appellate courts and the special Commonwealth Court. The second commission develops lists of nominees for use by the governor in filling interim vacancies on the trial court level. By congressional home rule legislation, approved by the voters in 1974, the District of Columbia became the most recent jurisdiction to adopt merit selection. When vacancies occur on the trial and appellate benches of the District of Columbia court system, the commission submits lists of three names to the President who must appoint from those lists in filling vacancies, subject to confirmation by the U. S. Senate.

Hybrid Merit Selection Plans: Bar Screening and Other Variations

In addition to the states which meet our definitional standard of nonpartisan merit selection, a number of states have plans that are similar but vary in some important respect from the nonpartisan merit plan. Several states make use of commissions composed of bar association members rather than both non-lawyers and lawyers. In 1951, Governor Edwin L. Mechem of New Mexico began to fill between-election appellate and trial court judicial vacancies based upon a list submitted by the unified state bar. This voluntary practice has been followed by all succeeding governors including the present incumbent, Governor Bruce King.

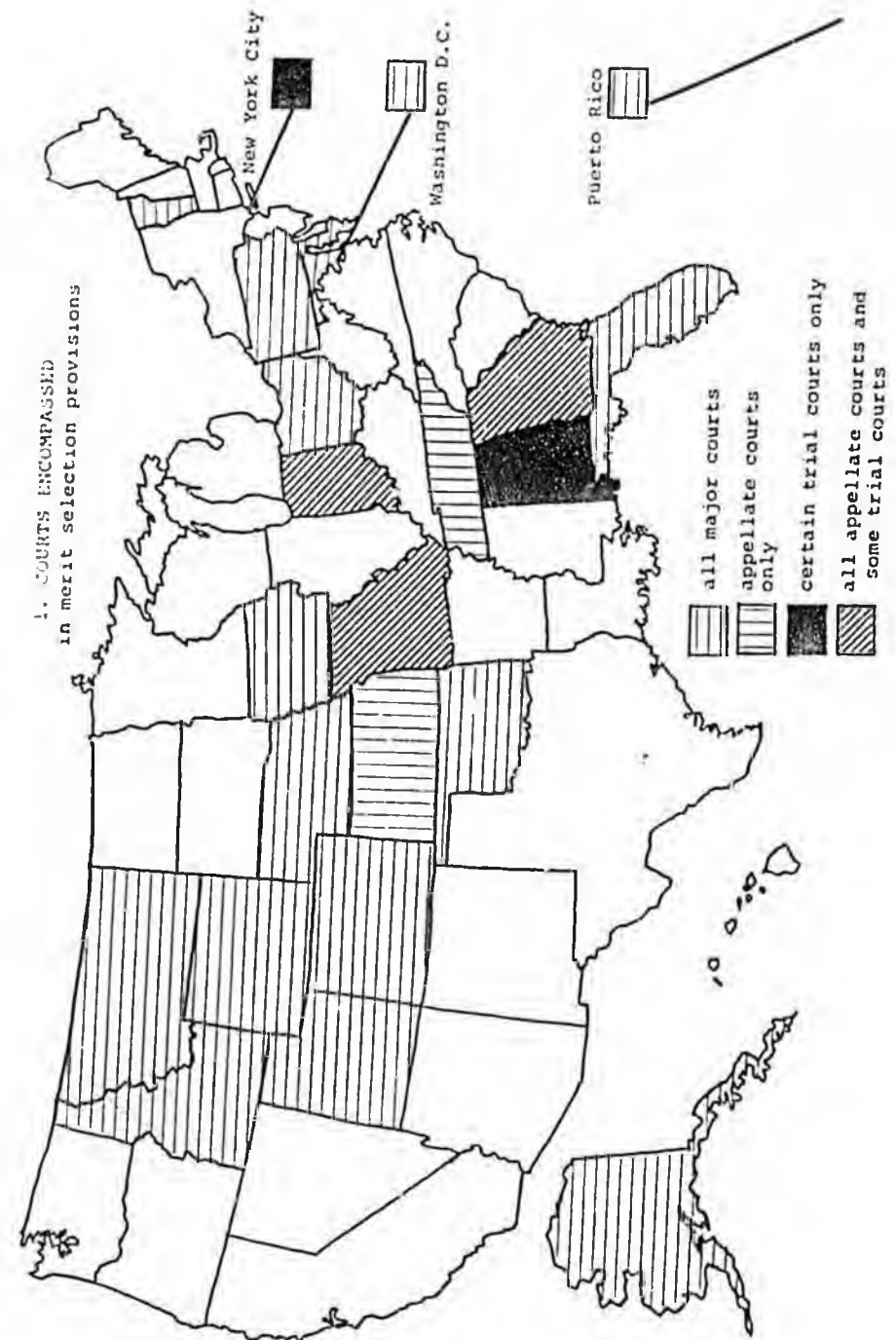
Under a voluntary plan initiated by former Governor Winthrop Rockefeller and continued by incumbent Governor Dale Bumpers, Arkansas also follows a "merit plan" using a bar association committee. The selection committee, specifically designated by the president of the Arkansas Bar Association, performs two major functions. Since state law prohibits judges who are appointed to fill vacancies from succeeding themselves, the selection committee screens lawyers interested in taking these short-term judicial appointments. The committee also nominates a slate from which the governor appoints attorneys to sit temporarily on the supreme court when a justice disqualifies himself from serving on a case.

New Jersey is a third state which employs a form of bar association committee. The plan involves two types of bar committees, one to recruit prospects for the governor to nominate and another to screen and rate his choices before appointments are formalized.

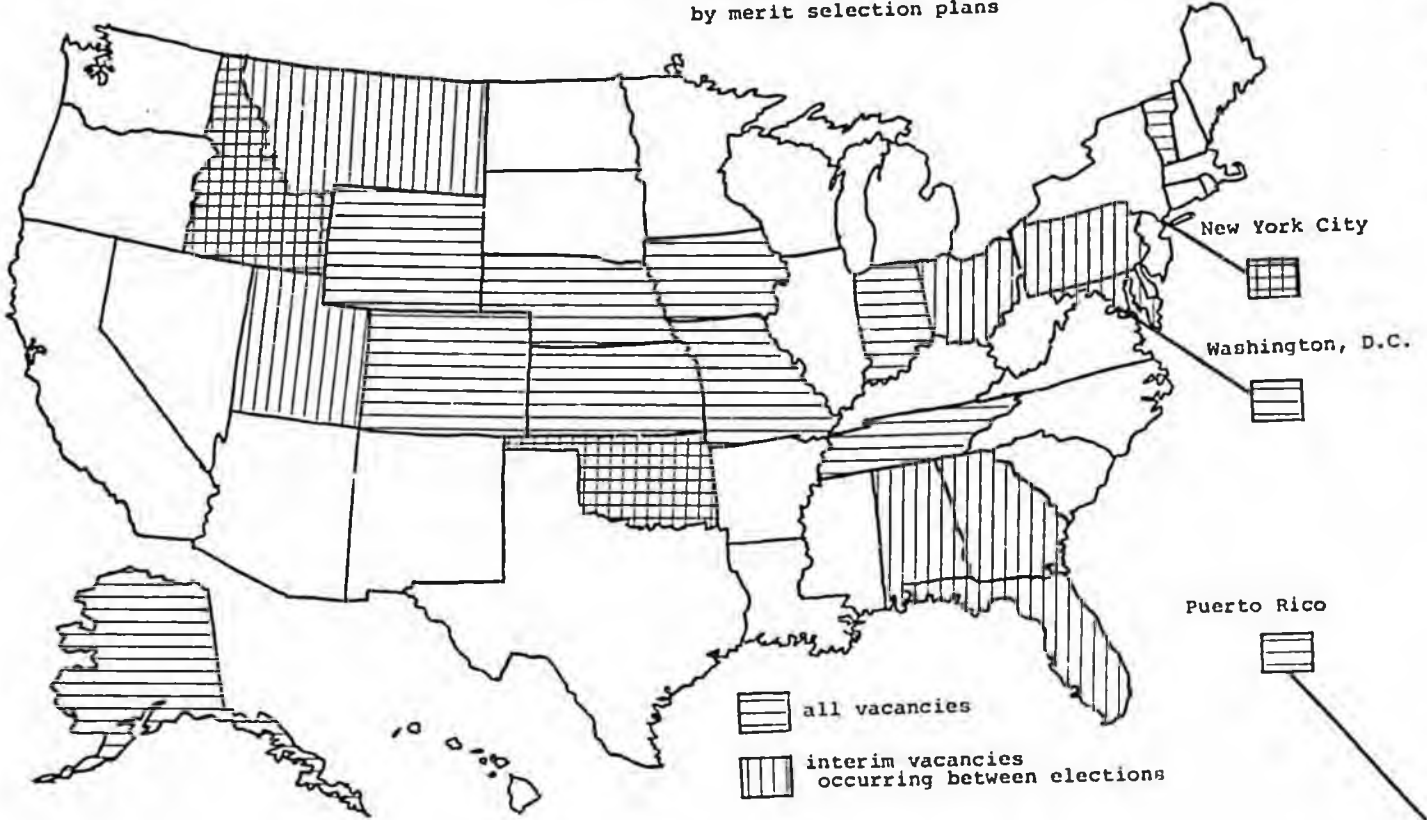
In Delaware, former Governor Russell T. Peterson initiated a voluntary plan for the appointment of judges only after seeking the advice of the state bar association. The plan has been continued by Governor Sherman W. Tribbitt.

Governor Ronald Reagan of California has voluntarily filled all judicial vacancies on the trial courts of his state with the help of commissions he established by executive action in 1967. In each of the fifty counties a commission composed of lawyer and non-lawyer members rates judicial candidates. Similarly, the State Bar Board of Governors Commission also evaluates prospective nominees. However, the county commissions have not been included as nominating commissions that satisfy the framework of a nonpartisan merit selection plan. Before a judicial candidate's name is submitted to the commission, he must apply to the governor's office for consideration. While the initial screening of candidates at the governor's office is minimal, the commission is placed in a position of approving or disapproving the governor's choices rather than initially and independently generating, screening and submitting candidates to the governor.

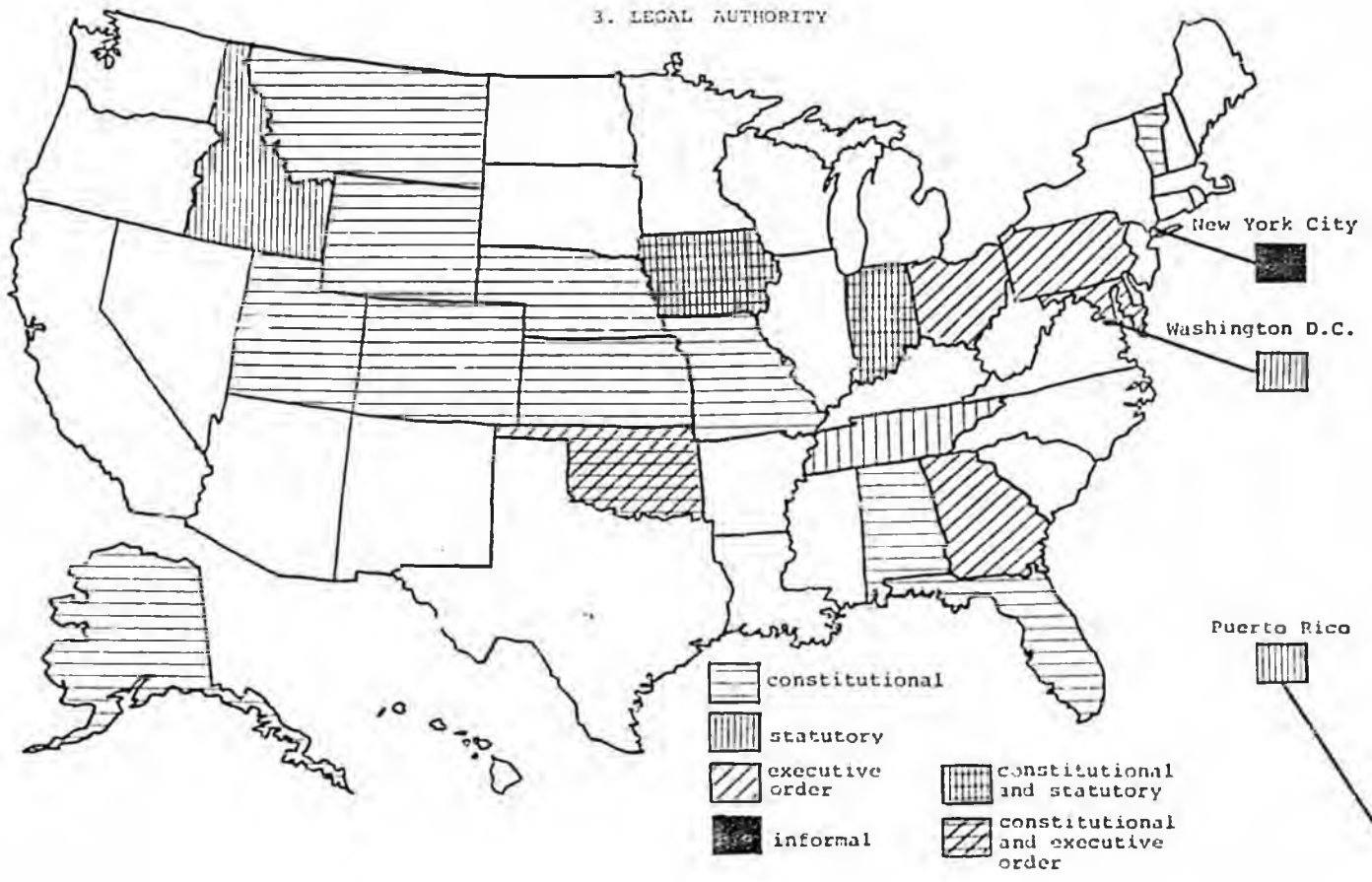
The methods of state judicial selection have varied considerably over the past two centuries. Variety continues to be a basic element in the nonpartisan merit selection plan. No two state or municipal plans are identical in all relevant respects. The profound impact that these commissions have on the selection of state judges serves as the basis for this study. Having provided an historical backdrop for these nominating commissions, we will proceed to analyze and evaluate them in much greater detail.



2. VACANCIES COVERED
by merit selection plans



3. LEGAL AUTHORITY



CHAPTER 2

JUDICIAL NOMINATING COMMISSIONS

Introduction

The judicial nominating commission is the cornerstone of the merit selection plan. Because the nominating commission has ultimate authority to determine which candidates are qualified to hold judicial office, the effectiveness of the merit plan is dependent upon the successful functioning of this body. Accordingly, this chapter is devoted to an analysis of the workings of presently established commissions in an effort to discover how such factors as the commission's composition, workload, and operating procedures affect the selection process. As an aid in this analysis the reader should refer to Table 1 (appearing at pp. 27-37, which outlines the composition and operation of the nominating commissions in each merit selection jurisdiction.

Our questionnaire survey of judicial nominating commissioners was designed to be a nation-wide reference point for our discussion of the issues surrounding the operation of the

commission. The questionnaire was developed and pretested in Nebraska and at a Florida Judicial Nominating Commissioners Institute in the spring of 1973. Thereafter, a questionnaire¹ was mailed to every current member of all those commissions (except Nebraska's) which we felt had enough of an operating history to be able to give informed responses. Thus, we did not question commissioners in Georgia, Indiana, Ohio, Pennsylvania, Montana, or the District of Columbia because they lacked sufficient experience as of June, 1973, the date of our mailing. We mailed 797 questionnaires to commission members in thirteen states, one city (New York City), and one county (Jefferson County, Alabama), all of which had had some form of merit selection in operation for longer than one year at the time of the mailing. For comparison purposes we also sent 85 questionnaires to "bar screening" commission members in five states whose operations are superficially similar to judicial nominating commissions.² From the merit selection states we received usable responses from 371 current commissioners, a response rate of 46.5%. It should be noted however that although we did succeed in obtaining a wide geographical range, the four states with the most numerous commissions and commissioners (Florida, Colorado, Iowa, and Maryland) accounted for 77.6% of the replies.

The questionnaire attempted to elicit information in three basic areas: 1) The nominating commissioners themselves; 2) The personal qualities and qualifications that commissioners regard as most important in selecting judges; and 3) The actual operations and procedures of the commissions. With the aid of a computer we also were able to determine whether significant variation occurred when commissioners were compared on the basis of age, experience, political party, occupation, and bar affiliation. Similarly, we were able to isolate certain key operational differences among the various commissions such as mode of recruiting, interviewing, and confidentiality. Finally, we encouraged each commissioner to give his impressions as to the success of his commission as well as his suggestions for improvement, if any.

1. See Appendix 2-A.

2. Upon analyzing the responses contained in the 34 questionnaires completed and returned by "bar screeners", we found no significant differences between their evaluation of the qualities and qualifications which should be exhibited by a potential appointee and the evaluation of the commissioners in merit plan jurisdictions.

Commission Composition

Historical Development

As with other aspects of the merit selection plan, thinking regarding the question as to who should sit on the nominating commission has changed over the years. The nominating body contained in the plan conceived by Professor Kales in 1914 consisted of a judicial council, composed solely of high ranking members of the judiciary. During the 1920's, the advisability of including members of the bar in the nominating process was propounded by such men as Harold J. Laski and Herbert Lincoln Harley. Finally, at the 1931 annual meeting of the American Judicature Society, Walker B. Spencer set forth a proposal concerning the composition of the nominating body which has since met with widespread favor. Spencer proposed that candidates be nominated by a commission composed not only of judges and lawyers but non-lawyers as well.³ In adopting a resolution in favor of a merit plan for judicial selection in 1937, the House of Delegates of the ABA appears to have given consideration to the approaches taken by both Kales and Walker in proposing that the nominating body be "composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office."⁴

When Missouri became the first state to adopt a merit plan in 1940, it included on each of its nominating commissions a member of the judiciary and an equal number of lawyer and non-lawyer members. Since then, the majority of the jurisdictions adopting a merit plan have followed Missouri's lead in including judicial, lawyer, and non-lawyer members on the commission.⁵ In addition, the Model Judicial Article approved by the American Bar Association's House of Delegates in 1962 also contains a merit plan for judicial selection which utilizes nominating commissions composed of judicial, lawyer, and non-lawyer members.

In most jurisdictions which have adopted a merit plan, the judicial member of the nominating commission acts as chairman and, in certain of these jurisdictions, sits as a non-voting

member. The lawyer members of the commission are usually either elected at large by members of the bar residing in the geographic area in question or appointed by the governing body of the organized bar. The non-lawyer members of the commission are usually appointed directly by the governor.⁶ Although there is little argument over the desirability of including non-lawyers, since their inclusion "assures that public expectations concerning the judiciary are influential and the non-professional attributes of a good judge are recognized",⁷ the general practice of having the governor appoint these lay members has been criticized as an invitation for political machinations. Since merit selection is intended to deprive the executive of the opportunity to make judicial appointments solely on the basis of his political motivations (and to remove the political pressures on him to do so), it is thought to be self-defeating to permit the executive to have a direct say in the appointment of the nominating commissioners.⁸

To remedy this problem it has been suggested that the lay members of the commission be selected by a bi-partisan legislative committee.⁹ Of course, the details of such a solution may perhaps embroil the legislature in its own partisanship, because bi-partisan rarely means nonpartisan. At any rate, there is much concern expressed by the commentators that the lay members are either particularly susceptible to undue influence or all are mere ciphers who meekly defer to the political demands of the executive, the authoritative tone of the judicial member, or the glibness and legal expertise of the lawyer members. The open-ended responses to our questionnaires reveal that very few lay members felt dominated by the lawyers and that equally few lawyer members felt the lay members to be superfluous. Our responses did indicate differences in perceptions between lawyer and laymen, and there were some suggestions that perhaps the lawyers do hold the balance of power, especially in recruiting. However, we have found little reason to doubt the need for lawyer-laymen interaction on the judicial nominating commission. An evaluation of the recent ad hoc Massachusetts judicial selection committee supports this conclusion:

6. *Id.*

7. ABA Commission on Standards of Judicial Administration, *Standards Relating to Court Organization* 40 (Tentative Draft, 1973).

8. Note, *Analysis of Methods of Judicial Selection and Tenure*, 6 SUFFOLK L. REV. 955, 968 (1972).

9. *Id.*

3. For an excellent discussion of this historical development. See Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, 7 DUQUESNE L.REV. 61 (1968).

4. 62 A.B.A. Rep. 893 (1937).

5. See Table I, this chapter.

The interaction between lawyers and laymen on the Committee is of some interest. Except in one or two cases, most of the laymen have scant knowledge of the courts, the judiciary, or their recent problems. The laymen, however, soon realized that they were as perceptive as the lawyers about people, and equally adept in evaluating available information. While laymen had to defer to lawyer opinions about legal experience, they had strong, independent views and were by no means dominated or manipulated by the lawyers.

Lawyer perceptions of the lay members confirm the capacity and desirability of lay participation. Most felt that lay people provided a more detached view of the system, bringing a consumer citizen perspective to bear, and counteracting the "chumminess" that tends to exist among lawyers.¹⁰

In addition to the lawyers and laymen, many commissions provide for a judicial member as well. As indicated in Watson and Downing's seminal study of judicial selection in Missouri, this judge often has been a dominating force.¹¹ Indeed, this may still be a problem in that state since one Missouri commissioner complained that there was "a tendency for the Supreme Court member to stifle the arguments for or against a particular candidate. Most attorneys on the commission have been trial attorneys, and the awe, respect or dominance of judges tends to become built in." On the other hand we received generally favorable comment about the role of the judicial members in Colorado.

Aside from the judicial member, who usually serves ex-officio, most merit plan jurisdictions provide for six-year, staggered terms for commission members. All merit plans require that the lawyer and non-lawyer members be residents of the geographic area covered by the judicial offices to be filled by the commission. Although few plans contain explicit provisions which attempt to insure that the two major political parties will be given relatively equal representation on the commission,¹² most plans explicitly require that the appointing official or appointing body not give consideration to political affiliation in appointing members of the commission. In addition to these restrictions concerning political affiliation, many plans pro-

hibit the appointment of a public office holder to the commission and some prohibit the appointment of persons holding office in a political party.¹³ Finally, some plans prohibit commission members from serving for two consecutive terms and explicitly preclude a commission member's eligibility for judicial office while he sits on the commission and for a period of one or more years thereafter.¹⁴

13. See Table X, Chapter 3.

14. *Id.*

TABLE I
Judicial Nominating Commissions

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|---------|--|---|--|
| Alabama | <i>Constitutional</i> Governor appoints to interim vacancies only. Thereafter, appointee must run in partisan election at end of each term. | (2) <i>Jefferson County Judicial Commission</i> 10th Judicial Circuit Court <i>Madison County Judicial Commission</i> 23rd Judicial Circuit Court (6 year terms) | 5 Members 1 judicial—elected by judges of appropriate judicial circuit. 2 lawyers—elected by lawyer residents of appropriate judicial circuit from list of nominees of the appropriate Bar Assn. 2 non-lawyers—elected by state senator and representatives from appropriate county. All serve 6 year terms. |
| Alaska | <i>Constitutional</i> Governor appoints. Thereafter, appointee must stand in retention election at end of each term. | (1) <i>Judicial Council</i> Supreme Court (10 year term) Superior Courts (6 year term) District Courts (4 year term) | 7 Members Chief Justice of Supreme Court (Chairman) 3 lawyers—appointed by governing body of state's unified bar 3 non-lawyers—appointed by governor, subject to legislative confirmation. All serve 6 year terms. |

10. Robertson and Gordon, *Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee*, 58 MASS. L.Q. 131, 138 (1973).

11. Watson and Downing, *THE POLITICS OF THE BENCH AND BAR* (New York: John Wiley and Sons, Inc., 1969).

12. See Table IX, Chapter 3.

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|----------|--|---|---|
| Colorado | <i>Constitutional</i> Governor appoints. Appointee serves provisional term of 2 years; thereafter, must stand in retention election at end of each term. | (24) <i>Supreme Court Nominating Commission</i> Supreme Court (10 year term) Court of Appeals (8 year term) | 12 Members Chief Justice of Supreme Court (Chairman). 5 lawyers (one from each congressional district) — elected by majority vote of governor, attorney general and chief justice. 5 non-lawyers (one from each congressional district) — appointed by governor. 1 non-lawyer — appointed by governor. All serve 6 year terms. |
| | | <i>Judicial District Nominating Commissions</i> (22) District Courts (6 year term) Probate Courts (6 year term) Juvenile Courts (6 year term) Superior Court of Denver (6 year term) County Courts outside of Denver (4 year term) | 8 Members Supreme Court Justice (Chairman). 3 lawyers* — elected by majority vote of governor, attorney general and chief justice. 4 non-lawyers (at least one from each county in the appropriate judicial district) — appointed by governor. All serve 6 year terms. |
| | <i>Denver Home Rule Charter</i> Mayor appoints for provisional term of 2 years. Thereafter, appointee must stand in retention election at end of each term. | <i>Denver County Court Judicial Nom. Commis.</i> Denver County Court (4 year term) | 8 Members Denver County Court Presiding Judge. 3 lawyers — appointed by mayor. 4 non-lawyers — appointed by mayor. All serve 4 year terms. |

*Colorado Judicial District Nominating Commissions—in judicial districts having a population of 35,000 or less, at least 4 members of the commission must be non-lawyers; the other members may be lawyers or non-lawyers, depending on majority vote of the governor, attorney general, and chief justice.

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|----------------------|--|--|---|
| District of Columbia | <i>Statutory</i> President appoints with Senate confirmation. Automatic reappointment if Tenure Commission finds "exceptionally well qualified" or "well qualified". If TC finds "qualified", President has option to resubmit for Senate confirmation or not. If TC finds "unqualified", appointee ineligible for reappointment. | (1) <i>Judicial Nominating Commission</i> Court of Appeals (15 year term) <i>Superior Court</i> (15 year term) | 7 Members Active or retired federal judge serving in the District — appointed by Chief Judge of the U.S. District Court for the District of Columbia 1 lawyer or non-lawyer — appointed by President of United States. 2 lawyers — appointed by Board of Governors of the D. C. United Bar. 2 members (one of whom may not be a lawyer) — appointed by mayor. 1 non-lawyer — appointed by the District Council All serve 6 year terms except member apptd. by President who serves a 5 year term. |
| Florida | <i>Constitutional</i> Governor appoints to interim vacancies only. Thereafter, appointee must run in non-partisan election at end of term. | (25) <i>Supreme Court Nominating Commission</i> Supreme Court (6 year term) <i>District Courts of Appeal Nominating Commissions</i> (4) Courts of Appeal (6 year term) <i>Judicial Circuit Nominating Commissions</i> (20) Judicial Circuit Courts (6 year term) | Each Commission has 9 Members 3 lawyers — appointed by Board of Governors of Florida Bar. 3 electors — appointed by governor. 3 non-lawyers — elected by majority vote of other commissioners. All serve 4 year terms. |
| Georgia | <i>Executive Order</i> Governor appoints to interim vacancies. Thereafter, appointee must run in next general election. | (2) <i>Judicial Nominating Commission</i> Supreme Court Court of Appeals Superior Courts | 10 Members 5 lawyers — serve by virtue of office in the State Bar of Georgia 5 non-lawyers — apptd. by governor. Non-lawyers serve for terms concurrent with the governor's term. |

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|---------------------|--|---|--|
| Georgia (continued) | Atlanta City Charter Mayor appoints. Thereafter, appointee must stand in retention election at end of each term. | Judicial Commission Municipal Court of City of Atlanta (4 year term) | 8 Members 3 lawyers — appointed by Atlanta City Bar Association 3 lawyers — appointed by Gate City Bar Assn. 2 non-lawyers — apptd. by mayor. |
| Idaho | Statutory District Magistrate Commission appoints for term of 2 years. Thereafter, appointee must stand in retention election at end of each term. | District Magistrates Commissions (7) Magistrates of District Courts (2 year term) | 5+ Members 2 lawyers — nominated by local bar association 3 non-lawyers — appointed by governor with consent of Senate All serve 6 year terms |
| | | | 7 Members 3 lawyers — appointed by Governor 4 non-lawyers — appointed by Governor with consent of Senate All serve 6 year terms |
| | | | 3 non-lawyers — appointed by Governor with consent of Senate All serve 6 year terms |

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|---------------------|---|--|--|
| Indiana (continued) | Statutory Governor appoints certain County Superior Court judges for initial term of 2 years. Thereafter, appointee must stand in retention election at end of each term. | Lake County Superior Court Nominating Commission Lake County Superior Court Allen County Superior Court Commission Allen County Superior Court Vanderburgh County Superior Court Nominating Commission Vanderburgh County Superior Court (6 year terms) | 7 Members 1 judicial (Chairman) — appointed by Chief Justice of Supreme Ct. 3 lawyers — elected by lawyer residents of appropriate county. 3 non-lawyers — appointed by governor. All serve 4 year terms. |
| | Statutory Governor appoints to initial term, and makes subsequent re-appointments at end of each term. | Marion County Municipal Court Nominating Commission Marion County Municipal Court (4 year term) | 9 Members 1 judicial — appointed by Chief Judge of Court of Appeals 2 lawyers — elected by local bar association 2 non-lawyers — appointed by mayor 2 non-lawyers — appointed by governor. 1 lawyer — appointed by Marion County Superior Court en banc. 1 Circuit Judge (Secretary) All serve 2 year terms |
| | | (113) State Judicial Nominating Commission Supreme Court (8 year term) | 12 Members 6 electors (one from each congressional district) — appointed by governor with Senate confirmation 6 electors (one from each congressional district) — elected by bar members of appropriate district. All serve 6 year terms |

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| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|---------------------|--|--|---|
| Iowa (continued) | Statutory Commission appoints | District Judicial Nominating Commissions (13) District Courts (6 year term) | 11 Members 1 District Judge—appointed by Chief Judge of district. 5 electors—appointed by governor. 5 electors—elected by bar members of appropriate district. All serve 6 year terms. |
| | | County Judicial Magistrate Appointing Commissions (99) Judicial Magistrates (4 year term for full-time; 2 year term for part-time) | 6 Members 1 judicial—appointed by Chief Judge of District. 2 lawyers—elected by appropriate county bar. 3 non-lawyers—appointed by appropriate County Board of Supervisors. All serve 6 year terms. |
| Kansas | Constitutional Governor appoints. Hereafter, appointee must stand in retention election at end of each term. | (1) Supreme Court Nominating Commission Supreme Court (6 year term) | 11 Members 1 lawyer-at-large—Chairman—elected by Kansas lawyers. 4 lawyers—one from each congressional district—elected by appropriate county bar. 6 non-lawyers—appointed by governor. All serve 6 year terms. |
| Maryland | Executive Order Governor appoints to interim vacancies only. | (9) Governor's Commission on Appellate Judicial Selection Court of Appeals Court of Special Appeals | 13 Members 1 Chairman—appointed by governor. 6 lawyers—elected by bar. 6 non-lawyers—apptd. by governor. All serve 4 year terms. |

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|-------------------------|--|--|---|
| Maryland (continued) | | Governor's Commissions on Trial Court Judicial Selection (8) Circuit Courts Supreme Bench of Baltimore Municipal Bench of Baltimore People's Courts of Prince George and Wicomico Counties | 11 Members 1 Chairman—apptd. by governor. 5 lawyers—elected by bar. 5 non-lawyers—apptd. by governor. All serve 4 year terms. |
| Missouri | Constitutional Governor appoints. Thereafter, appointee must stand in retention election at end of each term. | (6) Appellate Judicial Commission Supreme Court (12 year term) Court of Appeals (12 year term) | 7 Members 5 Supreme Court Justice—elected by members of Supreme Court. 3 lawyers (one from each court of appeals district—elected by lawyer residents of appropriate district. 3 non-lawyers (one from each court of appeals district)—appointed by governor. All serve 6 year terms. |
| | | Judicial Circuit Commissions (4) Circuit and Probate Courts within St. Louis, Clay, Platt and Jackson Counties (12 year terms) St. Louis Courts of Criminal Correction (12 year term) | 5 Members Chief Judge of District Court of Appeals. 2 lawyers—elected by lawyer residents of appropriate circuit. 2 non-lawyers (one from each circuit)—apptd. by governor. All serve 6 year terms. |
| | Charter of Kansas City City Council appoints. Hereafter, appointee must stand in retention election at end of each term. | Municipal Judicial Nominating Commission Municipal Court of Kansas City (4 year term) | 5 Members Presiding Judge of Circuit Court of Jackson County (Chairman) 2 lawyers—elected by lawyer residents of Kansas City. 2 non-lawyers—apptd. by mayor. All serve 4 year terms. |

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|----------|--|---|--|
| Montana | <i>Constitutional</i> Governor appoints (with Senate Confirmation) to interim vacancy only. Thereafter, appointee must run in non-partisan election at next general election. | (1) <i>Judicial Nomination Commission</i> Supreme Court District Courts | 7 Members District Judge—elected by district judges and certified by Supreme Court. 2 lawyers (one from each congressional district)—appointed by Supreme Court. 4 non-lawyers—apptd. by governor. All serve 4 year terms. |
| Nebraska | <i>Constitutional</i> Governor appoints. Thereafter, appointee must stand in retention election at end of each term. | (51) <i>Supreme Court Nominating Commissions</i> (7) Supreme Court (6 year term) <i>District Court Nominating Commissions</i> (21) District Courts (6 year term) <i>County Court Nominating Commissions**</i> (21) County Courts (6 year term) <i>Juvenile Judge Nominating Commission</i> Juvenile Courts (6 year term) <i>Workman's Compensation Court Nominating Commission</i> Workman's Compensation Court | Each Commission has 9 Members Supreme Court Justice (Chairman)—apptd. by governor. 4 lawyers—elected by lawyer residents of appropriate district. 4 non-lawyers—apptd. by governor. All serve 6 year terms. |

**Nebraska County Court Nominating Commissions—in practice, the members serving on these Commissions often serve also on the corresponding District Court Nominating Commissions.

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|---------------|---|---|---|
| New York City | <i>Voluntary</i> Mayor appoints. | (1) <i>Mayor's Committee on the Judiciary</i> Criminal Court (10 year term) Family Court (10 year term) Civil Court (interim vacancies only) | 24 Members 13 lawyers or non-lawyer—each Presiding Justice of New York City's two Appellate Divisions selects 6 members; one member is selected jointly. 11 lawyers or non-lawyers—appointed by mayor. Serve terms concurrent with the mayor's term. |
| Ohio | <i>Executive Order</i> Governor appoints to interim vacancies only. Thereafter, appointee must run in non-partisan election at end of term. | (12) <i>Supreme Court Nominating Council</i> Supreme Court (6 year term) <i>District Judicial Nominating Councils</i> (11) Court of Appeals and Trial Courts within Appellate District (6 year terms) | 11 Members 5 lawyers—appointed by governor. 5 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—appointed by governor. All serve 4 year terms. 10 Members 5 lawyers—appointed by governor. 5 non-lawyers—apptd. by governor. All serve 4 year terms. |
| Oklahoma | <i>Constitutional</i> Governor and Chief Justice of Supreme Court appoint. Thereafter, appointee must stand in retention election at end of each term. (Appellate Cts.) <i>Executive Order</i> Gov. appts. to interim vacancies (trial cts.) | (1) <i>Judicial Nominating Commission</i> All judicial offices within the state. | 13 Members 6 lawyers (one from each congressional district)—elected by lawyer residents of appropriate district. 6 non-lawyers (one from each congressional district)—appointed by governor. 1 non-lawyer—elected by other commissioners. All serve 6 year terms except member-at-large who serves 2 year term. |

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|--------------|---|---|--|
| Pennsylvania | <i>Executive Order</i> Governor appoints to interim vacancies only. Thereafter, appointee must run in partisan election in next odd-numbered year. | (2) <i>Appellate Court Nominating Commission</i> Supreme Court Superior Court Commonwealth Court | 7 Members 3 lawyers—appointed by governor. 3 non-lawyers—apptd. by governor Supreme Court Justice who is ineligible for retention—appointed by governor. All serve 4 year terms |
| | | <i>Trial Court Nominating Commission</i> Courts of Common Pleas Community Courts Philadelphia Municipal Court Traffic Court of Philadelphia | 5 Members-at-Large+ 2 lawyers—appointed by governor 2 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—appointed by governor. + 2 lawyers from each judicial district with 30+ judges (serve only for appointments within that district—districts with less than 30 judges have 1 lawyer member)—appointed by governor. All serve 4 year terms. |
| Tennessee | <i>Statutory</i> Governor appoints. Thereafter, appointee must stand in retention election at end of each term. | (1) <i>Appellate Court Nominating Commission</i> Court of Appeals Court of Criminal Appeals (8 year terms) | 6 Members 3 members (one resident from each grand division of state—only one can be lawyer)—apptd. by governor. 3 lawyers (one from each grand division of state)—elected by members of Tennessee bar. All serve 6 year terms. |

| State | Type of Plan | Commission(s) and Judicial Offices Encompassed | Selection and Tenure of Commissioners |
|---------|--|---|---|
| Utah | <i>Statutory</i> Governor appoints. Thereafter, appointee must run in non-partisan election at next general election. | (8) <i>Supreme Court Nominating Commission</i> Supreme Court <i>District Court Nominating Commissions</i> (7) District Courts | 7 Members Chief Justice of Supreme Court (Chairman) 2 lawyers—selected by Utah State Bar Assn 2 non-lawyers—apptd. by governor. 1 lawyer or non-lawyer—selected by State Senate. 1 lawyer or non-lawyer—selected by State House of Representatives. All serve 4 year terms. |
| Vermont | <i>Constitutional</i> Governor appoints, subject to confirmation by the Senate. | (1) <i>Judicial Selection Board</i> Supreme Court (2 year term) Superior Court (6 year term) District Court (4 year term) | 11 Members 3 lawyers—elected by lawyer residents of the state. 2 non-lawyers—apptd. by governor 3 state senators (only one may be a lawyer)—elected by State Senate. 3 state representatives (only one may be a lawyer)—elected by State House of Representatives. All serve 2 year terms. |
| Wyoming | <i>Constitutional</i> Governor appoints. Thereafter, appointee must stand in retention election at end of each term. | (1) <i>Judicial Nominating Commission</i> Supreme Court (8 year term) District Courts (6 year term) | 7 Members Supreme Court Justice (Chairman)—selected by Chief Justice of Supreme Court. 3 lawyers—elected by members of Wyoming bar. 3 non-lawyers—apptd. by governor. All serve 4 year terms. |

Biographical Information

The 371 commissioners who responded to our questionnaire were overwhelmingly white (97.8%) and male (89.6%). Only six replies were received from black commissioners (one commissioner listed his race as "mixed" and one was a Chicano). Of course it is well known that the percentages of black lawyers and judges in this country are correspondingly low. A recent statistical profile of the black judge in America concluded:

There are still alarmingly few black lawyers in the country, although the number is rising. Recent statistics indicate that only about 4000 of the nation's 325,000 attorneys are black. Black attorneys constitute slightly more than one percent of the total number of attorneys even though blacks represent approximately twelve percent of the American population. With these statistics in mind it comes as no great surprise that there are few black judges. At the time of our survey [1972] there were 475 federal judges, of whom 31, or almost seven percent, were black. Of 21, 294 full and part time state and city judges, only 255 were black, or slightly more than one percent.¹⁵

Clearly the number of black judges in this country is too low, and improvement in this area is largely dependent upon an increase in the number of qualified black attorneys (a need which must be met by the law schools). However, there is no reason why the judicial nominating commission should remain so unrepresentative in this respect. Perhaps the paucity of non-white lawyers explains the fact that only two of 194 lawyers (including 16 judges) on the commissions were non-white. But that does not explain why only five of the 153 lay members (3.3%) were non-white. Part of the reason for including lay members on the commission is to insure a more representative cross-section of the community. Perhaps the recent conversion of some of the more urbanized states to merit selection such as Pennsylvania, Ohio, Indiana, and the District of Columbia will bring a concomitant rise in minority group representation on the judicial nominating commissions; however, our study indicates that, at least in those states surveyed, the goal of a representative cross-section of the community in terms of racial make-up is not being fulfilled.¹⁶

15. *The Black Judge in America: A Statistical Profile*, 57 JUDICATURE 18 (1973).

16. Although our questionnaire results gave no indication of this, the Executive Director of the Florida Bar has informed us that there is at least one black member on each of the 25 nine-member Judicial Nominating Commissions in Florida. Letter from Marshall Cassidy to Allan Ashman, April 2, 1974.

The percentage of women members was also surprisingly low—10.4%. However, this figure obscures the even more dramatic finding—that only one of the 194 lawyers responding to our questionnaire was a woman. As is the case with black lawyers, women make up a very small percentage of the profession—only 2.8% of all lawyers are women.¹⁷ Of the lay members, 22.3% were women.

The political affiliation of our responding commissioners is more evenly divided although the percentage of Republican members is higher than the national average:

Democrats—47.9% Republicans—45.1% Independents—6.6%

A commissioner was more likely to be 54 years old or older (42.3%) than 47 years old or younger (35.0%):

| | | | |
|----------------|--------|--------------|--------|
| 35 or younger— | 6.8% | 54-59 | —19.5% |
| 36-41 | — 8.5% | 60-65 | —13.2% |
| 42-47 | —19.7% | 66 or older— | 9.4% |
| 48-53 | —22.7% | | |

Almost half (49.6%) of our respondents were lawyers, with an additional 4.7% judges. This result is in harmony with the general half lawyer—half lay make-up of the commission which prevails in most of the merit selection jurisdictions.¹⁸ Among the lay members, bankers and business executives predominated (27.1% of the laymen), along with a sprinkling of educators (7.8%), journalists (4.8%) and medical professionals (3.6%). The rest (56.6%) fall into other occupations: ranchers, salesmen, housewives, etc. As far as we could determine, only one student (a Florida college student) has been appointed to serve as a lay member of a commission.

Thus, as a preliminary observation, it is apparent that the commissioners are predominately lawyers and businessmen. This is not to say that the commissions' work is necessarily dominated by these two groups, but it does leave the nominating commission as an institution open to charges of elitism. As Watson and Downing pointed out in their analysis of the St. Louis lay commissioners, the over-representation of businessmen and bankers tends to undercut the rationale for having lay commissioners.

[T]he largest number of lay nominating commissioners have been spokesmen for the value of the business community. Drawn entirely

17. THE 1971 LAWYER STATISTICAL REPORT, American Bar Foundation (1972).

18. See Table 1 at pp. 27-37.

from banking, commerce, and industrial firms, they have generally shared the values of the corporate lawyers serving on the nominating commission, and have usually deferred to the lawyer commissioners and the presiding judge for assessment of the legal abilities of judicial candidates. In addition, these lay commissioners occasionally have turned for advice to the legal counsel employed by their own business firms.¹⁹

Thus, there is some doubt that this type of lay member really does represent the broad public interest or that he really is better able to ensure that the non-professional attributes of prospective judges are recognized.

The question of representation is, then, a valid one; but it must be remembered that a judicial nominating commission is not meant to be a democratic institution. Indeed, it is meant to be a refinement of the democratic process—adding the informal expert opinion of the commission to the political considerations which inevitably (and arguably should) affect the elected executive who must make the final choice. On the other hand, if the commissions as presently constituted are unrepresentative, there is a danger that this might operate as a substitute for, or at the expense of, legitimate expertise. If this be true the commission may not begin its task objectively, and certain biases will naturally creep into its procedures and its evaluation of potential judges. This issue may be better explored after a look at commission operating procedures.

Commission Operating Procedures

Before evaluating the nominating process, some consideration must be given to the characteristics which should be exhibited by a good selection process. In a paper presented at the National Conference on the Judiciary in 1971, Judge Laurance M. Hyde, Jr., then Dean of the National College of State Trial Judges, catalogued his conception of the attributes of a good judicial selection process. It should, he stated:

- 1) systematically and aggressively seek the best potential judicial talent;
- 2) identify and reject aspirants who are not qualified for the bench;
- 3) operate with sufficient dignity so as not to cause capable lawyers to refuse to be candidates for judicial office;
- 4) provide tenure of such a nature as to encourage each

judge to do the best job of judging of which he is capable and to encourage good lawyers to give up their practices for the bench; and

- 5) deserve and receive public respect and trust.²⁰

Although others may have approached this topic from a different perspective, Judge Hyde's concise list is sufficiently comprehensive to reflect the thinking of most serious commentators on this subject. Since Judge Hyde also is an outspoken proponent of merit selection, his list tends to reflect the expectations of most commentators not only as to the attributes of a good judicial selection process generally but also the attributes of the merit selection process in particular.

If the selection process itself is expected to "systematically and aggressively seek the best potential judicial talent" and "identify and reject aspirants who are not qualified for the bench", the process must include a dynamic component which actively and effectively recruits and screens potential judicial talent. Under the nonpartisan merit selection plan, this role is ascribed to the nominating commission. Thus, if Judge Hyde's comments were extended to the nominating process, it would appear that the nominating commission is expected to play a dynamic role in recruiting and screening candidates, while operating "with sufficient dignity so as not to cause capable lawyers to refuse to be candidates for judicial office" and in a manner which will insure that the selection process will "deserve and receive public respect and trust".

In light of these considerations, it is clear that the operating procedures of the nominating commission are of critical importance in assessing the effectiveness of a merit selection plan. If the commission conducts its business in a careless, disorganized fashion it is almost certain that the plan will not exhibit the attributes of a good judicial selection process. The remaining portions of this chapter analyze the operating procedures of the various nominating commissions. To facilitate such an analysis, commission procedures have been related to each of the essential aspects of the nominating process.

Commission Rule-Making

Unlike the detailed attention which is paid to the composition of the nominating commission, the provisions of the state

²⁰ Hyde, *Good Judges are Made* * * *, JUSTICE IN THE STATES, ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY (West, 1971).

¹⁹ Watson and Downing, *supra* note 11 at 136-137.

constitutions, legislative enactments, and executive orders which establish merit selection plans generally give scant attention to the operations of the nominating commission. Most plans simply require that the nominating commission, by concurrence of a majority of its members, assemble a list containing the names of a minimum number of nominees (usually three) and forward the list to the appointing official within a specified period of time. Where restraints are imposed, they normally are couched in terms so broad or vague as to offer little practical guidance. For example, the Maryland commission is required simply to "seek, receive, and review recommendations and information concerning the qualifications of proposed nominees for appellate judicial office".²¹

Because most merit selection plans do not contain provisions which dictate the procedures to be followed by the nominating commissions, the commissions generally have broad discretion in their recruiting, screening, evaluating, and nominating procedures. In fact, most plans explicitly grant to the nominating commission full authority to adopt any and all rules of procedure which it deems appropriate.

It appears, however, that most of the commissions either have not exercised their authority to adopt procedural rules or, if they have adopted rules, have neglected to commit them to written form. Sixty percent of the commissioners who responded to our questionnaire indicated that the operating procedures of their commission were not written or codified in any manner. This fact has provoked considerable self-criticism among commission members. Many respondents felt that the most important suggestion they could offer for improving the nominating process was the adoption of written procedural rules. An Iowa commissioner remarked, ". . . the meetings [of the commission] tend to be lengthy since we must establish our rules and procedures (such as how do we vote, what role should the presiding judge play) as we go along. At our last session we concluded that we must meet as a group and establish some ground rules."

In addition to provoking a certain amount of self-criticism, this situation apparently has engendered considerable confusion among commission members. The responses to our questionnaire indicated that, in at least seven jurisdictions, members of the same commission disagreed as to whether their

commission had compiled written procedural rules. This confusion can be attributed to two factors. The first is that it appears that some of the newer members of certain commissions were not made aware of the fact that written rules of procedure had been promulgated prior to their tenure on the commission. For example, the Rules of the Jefferson County Judicial Commission in Alabama were adopted in 1954, yet many members of that commission apparently are unaware of the existence of these rules. The second factor which has contributed to this confusion is an apparent disagreement over what constitutes rules of procedure. Some commissions have prepared written policy statements or manuals for new commission members which contain guidelines as to the objective and subjective criteria which should be applied in evaluating the candidates for judicial office. Although the existence of these general standards or policy statements in written form might tend to limit or control the discretion of the commission they clearly are more in the form of "interpretive" than "procedural" rules.²²

However, a sizable minority of commissions have adopted "procedural" rules which limit or control the discretion of the commission. The Alaska Judicial Council and some of the commissions in Colorado, Florida, Iowa, Maryland, Nebraska, and Utah appear to adhere fairly closely to detailed procedural rules which they have adopted in written form. These rules establish quorum requirements, make provision for the calling of commission meetings, outline recruiting and screening procedures, and describe the balloting procedures.

Therefore, the commissions tend to fall into three broad categories insofar as they limit or control their own discretion with regard to the procedures which they employ. On one hand are those commissions which continue to exercise unfettered discretion with regard to the procedures they employ. At the other extreme are commissions which adhere to written procedural rules which they have adopted. In between are commissions which employ a mixture of published lists of standards and policy statements to control the discretion of individual commissioners.

The extent to which a commission "structures" its discretion,

21. *Executive Order Creating the Governor's Commission on Appellate Judicial Selection*, p. 117 (July 6, 1970).

22. For a discussion of the distinction between "interpretive" and "procedural" rules see Cooper, *Administrative Agencies and the Courts* (Ann Arbor: University of Michigan Law School, 1951).

by adhering to written procedural rules,²³ appears to affect the extent to which political considerations or other types of favoritism may enter into commission deliberations and may influence its decisions. Fourteen percent of the commissioners who responded that their commission had *not* adopted written procedural rules felt that political influences were introduced into their deliberations frequently, as opposed to only 8% of the commissioners who responded that their commission had adopted written procedural rules. Of greater importance is the effect which political considerations ultimately have upon the actual decisions of the commissions. Among those commissioners who indicated that their commission had not adopted written procedural rules, 24% believed that political considerations were of *some* importance in determining the eventual selection made by the commission and 6% felt that these considerations were of *decisive* importance. On the other hand, only 15% of the commissioners who indicated that their commission had adopted written procedural rules believed that political considerations were of *some* importance in determining the eventual selection made by the commission and only 2% felt that these considerations were of *decisive* importance.

These statistics may indicate more about the general influence of political considerations upon the decision-making process of the commission than they do about the effect of a more "structured" decision-making process on conscious or unconscious political bias. Accordingly, these influences are treated in greater detail in Chapter 3. However, for present purposes, these statistics do demonstrate certain tendencies which appear to be connected to the commission's exercise of its rule-making authority. Clearly, there is less of a tendency both for political considerations to be introduced into commission deliberations and for political influences to be of decisive importance in the eventual selection made by the commission if the commission adheres to written procedural rules.

This is true even though the procedural rules which presently control the decision-making process of certain commissions do not appear to be geared specifically toward excluding such influences from commission deliberations. None of the written rules adopted by these commissions explicitly bars discussion

of a candidate's political affiliation during commission meetings nor do they contain language which would bar a commissioner from giving some effect to a candidate's political affiliation in reaching his ultimate decision. Certainly, even if such rules were adopted, it would be no more possible to insure the compliance of individual commissioners than it is to insure that a juror will comply with a judge's instruction to disregard prejudicial testimony. However, the formal imposition of such restraints should go far towards creating the proper climate within which these important decisions will be made. Such a climate must be created if the selection process is to exhibit the characteristics outlined by Judge Hyde.

As this study suggests, there are many areas in which the current operating procedures of the various nominating commissions can be improved. However, in order to give effect to any changes or improvements in the operating procedures of the various commissions it will be necessary for the commissions to give much more attention than they have in the past to adopting comprehensive rules of procedure to govern their actions. To be sure, the commissions must retain a certain amount of discretion. The nature of the nominating process is such as to require a good deal of flexibility. However, there appears to be a great need, at present, to "structure" this discretion by adopting procedural rules which describe the methods which will be used by the commission in carrying out its nominating function. The adoption of comprehensive sets of rules to "structure" the discretion of the commissions should lessen the likelihood that certain commissioners will be guided by vague standards and improper influences which have no place in a selection process based on merit.

Commission Meetings, Workload and Time Constraints

A major reason for the failure on the part of many of the commissions to adopt clear-cut procedures which will govern their actions is that many commissions meet infrequently. When they do meet they generally are required to give immediate attention to the business at hand—that of compiling a list of nominees for one or more judicial vacancies to be filled within a rather short period of time. In fact, none of the plans currently require the commissions to meet for any purpose other than to nominate candidates for particular vacancies which have recently occurred.

23. See Davis, *DISCRETIONARY JUSTICE* (Baton Rouge: Louisiana State University Press, 1969) IV.

Since most commissioners are not compensated for the time they spend on commission business and most commissions are not provided with the services of a salaried staff, requiring the commissions to meet more frequently for the sole purpose of formulating or revising procedural rules may place too much of an additional burden on commission members. However, experience has clearly demonstrated that, in the absence of such requirements, the commissioners tend to give less than adequate attention to such matters.

A possible alternative approach to this problem has been taken by the plans in Nebraska and Wyoming. Rather than delegating rule-making authority to the commission, the authority to promulgate rules of procedure which will control the actions of the commission has been delegated to the state's highest court. Such an approach would be consistent with the tendency to repose in the highest court of the state the authority to adopt all rules which govern the operations of the state's court system. However, because this is a relatively recent development, there has not been enough experience to assess the consequences of this approach.

Because most nominating commission members are not compensated for the time they spend on commission business and most commissions are not provided with the services of a salaried staff, the size of commission workload often has a direct bearing upon the commission's ability to give thorough consideration to the qualifications of all potential candidates for a judicial vacancy. Although some commissions normally are required to nominate candidates for only one or two judicial vacancies each year, others consider candidates for as many as forty to fifty vacancies each year. In addition, while certain commissions must consider candidates for only a single judicial office, in certain states a single commission is required to screen and nominate candidates for *all* judicial offices (trial and appellate) within the state.

The Nebraska and Oklahoma plans represent the extremes in this regard. In Nebraska, there is a separate seven-member commission for each seat on the supreme court of the state and members of these commissions often serve out their six-year term without ever having screened a single candidate for judicial office. In Oklahoma, on the other hand, a single commission screens candidates for all judicial vacancies for the trial and appellate courts within the state. One Oklahoma commissioner estimated that during his tenure on the commission,

it has met approximately ten to twelve times per year, selecting nominees for from one to four judicial vacancies on each occasion.²⁴

A heavy workload can have certain negative effects on the selection process. These negative effects generally relate to a commission's ability to recruit and screen potential candidates adequately and are discussed in later sections of this chapter. On the other hand, the positive effect to be derived from a commission's having a workload which is heavy but not unduly burdensome is that frequent exposure to the nominating process should aid in developing the commissioner's expertise in assessing the qualifications of candidates. This is particularly true for lay members of the commission.

Another factor which may have an adverse effect upon a commission's ability to function effectively is the time constraints which are imposed on the commission.

TABLE II
Time Constraints:
Occurrence of Vacancy to Submission of Names

| <i>Within 30 Days</i> | <i>Within 45 Days</i> | <i>None</i> |
|-----------------------|-----------------------|-----------------|
| Alaska | Utah | Alabama |
| Colorado | | Georgia |
| District of Columbia | <i>Within 60 Days</i> | Idaho |
| Florida* | Kansas | Missouri |
| Montana | Maryland | Nebraska |
| Ohio | Wyoming | Oklahoma |
| Pennsylvania | | Vermont |
| Tennessee | <i>Within 70 Days</i> | New York City** |
| | Indiana | |

*Governor may extend time an additional 30 days.

**List of approved candidates is maintained and not limited to a precise formula based on specific vacancies (an approval expires 18 months after it is granted).

The Colorado plan is among the most restrictive, in requiring that the commission forward the names of the nominees to the governor *within thirty days of the creation of the vacancy.*

24. From a speech delivered by Jack R. Givens at the Pennsylvania Judicial Nominating Commissioners Institute on September 20, 1973.

The Key to Judicial Merit Selection

These strict time constraints make it particularly difficult for commissions to recruit and screen potential candidates adequately. This is true even if their operating procedures are fairly well-established. Justice Donald E. Kelley of the Colorado Supreme Court has stated:

The few problems Colorado has emanate from the 30-day period between the creation of the vacancy and the certification by the Commission of the names of the nominees to the governor. Although this shortens the time that the court is unmanned, it does preclude time for a thorough investigation of the candidates.²⁵

Commission Recruitment of Candidates

Upon the occurrence of a judicial vacancy, all merit plans contain explicit provisions to insure that adequate notice of the vacancy, and notice of procedures to be followed in submitting the names of applicants for the vacancy, is published in the newspapers and bar media covering the particular area in which the vacancy has occurred. In some jurisdictions, notice of the vacancy is mailed to every member of the bar qualified to fill the vacancy by reason of their residence alone. In addition, most commissions and individual commissioners are encouraged to actively recruit candidates for the vacancy.

Although workload and time factors often discourage certain commissions or individual commissioners from spending much time in active recruitment of potential candidates, certain plans have built-in devices to encourage such recruitment. When a judicial vacancy occurs in Nebraska, the clerk of the supreme court immediately contacts the chairman of the commission which has the responsibility for nominating candidates for the particular vacancy to ascertain from him the time and place for the first meeting of the commission. By statute,²⁶ this first meeting is required to be a *public* meeting and the clerk is required to inform each commission member and appropriate news media of the time and place for this meeting. The news media are informed that the commission will be interested in receiving at this meeting information relating to

qualified candidates for the vacancy. In addition, the procedural guides furnished to the Nebraska nominating commissioners encourage individual commissioners to actively solicit qualified individuals to accept judicial office "even though these individuals or their friends do not see fit to suggest them as possible candidates at the public meeting".

The Nebraska commission is unusual in using the public hearing as a device to recruit applicants for judicial vacancies. In other jurisdictions, a heavy workload or certain time limitations may preclude the use of such formalized recruitment devices. For example, even though commission members in Oklahoma often attempt to encourage qualified individuals to apply for judicial office, the workload of the Oklahoma commission is so onerous that the use of such formal devices as the holding of public hearings is out of the question, and any solicitation of qualified candidates must necessarily be performed in an informal and uncoordinated fashion. This situation is aggravated when a vacancy occurs in an area of the state with which few, if any, members of the commission are familiar. Given such a situation, commission members must simply hope that publicity of the judicial vacancy will be sufficient to encourage an adequate number of qualified candidates to come forward.

Although most commissioners are encouraged to "beat the bushes" for qualified candidates, the stringent time limitations contained in many plans often make recruitment by commission members extremely difficult. Much of the thirty-day period allotted to many of the commissions is consumed in screening applicants who come forward of their own volition, making active recruitment of additional candidates extremely difficult.

Certainly, active recruitment poses certain problems. A commission member who personally solicits a certain individual whom he feels is well qualified runs the risk of having this individual assume that he ultimately will be nominated if he throws his hat in the ring. If the commission then fails to nominate this individual, both the commissioner and the candidate himself may be embarrassed. The plans in Kansas, Missouri and Wyoming have attempted to lessen the likelihood that such a situation will occur by allowing the commission to "tender nomination" to an individual before he has indicated his willingness to serve, if the commission believes that the individual is qualified but may not apply for judicial office unless he is given such prior assurance of nomination. In prac-

25. From a speech delivered by Justice Kelley at the Maryland Judicial Nominating Commissioners Institute on May 24, 1973. It should be noted, however, that the Colorado plan allows the commission to begin receiving applications well before the occurrence of the vacancy if the vacancy can be anticipated.

26. NEB. REV. STAT. 24-810.

tice, however, this has seldom been done; and commission members have resorted to using personal encouragement without assurances of ultimate nomination or have tried to solicit the aid of influential members of the bench or bar in an effort to encourage the potential candidate to apply for the vacancy.

In their study of the nonpartisan court plan in Missouri, Watson and Downing pointed out the existence of a "recruitment politics", which was based on the assessment of both the recruiters and the recruited as to how the system operates or should operate. The authors found that "many and perhaps most lawyers feel that bar folkways dictate that you be asked to be a judge, rather than overtly seeking the position".²⁷ In conducting their study, Watson and Downing spoke to a number of lawyers who said that the reason they had never sought a judgeship was simply that no one had ever asked them.

If Watson and Downing's assessment of the "politics" of recruitment is correct, active recruitment of potential candidates must be viewed as an important function of the commission. In this regard, the first of Judge Hyde's attributes of a good selection process ("[i]t should systematically and aggressively seek the best potential judicial talent") is of particular relevance. Merit plans which create an environment which discourages such active recruitment by the commission—by virtue of imposing an onerous workload, strict time constraints, or other limiting factors—clearly fall short of the desired objective.

Commission Screening

The second of Judge Hyde's attributes of a good judicial selection process ("[i]t should identify and reject aspirants who are not qualified for the bench") is directly related to the manner in which the commission goes about screening candidates for a judicial vacancy. Because the screening procedures utilized by various commissions vary greatly, the use of the following devices will be dealt with separately in discussing commission operations:

1. candidate questionnaires;
2. commission investigations;
3. independent agency investigations;
4. preliminary deliberations to pare down the list of candidates;

5. candidate interviews.

Candidate Questionnaires. Once a judicial vacancy has been publicly announced, the nominating commission usually will begin to receive correspondence from lawyers, judges, and interested citizens recommending certain individuals to the commission. In addition, the commission will receive direct correspondence from lawyers who wish to be considered for nomination. In most jurisdictions, the commission will then forward a "questionnaire" to all those individuals who have been brought to the attention of the commission. These questionnaires are of varying length and depth. For example, the one-page questionnaire utilized by the Kansas Supreme Court Nominating Commission contains only very general questions concerning the potential candidate's personal and professional history. On the other hand, the questionnaire used by the Pennsylvania Appellate Court Nominating Commission is nine pages long and, in addition to very particularized questions concerning the candidate's personal and professional history, contains an "open-ended" question which seeks to elicit the potential candidate's attitudes and opinions concerning the law and his qualifications for the bench.

In those jurisdictions which forward questionnaires to potential candidates who have not contacted the commission directly, and therefore have not indicated whether they will be available for judicial office, the candidate questionnaires used by the nominating commissions normally contain a question concerning the candidate's willingness to serve if nominated by the commission and appointed by the governor. Thus, aside from providing the commission with basic information concerning applicants, the questionnaire can play an important role in recruiting potential candidates. The commission's forwarding of the questionnaire to persons who have been recommended to it by others acts as an invitation by the commission. Thus qualified individuals who would not otherwise have applied for the judgeship become potential nominees.

In addition to general questions concerning the candidate's background, most of the candidate questionnaires ask the candidate to submit the names of individuals who are able to comment upon his qualifications for judicial office. The Pennsylvania questionnaire contains an interesting approach in this regard. The candidate in Pennsylvania is asked to submit the names of up to five judges before whom he has appeared most often during the previous five years and the names of the

27. Watson and Downing, *supra* note 11, at 65.

adversary counsel against whom he has litigated his primary cases over the previous five years. The inclusion of such questions goes far toward decreasing the likelihood that the candidate has "padded" his questionnaire with overly favorable references.

Commission Investigations. The extent to which any of the commissions are able or willing to follow up on information supplied in the questionnaire, by contacting personal references or other individuals who should be familiar with the candidate, by virtue of their being connected with schools which the candidate has attended or with courts before which the candidate has practiced, will depend upon a number of factors. Such factors include the commission's workload and time constraints, the commission's preliminary assessment of the candidate's qualifications, and whether the commission has learned of something in the candidate's past which would render him automatically unfit to sit on the bench.

Although some of the commissioners are more thorough than others in this regard, 89% of the commissioners who responded to our questionnaire indicated that, beyond reviewing the personal and professional biographical data submitted to the commission, they make an additional personal effort to learn more about the candidate.

Independent Agency Investigations. Information which would result in a commission's decision that a particular candidate is unfit for judicial office usually is obtained as a result of an independent investigation of the candidate's background. Most commissions secure from each applicant a waiver of any privilege which the candidate has against receipt of credit, tax, criminal, medical, or psychiatric information. In most jurisdictions, such a waiver is contained in the questionnaire initially forwarded to the potential candidates.

Although many commissions limit such investigations to the securing of a credit report, others go much farther. For example, the chairman of the Oklahoma commission routinely requests that the Oklahoma Crime Bureau and the Oklahoma Tax Commission investigate each candidate. The Crime Bureau conducts field interviews with from three to five lawyers, laymen, or judges from the appropriate community. In addition, the Crime Bureau supplies the commission with any criminal report that may exist on the candidate. This report includes traffic offenses. The Tax Commission informs the commission as to whether the candidate has reported and paid his income taxes for a period

of five years prior to the candidate's application. Evidently this investigation is considered necessary because a previous governor of Oklahoma had made an appointment from a list of nominees only to discover later that the appointee had not reported or paid his income taxes for several years.

Preliminary Deliberations. After reviewing the information supplied directly by the candidates, obtaining information concerning the candidates' qualifications from other individuals, and securing reports from one or more investigative agencies, many commissions may find it necessary to assemble to pare down the list of candidates prior to conducting candidate interviews and entering into more serious deliberations. Whether such a preliminary "pruning" is necessary depends upon a number of factors, including the number of candidates for a particular vacancy and whether the commission ultimately will conduct personal interviews with the candidates. Often the list of candidates for a particular vacancy is so long that the commission may find it impossible to interview each applicant. Even if the commission does not contemplate holding personal interviews with the candidates, the list of candidates may be so long and contain so many candidates who are not deemed suitable for consideration that such a paring down may be necessary before the commission enters into more serious deliberations.

Often this paring down process is conducted by a subgroup of the commission. In Missouri, for example, this initial pruning is sometimes accomplished informally by the lawyer and judicial members of the commission, with the lay commissioners deferring to their judgment.²⁸ In New York City, all candidates for Family or Criminal Court appointments must first be interviewed and approved by a sub-committee before they can be interviewed by the full committee.²⁹ On the other hand, certain commissions have deemed it necessary to call a general meeting of the commission and to proceed by having the entire commission cast ballots which rank those candidates whom the commissioners deem to be worthy of further consideration.

Candidate Interviews. Once all the information concerning each of the candidates warranting serious commission con-

28. See Watson and Downing, *supra* note 11, at 103.

29. "Procedures and Policies of the Mayor's Committee on the Judiciary" (as agreed to January 29, 1974).

sideration has been assembled, most commissions conduct a confidential interview with each candidate. Normally, each commissioner has received copies of all documents and correspondence received by the commission which are relevant to the applicant's candidacy prior to the scheduled date for the interview. Certain commissions have developed strict procedures for conducting such interviews. In Colorado, for example, the chairman begins the interview by questioning the candidate in an effort to clarify questions which may have been raised by the information which the candidate submitted directly to the commission. The chairman then proceeds to draw the candidate out on general matters concerning the candidate's legal philosophy. When the chairman has finished, each member of the commission, in order, questions the candidate as to specific matters deemed relevant to the applicant's candidacy.

In those jurisdictions which presently do not conduct personal interviews with the candidates, many commissioners, in responding to our questionnaire, indicated that they believed that the addition of personal interviews with the candidates was the most important suggestion they could offer for improving their commission's screening process. Generally, the non-lawyer members appeared to be more concerned than the lawyer members that this change be effected. They believed that adding candidate interviews to the screening process would put them on a par with the lawyer members of the commission in evaluating the individual candidate. One non-lawyer commission member in Iowa stated:

The attorneys [on the commission] are usually well acquainted with the particular candidates while some of the other commission members may be less well associated. The opinion of the attorneys is usually relied on heavily for this reason. I think personal interviews might serve to give the whole commission a better perspective.

At present, it appears that none of the nominating commissions employ *all* of the basic screening devices—candidate questionnaires, commission investigation, independent agency investigation, preliminary deliberations to pare down the list of candidates, and candidate interviews—to their full extent. Most commissions find it necessary to rely on the use of certain of these devices to the exclusion of others. For example, although the Oklahoma commission appears to go the farthest in its use of independent investigative agency reports, it does not conduct personal interviews of candidates. This is not because the commission decided that personal interviews would not be worthwhile. Rather, it is attributable to the fact that

the commission is faced with a tremendous workload and is not provided with a salaried staff to aid in the handling of that workload. As one commission member stated:

I would have to be a paid employee of the state of Oklahoma in order for us to consider conducting personal interviews of candidates.³⁰

Clearly, the use of each of the aforementioned devices adds an extra dimension to the screening process. The proper use of each device enhances a commission's ability to "identify and reject aspirants who are not qualified for the bench". In addition, at no time during our study did individual commissioners indicate that the proper use of any of these devices was a waste of time or money. Therefore, in all merit plan jurisdictions, care should be taken to insure that the commission's business is organized in a manner which allows the commission to employ any or all of the screening devices so that it will select the best judicial talent available and eliminate from consideration those who are not qualified to hold judicial office.

Confidentiality

All nominating commissions attempt to keep all information received on a particular candidate during the screening process in strictest confidence. Although the public meeting requirements of certain plans may tend to subject certain information to public disclosure, even in these jurisdictions the commissions may receive applications after the public meeting, and they must keep all information received subsequent to the public meeting confidential. In addition, the actual deliberations of the commissions in all merit plan jurisdictions are confidential.

There appears to be little or no disagreement that at least this much confidentiality is absolutely necessary to insure that an adequate number of qualified individuals will apply for judicial positions without fear of having their reputations tarnished. The fear is that matters discussed during commission deliberations (most of which necessarily are based on hearsay) might become public knowledge. Maintaining confidentiality also increases the ability of commission members to evaluate the candidates as objectively as possible, without fear of subsequent embarrassment or intimidation.

Although there is general agreement that the information

³⁰ Speech by Jack R. Givens at Nebraska Judicial Nominating Commissioners Institute on November 9, 1973.

received concerning applicants should be kept confidential, there is considerable disagreement over the advisability of keeping the *names* of individual applicants confidential. In this regard, the strictest confidentiality is maintained in jurisdictions such as Colorado, where only the name of the applicant who ultimately is appointed to the judicial office is divulged. The other extreme is typified by the merit plan in Jefferson County, Alabama, where the commission's rules explicitly require that the commission publicly announce the names of all those individuals who have been submitted to it for consideration for nomination. The Oklahoma plan is representative of the majority viewpoint as to this matter. In Oklahoma, only the names of the three nominees submitted to the governor are publicly disclosed.

TABLE III
Confidentiality Requirements

| <i>Names of All Applicants Made Known</i> | <i>Names of Nominees Only Made Known</i> | <i>Name of Appointee Only Made Known</i> |
|---|--|--|
| Alabama | Florida | Colorado |
| Alaska | Idaho* | New York City |
| Missouri* | Indiana | Ohio |
| Tennessee | Iowa | Vermont |
| | Kansas | Wyoming |
| | Maryland | |
| | Montana** | |
| | Nebraska | |
| | Oklahoma | |
| | Pennsylvania | |
| | Utah | |

*At discretion of judicial nominating commission (council)

**At discretion of the governor

The extent to which confidentiality should be maintained during the nominating process appears to be one of the most difficult questions facing the commissions. The reasons for insuring the confidentiality of certain information received during the nominating process are directly related to the goal

of creating a selection process which will "operate with sufficient dignity, so as not to cause capable lawyers to refuse to be candidates for judicial office." However, the public generally is suspicious of important governmental processes which appear to be cloaked in secrecy. Although it is unlikely that a commissioner will be pressured by individual citizens to disclose the names of applicants, or information concerning the applicants, or even the commissioner's evaluation of each applicant's chances for nomination, a commissioner often may be pressured by the news media or a representative of a special interest group to disclose such information.

The applicant who feels, for whatever reason, that his chances may be enhanced by receiving attention in the news media or by seeking the support of a special interest group, may prompt representatives of the press or the special interest group to elicit information from individual commissioners. Although the commissioner may feel that he has been placed in the untenable position if such a situation develops, it appears that members of the press generally have understood the need to keep certain information confidential once the need for confidentiality has been explained to them. Therefore, the need for maintaining the confidentiality of certain information does not appear to be incompatible with the goal of establishing a selection process which will "deserve and receive public respect and trust" as long as the commission can justify the need for confidentiality and is willing to explain this need to persons seeking information from individual commissioners.

Commission Nomination

Once the nominating commission has screened all available candidates, the commission is required to meet for the purpose of reducing the field to the actual number of candidates to be nominated. After considerable discussion of the qualities and qualifications of the applicants, each commissioner indicates his preferences by casting a ballot. Not only do balloting procedures differ from one commission to another, but more than one balloting technique may be used at different times by a single commission. One of the Missouri commissioners interviewed by Watson and Downing described the balloting techniques of his commission as follows:

In reducing the list to the three persons to be submitted to the Governor, no standard procedure is followed. Sometimes the commissioners rank the entire list of names according to their preferences,

using a preferential ballot type of procedure. At other times the commissioners each vote for three persons of their choice.³¹

Regardless of the balloting technique utilized, commissions traditionally have voted by a secret ballot. Although the decision to vote by secret ballot generally is made by the commission, sometimes a secret ballot is required by the constitutional or statutory provisions creating the plan.

In Nebraska there is a requirement that the commission vote orally. It should be noted that this requirement was not written into the original plan, but came about as a result of a constitutional amendment adopted in 1972 and implemented by a 1973 legislative enactment after expressions of concern over the methods utilized by certain Nebraska commissions in arriving at their list of nominees.³²

Evidently, certain commissions in Nebraska had been suspected of engaging in what has been called "panel-stacking". Watson and Downing have described this practice as "any form of panel selection wherein the nominating commission, through the choice of a particular combination of nominees, seeks to preempt the appointing function, or where the commission accedes to the governor's express wishes by nominating the person he desires to appoint."³³ Watson and Downing found certain variations of "panel-stacking" to be present in Missouri.³⁴ Apparently, the variation which was suspected to be present in Nebraska is that described as "panel-loading"—selection of a combination of nominees so that the governor is forced to appoint someone he does not want, but who is acceptable as the lesser of two or three evils.

It is questionable whether the requirement of an oral vote will produce the desired result of preventing "panel-stacking". In fact, such a procedure may increase the likelihood that individual commissioners will succumb to pressures by other commission members. However, it is too early to assess the consequences of such a development.

Submission of Names to Appointing Official

After a commission has decided which candidates it will nominate for a particular vacancy, it normally is required to list the names of these candidates in alphabetical order and

31. Watson and Downing, *supra* note 11, at 103.

32. For similar reasons, Alaska adopted an "open ballot" procedure in 1967 (see discussion on p. 157).

33. *Id.* at 107.

34. *Id.* at 101.

forward the list to the appointing official. Under most merit plans, the commission is required to submit the names of three nominees for each vacancy. However, in states in which the plan covers trial level courts in sparsely populated areas, the plan often calls for the submission of the names of two nominees.

TABLE IV
Submission of Names to Appointing Official

| Jurisdiction | Number of Nominees | Information Supplied To Appointing Official |
|-------------------------------|--------------------------|--|
| Alabama (Jefferson County) | 3 | Names Only: Commission states to governor that no significance should be attached to the order in which the names are listed |
| Alaska | 2 or more | Names Only |
| Colorado | 3/Appellate 2-3/Trial | Names Only*: Governor may also ask to consult with commission members |
| D. C. | 3 | Names Only |
| Florida | 3 or more | Names Only |
| Georgia | 3 | Names Only |
| Idaho | 2 - 4 | Names Only |
| Indiana | 3 | Written evaluation of each nominee based on considerations set out in the statutes |
| Iowa | 3/Appellate 2/Trial | Names Only: Alphabetical order |
| Kansas | 3 | Names Only |
| Maryland | 5 - 7 ⁺ | Names Only: Alphabetical order |
| Missouri | 3 | Names Only* |
| Montana | 3 - 5 | Names Only |
| Nebraska | 2 or more | Names Only* |
| N. Y. C. | ** | Committee may designate certain candidates as "exceptionally well-qualified" |
| Ohio | 3 | Names Only |
| Oklahoma | 3 | Names Only |
| Pennsylvania | 3 ⁺⁺ | Names Only |
| Tennessee | 3 | Names Only |
| Utah | 3 | Names Only |
| Vermont | 3 | All information the commission deems appropriate |
| Wyoming | 3 | Names Only |

*Governor may request additional information

⁺Commission may submit less than 5 names if an incumbent is seeking reappointment

**A list of approved candidates is maintained by the Mayor's office and is not limited to a precise formula based on specific vacancies

⁺⁺Fewer than 3 names may be submitted upon majority vote of commission and prior approval of the governor

Most plans attempt to insure that the appointing official and the nominating commission will remain independent from each other throughout the selection process. Some plans actually contain provisions which explicitly state that neither should attempt to influence the other. Still other plans carry this to an extreme and provide that *only the names* of the nominees, and *nothing more*, are to be submitted to the appointing official. However, recognizing that the appointing official might require or desire some guidance in this regard, many plans require or allow the commission to submit all the information accumulated on the nominees to the appointing official along with the list of names. In Colorado, after the commission has submitted its list of nominees, the governor may ask to consult with commission members or request that the information which the commission has compiled on particular nominees be forwarded to him. The Indiana plan goes even further, requiring that the commission submit to the appointing official its written evaluation of each nominee. This evaluation must be based on evaluative criteria which are clearly delineated in the statutes.

Commission Evaluation of Candidates

When a nominating commissioner evaluates an applicant for a judgeship, the candidate's background, professional skills, character and recommendations all naturally come under consideration. In our questionnaire, we attempted to isolate particular components of these four facets of the hypothetical applicant by asking our respondents to use a one to seven ranking system, "one" meaning that the commissioner felt this particular quality or qualification to be essential for every candidate for judicial office, and "seven" signifying that the possession or non-possession of this quality was of absolutely no significance in evaluating the applicant.³⁵ A series of qualities and qualifications was then listed. After tabulation we were able to determine the relative importance of these

qualities in the minds of those who do the actual nominating. We also asked the individual commissioner some direct questions about his own evaluational approach as well as the approach of his commission.

We recognized from the outset the difficulty in articulating the ingredients for a good judge. This difficulty once led the *New York Times* to remark that the recipe for a good judge was a "pinch of all virtues stirred in integrity." As Professor Maurice Rosenberg wrote:

An inquiry such as this probes so deeply into imponderables that it may be rash to enter upon it even with the greatest diffidence. Obviously, the custodians of every sector of human activity are eager to compile a list of qualities that 'best equip' a man to perform the chosen work with excellence, but everywhere the composition of the list is notoriously elusive. It is particularly obscure when the qualities sought are personal, subjective and human. Yet as hard as the task may be, there is a special urgency for finding the human qualities in a judge that are most promising and the flaws that are most damaging. More than the teacher, the engineer, or the lawyer, the judge acts directly upon the property, liberty, even life, of his fellows.³⁶

Professor Rosenberg's article is perhaps the most perceptive inquiry to date into the relative merits of criteria used in the selection of judges. By using much the same methodology as he employed when he questioned judges directly, we have been able to ascertain which qualities and qualifications most impress those who do the nominating.

The Candidate's Background

Our findings with respect to the importance which the commissioners attach to the candidate's age were inconclusive. The data generally confirmed our initial understanding that extreme youth or extreme old age is a handicap with forty to fifty-nine seen as the optimum age. However, many commissioners wrote that an older applicant might be suitable for the appellate bench (particularly if he had been a trial judge) yet be considered too old to begin a term as a trial judge. The general feeling seemed to be summed up by one commissioner's explanation that "age is an individual matter, not controlling." Table V presents the tabulation as to the importance of the candidate's background.

35. See the "Scoring Key" in Appendix 2-A for the entire ranking scale.

36. Rosenberg, *The Qualities of Justices—Are They Strainable?* 44 *HAS L. REV.* 1063, 1064 (1966).

TABLE V
Background Factors as Criteria for
Evaluating Candidates

| Average | Factors | Rankings in Percentages | | |
|---------|--|-------------------------|------|-----------------------|
| | | Most Relevant 1-2 | 3-4 | Least Relevant 5-7 |
| 1.171 | Mental health | 97.2 | 1.7 | 1.1 |
| 1.750 | Physical health | 80.8 | 15.1 | 4.1 |
| 3.557 | Previous service as a judge | 22.4 | 52.6 | 25.0 |
| 3.734 | Law school record | 26.0 | 41.0 | 32.1 |
| 3.901 | Knowledge of the community | 17.4 | 46.1 | 36.5 |
| 3.904 | Active in professional activities | 13.7 | 54.5 | 31.8 |
| 4.180 | Experience in supervising | 10.8 | 48.5 | 40.6 |
| 4.188 | Previous service as prosecutor | 11.9 | 47.0 | 41.0 |
| 4.358 | Active in civic, community affairs | 11.1 | 40.2 | 48.8 |
| 4.657 | Law school candidate attended | 5.0 | 42.1 | 53.0 |
| 4.889 | Undergraduate school | 3.9 | 30.8 | 65.3 |
| 5.381 | Past partisan political activity | 3.9 | 24.3 | 71.8 |
| 5.475 | Previous service as elected statewide official | 2.8 | 19.5 | 77.8 |
| 5.533 | Previous service as elected local official | 3.0 | 17.5 | 79.5 |

Considerations of health are paramount. In fact, mental health received the highest ranking of all with 90% of the responses being "1". Various responses also noted special concerns: alcoholism, vision or speech difficulties, vigor, nervous condition, and, as one perceptive respondent noted, "wife's health". Otherwise, however, the candidate's background appears surprisingly unimportant in comparison with his other qualifications. Commission members do not stress the candidate's law school record, and are quite unimpressed with the prestige of his law school or his undergraduate record. We found that more experienced commissioners are prone to disregard the prestige of the candidate's law school, and contrary to what one might suspect, lay members are far more influenced

by the candidate's legal education than are the members of the bar.

Perhaps more significant is the commissioners' disregard for previous public service. Although previous service as a judge is naturally seen to be of some importance, service as a prosecutor is regarded coolly, ranking below activity in professional (bar) affairs and general supervisory activities. Activity in civic affairs ranked even lower, and being an elected official at either a state or local level ranked at the very bottom of all the attributes, with a majority of the commissioners indicating that this activity was either insignificant (6), or of absolutely no significance (7) to their decision.

Even if the politics is characterized as "past honorable partisan political activity", the commissioners' answers indicate that they are aware that their mission is to exclude political consideration. However, lawyers and laymen differed strongly in their evaluation of past public service. Laymen were much more impressed with civic activity, supervisory experience, and knowledge of the community as well as previous service as a judge or prosecutor. Nor were lawyers as a group more impressed by extensive professional activities, as might be expected. However, when the lawyer members were further pared down to only those appointed or elected by their bar association, (i.e., excluding those lawyers who were appointed by the executive) such bar activity did attain its hypothesized importance. This suggests that it may be somewhat misleading to lump all lawyers as a single interest group.

As Watson and Downing demonstrated, bar loyalties and rivalries can significantly affect the way lawyer members approach the selection process.³⁷ Bar politics aside, more orthodox political party affiliation may also affect the evaluation process to some extent. For example, Democratic commissioners (even though having a greater proportion of lawyers in their ranks) also tend to put more stock in past activity in civic affairs and in the candidate's knowledge of the community. This accords with the grassroots tradition of the Democratic party, but it also suggests that although the differences in perceptions between lawyers and laymen generally are quite significant, party politics (or at least ingrained political philosophy) may cut across those differences.

37. Watson and Downing, *supra* note 11.

Professional Skill

The criteria in Table VI are concerned with the applicant's background as a lawyer.

TABLE VI
Professional Skills as Criteria for
Evaluating Candidates

| Average | Factors | Rankings in Percentages | | |
|---------|--|-------------------------|------|-----------------------|
| | | Most Relevant 1-2 | 3-4 | Least Relevant 5-7 |
| 1.276 | Reputation for propriety and integrity in legal matters | 95.0 | 3.0 | 1.9 |
| 1.366 | Reputation for fairness | 91.4 | 7.0 | 1.7 |
| 1.573 | Professional reputation | 86.6 | 10.1 | 3.3 |
| 1.906 | Always well-prepared, thorough | 79.9 | 17.9 | 2.3 |
| 2.160 | Knowledge of legal procedure | 70.0 | 24.3 | 5.8 |
| 2.370 | Abreast of legal developments | 58.0 | 36.6 | 5.9 |
| 2.772 | Level of skill in communication | 44.7 | 45.5 | 9.7 |
| 2.819 | Level of skill in written communication | 44.5 | 45.0 | 10.6 |
| 3.036 | Amount of trial experience | 33.2 | 55.5 | 11.3 |
| 3.265 | Number of years practiced | 28.2 | 52.3 | 19.5 |
| 3.388 | General area of practice | 27.3 | 49.1 | 23.5 |
| 3.472 | Knowledge of technical substantive law in a particular field of practice | 26.3 | 49.5 | 24.2 |
| 3.494 | Honors, distinctions as lawyer | 24.4 | 53.6 | 21.9 |
| 3.953 | Amount of appellate experience | 13.1 | 51.7 | 35.2 |
| 4.918 | Degree of success reflected by number of cases won | 3.1 | 35.2 | 61.7 |
| 4.997 | Degree of success (financially) | 3.3 | 32.5 | 64.1 |

What stands out in these results is that subjective considerations such as reputation, knowledge, skill in communication, all clearly outrank the more easily ascertainable and measurable qualifications such as amount of experience, number of honors, type of practice and degree of success. When confronted with this question directly, 70.3% of the respondents replied that they themselves placed greater emphasis on the more subjective attributes and 37.6% felt that their commission emphasized the more objectively ascertainable information. However, 51.5% said that their commission employed the more subjective scrutiny more often as a basis for vetoing a particular candidate than as a positive standard for selection. The penchant for subjectivity was not shared equally by all groups of commissioners. For example, laymen were more likely to rely upon the objective facts about the applicant (40.5%) than were lawyers (18.6%).

More specifically, the older (and more experienced) commissioners showed greater concern over the number of years the applicant had practiced law, while younger members emphasized oral and written skills. Lay members, with a few exceptions noted below, tended to assign more weight to nearly all of the listed indicators of professional skill while lawyers tended to be more skeptical in their regard of an applicant's legal skills. However, lawyers were much more interested in applicant's years of practice, especially his trial and appellate experience, than were laymen. Also, the lawyers were more interested in the applicant's success as a lawyer, both financially and in terms of cases won.

The lawyer members' emphasis upon *experience* as a lawyer, in terms of years, type of practice, and measurable success tends to undermine their claim that they placed more reliance on subjective evaluation than laymen. This may indicate that a lawyer's subjective evaluation presumes an experienced, successful practitioner, while the layman is able to focus more precisely upon the task of choosing the best new judge rather than selecting the most successful lawyer for the judgeship. At any rate, it is perhaps reassuring that reputation for integrity and for fairness top the list while degree of financial success is at the bottom.

Character and Personality

These qualities are, for the most part, not peculiar to lawyers or judges, but, as is indicated in Table VII, they are crucial to the selection of judges.

TABLE VII
Character, Personality and Motivation as
Criteria for Evaluating Candidates

| Average | Factors | Rankings in Percentages | | |
|---------|---|-------------------------|------|-----------------------|
| | | Most Relevant 1-2 | 3-4 | Least Relevant 5-7 |
| 1.332 | Not susceptible to influence | 92.1 | 6.4 | 1.4 |
| 1.412 | Possessed of moral courage | 92.4 | 6.1 | 1.4 |
| 1.449 | Open-minded, objective | 91.7 | 6.1 | 2.2 |
| 1.691 | Emotionally stable | 85.9 | 11.3 | 2.8 |
| 1.989 | Desire to serve as judge | 74.9 | 17.6 | 7.5 |
| 2.058 | Decisive, not dilatory | 74.3 | 22.7 | 3.1 |
| 2.061 | Considerate of others | 73.0 | 23.4 | 3.7 |
| 2.070 | Demonstrated self-discipline | 71.6 | 24.3 | 4.2 |
| 2.176 | Courteous | 68.2 | 26.4 | 5.4 |
| 2.203 | Patient | 65.7 | 29.0 | 5.3 |
| 2.289 | Punctual in keeping appointments, schedules | 65.0 | 29.4 | 5.6 |
| 2.292 | Industrious, will work long hours | 63.1 | 32.6 | 4.5 |
| 2.358 | Understanding, empathetic | 60.3 | 35.2 | 4.5 |
| 2.378 | Knowledge of human nature | 58.1 | 36.7 | 5.3 |
| 2.708 | Willingness to serve at present judicial salary | 55.7 | 29.2 | 15.0 |
| 2.712 | Credit rating | 55.6 | 27.7 | 16.8 |
| 2.804 | Humble, not over-bearing | 48.0 | 40.9 | 12.0 |
| 2.972 | Professional, neat appearance | 34.3 | 49.7 | 16.1 |
| 2.997 | Dedicated to bench as a lifetime job | 48.3 | 31.8 | 19.8 |
| 3.011 | Aura of dignity | 39.4 | 45.4 | 15.2 |
| 3.746 | Strong-minded | 19.7 | 51.0 | 29.3 |
| 4.235 | Sense of humor, witty | 11.2 | 46.6 | 42.2 |

As can be seen by the averages, the commissions are quite interested in the character and personality of their future judges. In this respect our findings differ little from Professor

Rosenberg's survey of the judges themselves. Although Professor Rosenberg's list of criteria was somewhat different from ours, he discovered a similar focus upon the candidate's non-measurable qualities:

A striking feature of these highest ranking attributes is that they tend to focus upon the personality or person of the candidate—what he is rather than what he has done, his innate or intrinsic qualities rather than his 'external' attainments.³⁵

This concern for each candidate's character and personality is wholly understandable, and it is not surprising that laymen should be particularly sensitive to these human qualities. The difficulty is that this concern is not easily articulated or structured. We will attempt to deal more fully in our recommendations with the task of structuring the evaluation.

Generally, lawyers showed less concern for the applicant's appearance, strong-mindedness, wittiness, decisiveness, punctuality, self-discipline, knowledge of human nature, and credit rating than the laymen. However, the lawyers, perhaps with a concern drawn from their own experiences, were more sensitive to the notion that the applicant not be "susceptible to influence".

Younger commissioners give noticeably less weight to punctuality, wittiness and personal appearance or to an applicant's professional dedication to the bench as a lifetime job. Conversely, older members and Republican members tended to put more stock in neat appearances, punctuality, wittiness and strongmindedness. A final quirk is that those commissioners who have served on the commission longest seemed to have noticeably higher regard for courtesy as a character trait. (Does this say something about their job?)

We also asked the commissioners whether there was any quality which would immediately disqualify a prospect in their own opinion. Almost 90% answered "yes", and the range of "vices" was extraordinary. Most commissioners wrote that dishonesty or lack of integrity was "enough", with a surprising number of respondents concerned about alcoholism. In other responses, individual biases surfaced: "atheist or agnostic", "divorced", "homosexuality", "member of ACLU", "Archie Bunker type". By contrast, only 50% could think of a single quality which would make a candidate pre-eminent above otherwise equally qualified candidates. Again integrity topped the list, but legal experience and legal ability were also in the

35. Rosenberg, *supra* note 36, at 1067.

forefront. The sheer number of differing responses is strong testimony to the difficulty of the commissioners' task as well as to the diversity of opinion among them.³⁹

Interest Group Recommendations

Finally, we wondered whether a candidate armed with a recommendation from an interest group would impress a commission more favorably. Apparently it depends upon the interest group.

TABLE VIII
Recommendations: Relevance for
Evaluating Candidates

| Average | Recommendation | Rankings in Percentages | | |
|---------|--|-------------------------|------|-----------------------|
| | | Most Relevant 1-2 | 3-4 | Least Relevant 5-7 |
| 3.092 | From bar groups | 39.5 | 43.2 | 17.3 |
| 3.143 | From other commission members | 39.3 | 40.2 | 20.5 |
| 4.741 | From public officials | 9.6 | 34.2 | 56.8 |
| 5.104 | From non-legal professionals and business associations | 6.1 | 25.8 | 68.1 |
| 5.106 | From <i>Martindale-Hubbell</i> | 8.5 | 29.5 | 62.2 |
| 5.729 | From labor unions | 2.8 | 14.4 | 82.7 |
| 5.763 | From civil rights groups | 2.2 | 14.1 | 83.5 |

While a strong recommendation from a bar group or from other commission members ranked the highest, they still ranked lower overall than most character and personality traits (e.g., approximately equal to "aura of dignity"). Other recommendations were almost disregarded, with a strong recommendation from a public official closely edging out an "a" rating in the *Martindale-Hubbell* legal directory. Interestingly, despite its unfamiliarity to many lay members, *Martindale-Hubbell* was relied upon almost as much as recommendations from non-legal associations. Laymen were more responsive to recommendations

from such associations as well as from public officials. Since all but one laymen were appointed by the executive it is not too surprising that these laymen were more receptive to recommendations from public officials. Whether they *should* be is another question. However, bar appointees indicated that they did not listen to recommendations from bar groups any more than they did from executive appointees.

Finally, a recommendation from a labor union or a civil rights group was ignored by nearly all of the commissioners (only 26 respondents gave either of them a ranking of 1, 2, or 3). Democratic members were slightly more receptive to these groups. But on the whole, this finding perhaps represented the hardest evidence that important segments of the community are not consulted in selecting judges under existing merit plans. This finding would not be so serious if in fact the commission did solicit recommendations from cause-oriented interest groups in the *recruitment* of possible candidates. Of course, once recruited, each prospective judge should be evaluated equally. But it is difficult to believe that an applicant's concern for social justice (including the rights of minority groups and workers) should be considered irrelevant to a commission's deliberations. At any rate, the mere suggestion that some segments of the community are excluded from the merit selection process demands further inquiry. Even if proven, it would indict the selection of the commission members themselves more than the actual operation of the nominating commission as a mechanism.

39. We have edited a list of these responses and included them in Appendices 2-B and 2-C.

CHAPTER 3

OUTSIDE INFLUENCES ON THE NOMINATING PROCESS

Unfortunately, knowing something about who the nominating commissioners are and how they go about their business does not offer a complete picture of the nominating process. Other forces which initially may appear to be outside the nominating process, and thus beyond the scope of our inquiry, often may be very influential in the ultimate selection of nominees for a particular vacancy. Because of the method of selection of commission members, two of these outside forces or influences are of particular importance—the influence of partisan politics and the influence of the organized bar. This chapter will attempt to analyze and evaluate the apparent influence of partisan politics and bar associations on the nominating process.

Partisan Politics

All jurisdictions which have adopted the non-partisan merit plan for judicial selection have had to struggle with the problem

of how to insure that the plan actually takes partisan politics out of judicial selection. Of course, no judicial selection plan will ever be entirely free from political influences. Even in Missouri, the plan "has not eliminated political forces from the selection of judges."¹ At times a commissioner may be inclined to favor a member of his own party. But an appointing official is likely to do so more often. In addition, the plan can create its own brand of politics which may be a mixture of both "party" and "bar" politics.

While cognizant of these influences, proponents of the merit plan clearly have intended that the plan be free of the more spurious influences of partisan politics. In particular, it has been their hope that the plan would eliminate the "reward system" whereby individuals are "rewarded" for past service or financial contributions to a political party by being slated or recommended for appointment to judicial office by party leaders.² Not only would the elimination of such influences aid in securing a more independent judiciary, but proponents of the plan have asserted that it would actually upgrade the caliber of the men sitting on the bench. Former Attorney General Herbert Brownell has stated that a system based on political rewards tends to produce the "gray mice" of the judicial establishment—"ordinary, likeable people of small talent."³

Such a reward system could conceivably develop in a merit plan jurisdiction. The non-lawyer members of most nominating commissions are chosen by the governor of the state. Generally, the governor is also the titular head of the party in his state. Therefore, there can be pressure on the governor to "load" the commission with members of his own party. If the commission were to become dominated by the "governor's people", the chances would be greater that a governor's previously hand-picked candidate might become one of the nominees of the commission, and, in effect, be assured of ultimate appointment. Inevitably, the duty of the commission to decide independently upon a slate of nominees would be destroyed and the system would degenerate into one founded on political "reward" rather than merit.

1. Watson and Downing, *THE POLITICS OF THE BENCH AND BAR* (New York: John Wiley and Sons, Inc., 1969), 6.

2. See Niles, *The Changing Politics of Judicial Selection: A Merit Plan for New York*, 22 *RECORD OF N.Y.C.B.A.* 242, 254 (1967).

3. Brownell, *Too Many Judges Are Political HACKS*, *SATURDAY EVENING POST*, 18 Apr. 1964.

In their study of the plan in Missouri, Watson and Downing found some instances of what they termed "panel-wiring": the governor makes his preferences known to one or more members of the nominating commission, either directly or through an intermediary. The commission then names a panel containing the name of the lawyer preferred by the governor plus two other nominees chosen on a "what difference does it make" basis.⁴ Not surprisingly, existing merit plans contain a variety of provisions apparently aimed at preventing such situations from developing. For example, in many merit plan jurisdictions, there is statutory or constitutional language requiring the governor, or other appointing officials, to make commission appointments without regard to political affiliation. As indicated in Table IX, certain plans have even gone further, seeking to insure non-partisan commission composition by, in effect, making them bi-partisan. In Colorado, for instance, no more than one half plus one of the commissioners can be members of the same political party.

TABLE IX
"Bi-Partisan" Commissions

| <i>Commission</i> | <i>Provision</i> |
|---|--|
| <i>Colorado</i> | |
| Supreme Court Nominating Commission | No more than half plus one of the members (excluding chairman) can be of same political party. |
| Judicial District Nominating Commissions | No more than 4 of the 7 members can be of same political party. |
| Governor County Court Judicial Commission | No more than 4 members may be of same political party. |
| <i>Ohio</i> | |
| Judicial Council | No more than 3 of the 6 appointed members can be of same political party. |
| <i>Indiana</i> | |
| Van, Lake, and Dearburgh County Superior Court Nominating Commissions | No more than 2 of the 3 appointed members can be of same political party. |

Watson and Downing, *supra* note 1, at 108.

Indiana (continued)

| | |
|---|--|
| Marion County Municipal Court Nominating Commission | No more than 1 of the 2 mayor appointed members, the 2 governor appointed members, and the 2 bar elected members can be of same political party. |
|---|--|

Missouri

| | |
|--|--|
| Kansas City Municipal Judicial Nominating Commission | No more than 1 of the 2 non-lawyer members nor more than 1 of the 2 lawyer members can be of same political party. |
|--|--|

Nebraska

| | |
|---|--|
| Supreme Court Nominating Commission and District Court Nominating Commissions | No more than 2 of the 4 governor appointed members nor more than 2 of the 4 lawyer elected members can be of same political party. |
|---|--|

Utah

| | |
|---|--|
| Supreme Court Nominating Commission and District Court Nominating Commissions | Member initially selected by senate shall be of same political party as governor, and member initially selected by house shall be of opposite political party. Thereafter, subsequent members shall be of opposite political party as their predecessors; no more than 1 of 2 members appointed by governor nor more than 1 of 2 members selected by Bar Association can be of same political party. |
|---|--|

Vermont

| | |
|--------------------------|---|
| Judicial Selection Board | At least 1 of the 3 senators and 1 of the 3 representatives must be of political party which is in minority in the senate and in the house. |
|--------------------------|---|

Also, many plans attempt to diminish the possibility that commissioners will be subjected to undue influence from political figures or constituencies by prohibiting commissioners, during their tenure, from holding office in a political party or in the local, state, or federal government. Other merit plan provisions seek to prevent commissioners from developing a personal power base or using their positions on the commission to launch their own judicial careers. In some states, commissioners are prohibited from serving for two consecutive terms. In other states commissioners may not serve more than a total of two terms. Generally, commissioners are ineligible for judicial office while serving on a commission and for a period of one to three years thereafter.

In their study of the plan in Missouri, Watson and Downing found some instances of what they termed "panel-wiring": the governor makes his preferences known to one or more members of the nominating commission, either directly or through an intermediary. The commission then names a panel containing the name of the lawyer preferred by the governor plus two other nominees chosen on a "what difference does it make" basis.⁴ Not surprisingly, existing merit plans contain a variety of provisions apparently aimed at preventing such situations from developing. For example, in many merit plan jurisdictions, there is statutory or constitutional language requiring the governor, or other appointing officials, to make commission appointments without regard to political affiliation. As indicated in Table IX, certain plans have even gone further, seeking to insure non-partisan commission composition by, in effect, making them bi-partisan. In Colorado, for instance, no more than one half plus one of the commissioners can be members of the same political party.

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| Judicial District Nominating Commissions | No more than 4 of the 7 members can be of same political party. |
| Denver County Court Judicial Commission | No more than 4 members may be of same political party. |
| <i>Idaho</i> | |
| Judicial Council | No more than 3 of the 6 appointed members can be of same political party. |
| <i>Indiana</i> | |
| Allen, Lake, and Vanderburgh County Superior Court Nominating Commissions | No more than 2 of the 3 appointed members can be of same political party. |

4. Watson and Downing, *supra* note 1, at 108.

Indiana (continued)

| | |
|---|--|
| Marion County Municipal Court Nominating Commission | No more than 1 of the 2 mayor appointed members, the 2 governor appointed members, and the 2 bar elected members can be of same political party. |
|---|--|

Missouri

| | |
|--|--|
| Kansas City Municipal Judicial Nominating Commission | No more than 1 of the 2 non-lawyer members nor more than 1 of the 2 lawyer members can be of same political party. |
|--|--|

Nebraska

| | |
|---|--|
| Supreme Court Nominating Commission and District Court Nominating Commissions | No more than 2 of the 4 governor appointed members nor more than 2 of the 4 lawyer elected members can be of same political party. |
|---|--|

Utah

| | |
|---|--|
| Supreme Court Nominating Commission and District Court Nominating Commissions | Member initially selected by senate shall be of same political party as governor, and member initially selected by house shall be of opposite political party. Thereafter, subsequent members shall be of opposite political party as their predecessors; no more than 1 of 2 members appointed by governor nor more than 1 of 2 members selected by Bar Association can be of same political party. |
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TABLE X
Restrictions on Commission Membership

| <i>Prohibited From Holding Public Office</i> | <i>Prohibited From Holding Political Party Office</i> | <i>Limitation as to Number of Terms</i> | <i>Ineligible For Judicial Office</i> | |
|--|---|--|--|--------------------------------------|
| Alabama | Alabama | Cannot Serve Two Consecutive Terms | During Term on Commission: | |
| Alaska | Colorado | | | |
| Colorado | Indiana | Alabama Colorado Iowa Missouri Nebraska Oklahoma Tennessee Utah | Alabama Iowa Maryland Pennsylvania Tennessee | |
| District of Columbia | Kansas | | | |
| Florida | Missouri | | | |
| Idaho | Ohio | | | |
| Indiana | Oklahoma | | | |
| Iowa | Pennsylvania | | | |
| Kansas | Tennessee | | | |
| Maryland | Wyoming | | | |
| Missouri | | | | During Term and 6 Months Thereafter: |
| Oklahoma | | | | Cannot Serve More Than Two Terms. |
| Pennsylvania | | Kansas Nebraska | During Term and 1 Year Thereafter: Montana Ohio Wyoming | |
| Tennessee | | | | |
| Wyoming | | | | |
| | | | During Term and 2 Years Thereafter: Florida Nebraska | |
| | | | During Term and 3 Years Thereafter: Colorado Indiana | |
| | | | During Term and 5 Years Thereafter: Oklahoma | |

Such sanctions, particularly when coupled with statements concerning the non-political role of the commissioners which are contained in handbooks and rules of procedure compiled by some of the commissions, generally have been successful in making commissioners aware of the fact that political considerations have no place in commission business. This is evidenced by the fact that in evaluating applicants for judicial office, commissioners indicated that they attached little importance to an applicant's past partisan political activity (even

when such activity is characterized as "past *honorable* partisan political activity") and to previous service as an elected statewide or local official.⁵

But just because commissioners know that they are expected to conduct their business in a non-partisan manner does not mean that they automatically do so. In an effort to determine the extent of the influence of politics on commission deliberations, we sought information on the frequency with which political influences or considerations were introduced into commission deliberations, either on a personal or commission-wide basis, and the importance of these political considerations.⁶

One Florida commissioner stated that "it [political considerations] does not influence my votes. However, in my judgment political considerations have been of importance with the majority of the commission on which I serve." This type of response was similar to ones received from several jurisdictions. Another Florida commissioner, however, was more cautious: "I suspect that some commission members gave primary consideration to political considerations, but never openly." A Colorado *lay* commissioner reflected a more specific bias: "Bar association members not openly, but in an undertone, mention political parties . . . lay members feel bar association members try to assert pressures."

Although most respondents clung to the notion that commission deliberations were devoid of political influences or considerations, a sizable minority indicated that although political influences and considerations were not a dominant force, sometimes they were present in commission deliberations. Only 2% of the respondents stated that political influences or considerations *always* were introduced into their deliberations, while 10% stated that they were introduced *frequently* and 37% indicated that they were introduced *infrequently*. The remaining 51% of the respondents stated that political considerations were *never* introduced.

Of the 49% who stated that political influences or considerations were introduced (however infrequently) into commission deliberations, only 7% (3% of all respondents) believed that when such considerations actually were introduced they were of decisive importance. Twenty-seven percent of the responding commissioners felt that such influences or con-

5. See Table V on p. 62.

6. See questions III (f) and (l) in the questionnaire in Appendix 2 A.

siderations were of some importance but not decisive. Forty-two percent (20% of all respondents) felt that such influences were of little importance and the remaining 24% felt that they were of no importance. Thus 36% of the total number of respondents stated that political influences had been interjected into their deliberations at some time and that these influences or considerations had some effect, albeit minor in many instances, in determining the eventual selection made by the commission.

For a variety of reasons, these responses cannot be viewed as the definitive picture of political influences on commission business. Because of the *sub rosa* nature of such influences, many of the responses reflected a commissioner's hunch rather than an informed judgment. Also, it is unlikely that commissioners who are most influenced by *sub rosa* political influences or considerations would give a totally candid response to these questions. What the responses do provide is a fairly accurate picture of the amount of "above-the-board" commission politicking that takes place. This is supported by the fact that the responses of the lawyer commissioners generally tended to parallel closely those of the lay commissioners.

The most significant findings relating to political influences actually were drawn from comparisons between certain merit plan jurisdictions. Because the four states with the largest number of commissions and commissioners (Colorado, Florida, Iowa, and Maryland) accounted for over 75% of the total replies to our questionnaire, we focused on the responses from these jurisdictions.

Although the merit plan in each of these four jurisdictions is established on a multi-commission basis, there are some significant differences between the plans. For example, the Colorado and Iowa plans are established by constitution and apply to the filling of all vacancies. Florida's plan, although constitutionally established, applies only to interim vacancies occurring between elections. The plan in Maryland is established by executive order and applies only to interim vacancies.⁷ In Colorado, Iowa and Maryland the lay commissioners are appointed by the governor. Lawyer commissioners in Iowa and Maryland are elected by members of the bar at large and in Colorado by a majority vote of the governor, attorney general and chief justice. In Florida, three lawyer commissioners are

appointed by the board of governors of the Florida Bar Association, three commissioners (lay or lawyer) are appointed by the governor, and three additional lay commissioners are elected by the six appointed commissioners.⁸ The most significant difference between these plans, for the purpose of analyzing the influences of political considerations, is that the Colorado plan provides for "bi-partisan" commissions.⁹ No such provision is made in the Florida, Iowa and Maryland plans.

While the restrictive provision in the Colorado plan has, as intended, produced commissions which are bi-partisan in make-up, the lack of such a provision in the other three jurisdictions has produced, for the most part, commissions which clearly are partisan in their composition. For example, all thirty-two of the Iowa lay commissioners who responded to our questionnaire were members of the governor's political party (Republican), as was the case for twenty-one of the twenty-five responding Maryland lay commissioners (Democrat). In Florida, sixty-two of the sixty-eight commissioners who responded to our questionnaire were members of the state's dominant political party (Democrat).

TABLE XI
Political Affiliation of Respondents
in Four States

| | Colorado | Florida | Iowa | Maryland |
|-------------------|----------|---------|------|----------|
| <i>Non-Lawyer</i> | | | | |
| Republicans | 33 | 4 | 32 | 2 |
| Democrats | 20 | 18 | 0 | 21 |
| Independents | 3 | 0 | 2 | 2 |
| <i>Lawyer</i> | | | | |
| Republicans | 16 | 1 | 28 | 10 |
| Democrats | 13 | 44 | 7 | 14 |
| Independents | 1 | 1 | 3 | 0 |

8. *Id.*

9. See Table IX, on pp. 72-73.

7. See Table I, at pp. 27-37.

From this one can conclude that, unless a merit plan contains a restrictive provision similar to Colorado's, a commission will tend to be partisan in its composition. Such commissions could still take on a more bi-partisan character over a period of time if the commissioners' terms were staggered and spread over the terms of governors of opposing political parties. However, this modification must be considered in light of the observations of one Iowa lay commissioner who stated:

The main flaw I see in appointment of commissioners is that in actual practice all appointees are members of the governor's political party (I believe he receives recommendations from county party committees). This has been true under governors of both major parties. So while we may hold the ideal that politics should have no influence on the selection of judges, the partisan make-up of the commission must realistically have some influence.

Naturally, there are no guarantees that political influences will be of greater significance in the deliberations of a commission which is partisan in make-up than in a commission which is bi-partisan. Bi-partisan commissions may not necessarily produce non-partisan decisions. However, the evidence seems to suggest, at least on the surface, that political influences are less prevalent and are of less consequence to a commission which is bi-partisan in nature. Nearly 70% of the Colorado respondents indicated that political influences or considerations were never introduced into commission deliberations. But only 51% of the Florida respondents, 54% of the Iowa respondents, and 39% of the Maryland respondents, made such an assertion.

At the heart of the entire issue, however, is the ultimate impact which the introduction of political influences or considerations has on a commission's ultimate selection. Only 15% of the Colorado respondents felt that such influences crept into their deliberations so as to affect their eventual selections. On the other hand, 39% of the Iowa respondents, 37% of the Florida respondents, and 41% of the Maryland respondents acknowledged the existence of such influences.

What emerges from our survey is that none of the merit plan jurisdictions have been totally successful in eliminating the influence of partisan politics from the judicial selection process. The survey does suggest that a merit plan is more likely to come closer to the ideal if it contains a provision guaranteeing the bi-partisan make-up of a nominating commission. However, the

inclusion of such a provision would appear to have at least one undesirable effect. It could effectively eliminate from commission membership anyone who could not be identified with one of the two major political parties. Because it would appear that alternative solutions to this problem should be developed and tested, a systematic analysis of the factors that encourage and discourage the introduction of political influences and considerations into commission deliberations should be undertaken.

Bar Influence on Lawyer Commissioners

The influence of bar associations on judicial nominating commissions presents a second major area that would benefit from a systematic analysis. This area remains essentially untapped as a source of research and offers great promise for future empirical studies. In this portion of the chapter we wish simply to provide a framework within which future investigations of bar association influence might be conducted. The following "case studies" of four jurisdictions suggest an initial blueprint for such investigations and serve to underscore the potentially large impact that bar associations have on nominating commissions.

Bar Appointment of Lawyer Members: The Birmingham Experience. Since 1950 the Jefferson County Judicial Commission has served as the nominating commission for state circuit judges of Jefferson County (Birmingham, Alabama). The Birmingham Bar Association appoints the two lawyer members of this five-member commission. The early procedures adopted by the bar for making these appointments proved to be unsatisfactory. A third attempt to formalize procedures, in 1954, proved viable and has been retained.

The adoption of the current procedure reflected a reaction against the selection of the association's two commission nominees solely by an association committee. Under the current procedure, the committee only *nominates* two lawyers for the offices to be filled. They then notify the bar membership at large of their two nominees by posting notice at several public buildings and by filing notice with the local newspaper. For ten days after such notice, any ten members of the Bar Association can nominate any other person or persons for the office by signing and filing with the President of the Bar Association a written statement to that effect.

At the end of the ten-day period the President of the Bar Association must mail to the entire membership notice of the

election, including a ballot to be marked and returned to the Executive Committee of the Bar Association within fourteen days. To induce more members to participate in the election, a stamped return envelope is included. The nominee who receives a majority of the votes wins. It became apparent immediately that if there were additional nominees, subsequent ballots might have to be held. The rules specified that these subsequent ballots would be conducted through the mail until one candidate received the requisite majority. In fact subsequent ballots have not been conducted, because there has never been an instance where members of the Bar Association have proposed additional candidates.

The Bar committee has turned primarily to individuals who have had positions of leadership in the association. For example, both lawyer members who served on the commission during 1973 were former presidents of the Association. Although this would seem to indicate that only one segment of the bar is represented, the procedure which allows for additional nominations has never been employed.

Several factors may explain the bar's reluctance to nominate additional candidates. Either the bar membership may generally be satisfied with the bar committee's nominations, or the membership may really wish to challenge such nominations but opt to acquiesce for reasons extrinsic to the appointment process (e.g., friendship with bar committee members, fear of bar association ostracism, etc.). These and other factors may explain why bar committee nominations have not been challenged and, indeed, why they probably will not be challenged.

The internal politics of the Birmingham Bar Association has an important political influence on the functioning of the commission itself. Since the leadership of the bar revolves around older, more established attorneys, the names placed on the ballot have reflected the viewpoint that older, more established attorneys are best equipped to evaluate someone for the bench. Several of the younger members of the bar have been highly critical of this process, stating that they felt it did not reflect their views and did not allow them an opportunity to serve. Yet, as noted, any ten members of the bar association can submit a name to be included on the ballot. The fact that this had never been done only reinforces the belief that the young lawyers who state they are not represented on the commission in reality do not feel as indignant about this situation as their language suggests.

The commission rules include the charge that its members act as trustees of the public. Evidently, laymen have not had any difficulty in reconciling themselves to this concept. On the other hand, several of the lawyers have expressed difficulties with this point. Because the lawyer members are nominated by a bar committee and elected by the bar members, they are confronted with a basic conflict—namely, do they vote as individuals or as members of the bar? One lawyer commissioner, who had given quite a bit of thought to the matter, stated that at one time he felt it was his duty to vote for a man who was acceptable to the bar, regardless of his own personal feelings toward the candidate. In retrospect he had concluded that this judgment was wrong. He discovered that by binding himself to vote the wishes of a sample of bar members, he was, in effect, banning himself from taking full advantage of information later presented to the commission during its deliberations—information that would not be known to the bar membership. Such a posture, he concluded, could lead only to subverting the entire purpose of the commission.

Bar Politics Among Lawyers Who Select Lawyer Members: The Missouri Experience. While the Birmingham Bar Association is responsible for the appointment of lawyer members to the nominating commission, the responsibility for selecting the lawyer members of the Missouri commissions rests directly on the state's lawyers. The distinction is narrow but crucial. The lawyer residents of each of Missouri's three court of appeals districts elect one lawyer member to the seven-member Appellate Judicial Commission, and the lawyer residents of the appropriate judicial circuits elect the two lawyer members of the five-member Judicial Circuit Commissions. Theoretically, Missouri lawyers are asked to make an independent determination rather than simply to confirm the bar nominees as in Birmingham. But, as noted by Professors Watson and Downing,¹⁰ the theoretical process bears little resemblance to reality. In practice, rival bar groups campaign extensively for their candidates for the circuit and appellate nominating commissions.

During the depression years of the 1930's schisms developed in the Kansas City and St. Louis bar associations. Lines were drawn roughly between "plaintiff" and "defendant" lawyers. Originally, "plaintiff" lawyers were those practitioners who represented injured persons in personal injury cases. Today

10. Watson and Downing, *supra* note 1.

these lawyers are associated with individual clients. "Defendant" lawyers initially were aligned with those clients (mainly insurance companies and business firms) being sued by injured persons. Today these lawyers are viewed as representing corporate and established economic interests. While the specific alignments are not of great significance for the purpose of this study, the end result of such maneuvering was the division of the bar in both cities into two separate organizations. With the adoption of merit selection in the early 1940's, the respective bar groups backed separate candidates for membership on the commissions.

Lawyer candidates for both the circuit and appellate commissions must be nominated by petition. The legal rules require only twenty signatures on the petition. Thus several candidates could seek these positions. But since the early 1950's there have been only two candidates in each election, one representing each of the rival bar groups. Organizational loyalty has prevailed, preventing nominations that would split the votes of the respective memberships.

The real concern in these bar contests are the judges that ultimately are selected to the circuit benches in Kansas City and St. Louis and the appellate courts of the state. By placing their own representatives on the commissions, the bar groups seek to influence the commission's choice of judicial candidates. A judge who is subtly or even subliminally sympathetic to a "plaintiff" or "defendant" lawyer's viewpoint may have a decisive effect on the outcome of a case. While the importance of such judicial sympathies is often minimized, it would be unrealistic to think that these lawyer-members do not remain vitally concerned with placing judges on the bench who will interpret rules in a particular way.

Bar Influences on All Commissioners

Bar Veto Power Over Committee Choices: The New York Experience. Since 1961, New York City's mayors voluntarily have adopted a merit selection plan for appointments to the Criminal and Family Courts and for interim appointments to the Civil Court. Under the Lindsay administration (1966-1973), the Bar Association of the City of New York was granted a very powerful role in this process.

Originally, the association was assigned only an advisory role in the selection of judges. Names of candidates for judgeships were forwarded by the mayor's office to the association after

the candidates had been approved by the mayor's committee. In response to association objections that it did not have enough time to investigate the candidates, Mayor Lindsay began submitting names to the association contemporaneously with their submission to the mayor's committee. However, the judiciary committee of the association does not consider candidates until the mayor's committee has first passed upon them.

The bar association had assigned applicants to its Judiciary Committee and to the separate sub-committee (Criminal or Family Court Committee) dealing with the particular court for which the applicant was proposed. Following separate investigation and interviews, a joint meeting of the two committees was held and a decision was made to approve or not approve.

During the second Lindsay administration a conflict arose between the association and the mayor. The mayor had appointed several candidates who had been approved by the mayor's committee but disapproved by the association. The mayor agreed that future appointments would not be made without bar association approval. The mayor's committee and the bar association judiciary committee determined that in the event they disagreed as to a single candidate, they would set up a joint subcommittee in order to determine whether either committee had information that was not available to the other. The mayor's committee approval of a candidate is suspended pending the joint subcommittee procedure. After the joint subcommittee confers, a report is sent back to the two committees who reach whatever result they deem appropriate.

The role of the bar association in the selection process under the Lindsay administration undercut, to some extent, the power of the mayor's committee. Without additional study the full extent of bar association influence remains problematic. Several reasons may be advanced for concluding that the veto power of the bar association is inconsistent with true merit selection. First, the bar association is responsible to no one in the community or in public office for its actions. Without doubt, the decisions of the bar association are made by individuals who are unlikely to pass judgment in a cavalier or arbitrary manner. But the fact remains that their decisions are not formally structured or checked by an independent authority. Second, the membership of the bar committees which recommend candidates are not broadly representative of the community, nor even of the bar association. Bar committee mem-

bership is much more difficult to come by than membership in the bar association and is often the result of internal political maneuvering. Third, the analytic justification for a grant of veto power to the bar association is no stronger than that of any other special interest group concerned with the judicial system. Indeed, it may be argued that the close working relationship between bar association members and the judiciary raised questions of self-interest and propriety that should preclude the granting of veto power to a bar association.

Bar Polls Prior to Commission Choices: The Alaska Experience. Original appointments to the bench are made by Alaska's governor from a list of not less than two names submitted for each vacancy by the judicial council, the state's nominating commission. This procedure has been followed since statehood in 1959 and is generally conceded to be quite effective. To aid the members of the judicial council, the Alaska Bar Association furnishes the results of bar polls to the council prior to its nomination of judicial candidates.

Bar polls serve as a means of ascertaining the opinions of the members of the bar association with regard to the qualifications of those lawyers seeking nomination by the judicial council. Two general formats for these polls have been employed in Alaska. The questionnaire concerning candidates for appointment to the Alaska Supreme Court solicits information respecting ten different characteristics of a candidate. The respondent is asked to provide a yes-no answer to these inquiries about impartiality, legal experience, temperament, etc. The second format employs a more comparative technique. Rather than a separate sheet for each candidate, all candidates for the bench are listed on a single ballot. Bar association members are asked to rate each candidate as *Not Qualified*, *Qualified*, or *Well Qualified*.

Again, without further research it is difficult to gauge accurately the effect of these polls on commission members. An American Bar Association study¹¹ notes that the Alaska Bar Association has reported the polls to be "quite effective". But such cryptic comments do little to verify the impact of the polls. The bar association readily admits that its polls are intended to influence commission members' opinions of candidates. Yet bar poll opposition (or endorsement) may cut

either way. "I would nominate a candidate over the opposition of the bar if I sincerely believed him well-qualified", claims an Iowa commissioner.¹² But a Kansas commissioner admits, ". . . If such opposition (of the organized bar) were known I would not personally concur in his nomination even if I believe him to be qualified, if other substantially equally well qualified persons were available."¹³ The double edge of the bar poll sword is equally apparent in Alaska. "Some lay members have been highly suspicious; some lay members have accused the bar association of running a 'popularity contest'; and one lay member is quite convinced he should vote exactly contrary to the ratings indicated by the bar poll."¹⁴

Concluding Note

It would be naive to think that partisan politics and bar associations do not influence the composition and deliberations of some judicial nominating commissions. By devoting a chapter to these outside influences we have sought to emphasize that the factors that bear on commission choices are not always easy to identify. Obviously, there are factors other than partisan politics and bar associations that influence commission determinations. Nor have the full implications of even these two influences been exhausted in this chapter. However, within the limited scope of this study, we simply wish to emphasize the futility of thinking of nominating commissions as hermetically sealed, self-contained entities. A complete treatment of the substantial outside influences on the commissions remains an unanswered challenge.

12. Niles, *supra* note 2, at fn. 88.

13. *Id.*, at fn. 89.

14. Letter from R. E. Hicks, Executive Director of the Alaska Judicial Council to Allan Ashman, Director of Research of the American Judicature Society, March 7, 1974.

11. Committee and Section Reports to the House of Delegates, American Bar Association, 1968.

Choosing The Attorney General: An Alternative

Kevin K. Bruce

Nearly 30 years ago, the framers of Alaska's constitution debated the relative merits of electing or appointing the attorney general. The delegates ultimately chose the appointment process, but the public debate over the best method of selecting the state's chief legal officer continues.

Those who favor retaining the appointment process claim that it is the only means by which the chief executive can be assured of a harmonious working relationship between the Department of Law and the Office of the Governor. Those who favor changing to an elective process insist that it is the sole method to insure that the state's chief legal officer acts in a responsible, non-partisan manner. Recent events would seem to suggest that both beliefs are overly optimistic.

Regardless of individual's preference on this question, it is presumed that we can agree that our attorney general should be a lawyer who is guided by the highest standards of professional conduct, who will uphold the law, who will act in the public's interest and who will see that justice is done. Neither election nor appointment can, by itself, guarantee that such an individual will be selected.

Electing the attorney general only ensures that a popular decision has been made, not that a qualified person has been selected. Appointing the attorney general only ensures that the chosen individual is trusted by the governor, regardless of other relevant qualifications or deficiencies. There is, however, a third alternative, which avoids the pitfalls of appointment or political campaigns.

Alaska, along with many other states, has adopted a judicial selection process based on merit which is clearly adaptable for selecting our attorney general. Merit selection of the attorney general will enhance the best aspects of appointment and election without the drawbacks of either.

The system would work like this: whenever the position of attorney general became vacant, any qualified attorney could apply for the position by submitting his or her name to the Judicial Council. As with judges, the Council would screen the applicants by carefully examining their backgrounds, credentials and professional reputations. After a lengthy interviewing process, the Council would forward to the Governor at least four names in nomination. The Governor would then have 30 days to make a selection from these nominees.

Unlike the Governor's other appointments, the attorney general would be required to stand for retention by the voters during each election year in which the Governor runs for election; with a maximum of two four-year terms in office. Under this proposal, an attorney general would be

prohibited from running for public office within four years of having served in that position.

What is gained by adopting such a process? First, we can be confident that our attorney general will be a highly qualified and a respected member of the Bar. Second, we can introduce public accountability into the process without creating an institutional conflict between the attorney general and the chief executive. Third, we are assured of an attorney general who can exercise the responsibility of the office independent of the partisan political desires of the chief executive, but not those of the public. Finally, we eliminate the potential of using the office of the attorney general as a platform for higher office.

This proposal is not a compromise position between an elected or appointed attorney general. It is a distinct third alternative, which should be put before the public. Admittedly, it is a bold and untried plan; to my knowledge no state selects its attorney general through a merit system. But Alaskans have always shown themselves to be innovative, willing to reject past practices that have failed to meet their goals and expectations. It is clearly time for another bold experiment in government.